THE RIGHT TO CLIMATE ACTION

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A handful of state constitutions include "Green Amendment" provisions that guarantee the right to a healthful environment. In a few prominent cases, courts have vindicated procedural environmental rights under these provisions, such as the right to a fulsome environmental review process or to local control over environmental matters, but they have consistently rejected substantive environmental rights claims demanding the state government prevent or ameliorate specific environmental harms. Consequently, the tangible outcomes of Green Amendment litigation are underwhelming, and the basic promise offered by these provisions remains unfulfilled.

In this Note, I develop another constitutional claim under what I call the right to climate action. In essence, the right to climate action is the freedom to bring about the world that Green Amendments prescribe. I argue that land use ordinances violate this right by hindering the development of clean energy infrastructure and multifamily housing near public transit. In doing so, I demonstrate a new, somewhat counterintuitive, role for constitutional environmental rights as tools for deregulation. By lending their strength to property rights, environmental rights can help pave the way for the green transition.

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INTRODUCTION

A handful of state constitutions include "Green Amendment" provisions that guarantee the right to a healthful environment. In a few prominent cases, courts have vindicated procedural environmental rights under these provisions, such as the right to a fulsome environmental review process or to local control over environmental matters, but they have consistently rejected substantive environmental rights claims demanding that the state government prevent or ameliorate specific environmental harms.[1] Consequently, the tangible outcomes of Green Amendment litigation are underwhelming, and the basic promise offered by these provisions remains unfulfilled.[2]

Courts have given two reasons for rejecting substantive environmental rights claims. The first is a basic concern for the separation of powers and the inherent limits of judicial remedies.[3] The second is a fear that, by recognizing substantive environmental rights, courts would invite environmental advocates to "harass and perhaps even thwart" legitimate development through litigation, causing great economic harm.[4]

Recent developments in Green Amendment cases brought by Our Children's Trust[5] suggest that courts might be willing to put these concerns aside to enable climate litigation. In *Held v. Montana*, the Montana Supreme Court recently held that greenhouse gas ("GHG") emissions can violate environmental rights.[6] In a similar case in Hawaii, the court rejected the State's motion to dismiss the plaintiffs' claim

1. *See infra* Part I.

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

3. *See, e.g.*, Order on Motion to Dismiss at *19, Held v. State, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 4, 2021) [https://perma.cc/6VYB-PUB6].

4. *See, e.g.*, Commonwealth, Dep't of Env't Res. v. Commonwealth, Pa. Pub. Util. Comm'n, 335 A.2d 860, 866 (Pa. Commw. Ct. 1975) (Kramer, J., concurring).

5. Our Children's Trust is a public interest law firm that represents youth plaintiffs in climate litigation. *See Our Children's Trust Home*, OUR CHILDREN'S TR., https://www.ourchildrenstrust.org/ [https://perma.cc/77N5-PHH9] (last visited Feb. 19, 2025).

6. Held v. State, 560 P.3d 1235 (Mont. 2024).

requesting a decarbonization plan for the State's transportation sector. A year later, the parties settled, with the State agreeing to devise a plan along the lines that the plaintiffs had proposed.[7]

But there is reason to doubt whether these results mark a real trend toward the robust enforcement of substantive climate rights. Prior to trial, the court in *Held* dismissed the plaintiffs' claim requesting the State devise and implement a comprehensive decarbonization plan, citing the political question doctrine;[8] while the settlement reached in *Navahine* merely obligates the State Department of Transportation to *request* funds toward decarbonizing the State's transportation sector, and does not obligate the legislature to appropriate any funds whatsoever.[9] In light of these results, Quinn Yeargain reasonably concludes that environmental rights are unlikely to function as a "skeleton key to unlock decarbonization,"[10] and that climate advocates should be careful not to expend too much time and energy pursuing what may amount to purely symbolic victories.[11]

Notwithstanding Yeargain's advice, this Note develops another constitutional claim under what I call the *right to climate action*. In essence, the right to climate action is the right to make the environment more healthful by using your property to reduce carbon emissions. I argue local land use rules violate this right by hindering clean energy development and dense housing development near public transit. Such rules are highly prevalent across the nation and are one of the primary obstacles to decarbonization—a core goal for any state that values a clean and healthful environment.

It is possible to argue forcefully that the right to climate action exists absent an explicit environmental rights provision,[12] but having one makes it easier. Green Amendments enable litigants to reappropriate a substantive due process argument that religious and

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7. Joint Stipulation and Order re: Settlement, Navahine F. v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (June 20, 2024) [https://perma.cc/6CZZ-2CHM].

8. Order on Motion to Dismiss at *19, *Held*, No. CDV-2020-307.

9. Joint Stipulation and Order re: Settlement, at *9, *Navahine F.*, No. 1CCV-22-0000631 [https://perma.cc/6CZZ-2CHM].

10. Quinn Yeargain, *Against Environmental Rights Supremacy,* 26 U. PA. J. CONST. L. 1323, 1326 (2024).

11. *Id.* at 1326–27; *see also* Erin C. Ferguson, Held v State of Montana: *A Constitutional Rights Turn in Climate Change Litigation?*, 36 J. ENV'T L. 453 (2024); Harv. L. Rev. Recent Case, Held v. State*, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023)*, 137 HARV. L. REV. 1491 (2024). For an international perspective on climate litigation, see generally Sam Bookman, *Catalytic Climate Litigation: Rights and Statutes,* 43 OXFORD J. LEGAL STUD. 598 (2023).

12. *See generally* Grant Glovin, *A* Mount Laurel *for Climate Change? The Judicial Role in Reducing Greenhouse Gas Emissions from Land Use and Transportation*, 49 ENV'T L. REP. 10938 (2019).

educational institutions once used to overcome local zoning rules prohibiting the construction of churches, synagogues, and schools in residential areas. In cases like *State ex. rel. Synod of Ohio v. Joseph*[13] and *Trustees of Union College v. Members of the Schenectady City Council*,[14] state high courts struck down such ordinances on the basis of substantive due process, reasoning that religious and educational uses were inherently beneficial to the general welfare. To substantiate this claim, the courts pointed to provisions in their state constitutions that protected individual rights to religious expression and education. They claimed the provisions signaled a community-wide commitment to the idea that each were essential components of human flourishing. In light of that assumption, the courts held that local governments faced a high burden when they sought to ban churches and schools from residential neighborhoods, and the reasons they typically cited—the preservation of neighborhood character, controlling car traffic, and so on—simply did not suffice. Such bans therefore violated landowners' substantive due process rights.[15]

The Green Amendment lends itself to an analogous due process claim. Abundant clean energy and low-carbon TOD are inherently beneficial to the general welfare because they are necessary to secure the constitutional rights to clean air and a healthful environment enjoyed by residents of Green Amendment states. Therefore, land use rules that impose substantial limits on climate-friendly development for insubstantial reasons, such as aesthetics, are void.[16]

The right to climate action offers a new, somewhat counterintuitive role for constitutional environmental rights. Up until now, litigants have mainly used Green Amendments to augment the "Grand Bargain" of 1970s environmentalism: slower, more expensive development in exchange for greater environmental protection through process and

13. State *ex rel*. Synod of Ohio v. Joseph, 39 N.E.2d 515, 524 (Ohio 1942).

14. Trs. of Union Coll. v. Members of the Schenectady City Council, 690 N.E.2d 862, 865 (N.Y. 1997).

15. *See, e.g.,* Westchester Reform Temple v. Brown, 239 N.E.2d 891, 896 (N.Y. 1968) ("We have said that factors such as potential traffic hazards, effects on property values and noise and decreased enjoyment of neighboring properties cannot justify the exclusion of such structures.").

16. In this respect, the right to climate action mirrors the property right protected under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which prohibits land uses that (1) substantially burden religious exercise, and (2) fail to take the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000cc (2010); *see also Religious Land Use and Institutionalized Persons Act*, DEP'T OF JUST., https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act (last updated Apr. 16, 2024) [https://perma.cc/UL77-HMGR].

regulation.[17] This Note highlights Green Amendments' deregulatory function. By lending their strength to property rights, environmental rights can help pave the way for the green transition.

Part I of this Note expands on the overview of Green Amendment case law in the United States offered above and provides further support to the idea that climate activists should explore new litigation strategies. Part II provides a similar overview of the constitutional law of zoning to set up the recommendation I make in Part III: rather than pursue positive, substantive remedies directing the government to cut emissions or draft renewable energy development plans, climate litigants should consider invoking *negative* climate rights by challenging zoning rules that are incompatible with rapid decarbonization.

I. Green Amendments: Process and Substance

In the 1970s, five states—Illinois, Pennsylvania, Massachusetts, Montana, and Hawaii—added environmental rights provisions to their constitutions.[18] Two of these states, Illinois and Massachusetts, have not yet produced much case law.[19] The remaining three—Pennsylvania, Montana, and Hawaii—have produced environmental rights jurisprudence focusing almost entirely on procedural rights,[20] such as rights to an adequate environmental review process,[21] to local control over land use,[22] and to intervene in public utility commission proceedings.[23] The few attempts that litigants have made to vindicate substantive environmental rights by requesting the court to read specific environmental standards into environmental rights provisions and

17. J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 Emory L.J. 1, 23–25 (2023); *see also* Sam Bookman, *Demystifying Environmental Constitutionalism*, 54 Lewis & Clark Env't L. Rev. 1, 25–26 (2024); Pa. Env't Def. Found. v. Commonwealth, 108 A.3d 140, 170 (Pa. Commw. Ct. 1976) ("[W]hen environmental concerns of development are juxtaposed with economic benefits of development, the Environmental Rights Amendment is a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process.").

18. James R. May, *Subnational Climate Rights in America*, 26 U. Pa. J. Const. L. 1237, 1254 (2024).

19. *See* Polk, *supra* note 2, at 155–65.

20. *Id.* at 165.

21. Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1237 (Mont. 1999).

22. Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013).

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

enjoin government actions that violate those standards have largely ended in failure.[24]

Until recently, the most significant development in American environmental constitutionalism had been the Pennsylvania Supreme Court's 2013 decision in *Robinson Township v. Commonwealth*,[25] which overturned a set of amendments to Pennsylvania's oil and gas laws that required municipalities "to authorize oil and gas operations . . . in all zoning districts throughout a locality"[26] because the amendments "displace[d] . . . prior planning, and derivative expectations, regarding land use, zoning, and enjoyment of property."[27] The court below and a concurring Supreme Court justice held the amendments violated substantive due process, reasoning the Pennsylvania constitution essentially *required* local control over land use.[28] A plurality of the Supreme Court reached the same conclusion but grounded the principle in Pennsylvania's Green Amendment, finding that the Pennsylvania legislature cannot "remove necessary and reasonable authority from local governments to carry out [their] constitutional duties" under the provision.[29]

Robinson Township was the first time that a state high court struck down a state law in part because it violated environmental rights, and it is one of the main reasons behind the current interest in adopting and litigating state constitutional environmental rights provisions.[30]

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24. *See, e.g.*, Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976); Hootstein v. Amherst-Pelham Reg'l Sch. Comm., 361 F. Supp. 3d 94, 115 (D. Mass. 2019).

25. *Robinson Twp.*, 83 A.3d at 901.

26. *Id.* at 971–72.

27. *Id.* at 972; *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.").

28. Robinson Twp. v. Commonwealth, 52 A.3d 463, 484 (Pa. Commw. Ct. 2012) ("by requiring municipalities to violate their comprehensive plans for growth and development, [these amendments] violate . . . substantive due process because [they do] not protect the interests of neighboring property owners from harm, alter . . . the character of neighborhoods and make . . . irrational [zoning] classifications"); *Robinson Twp.*, 83 A.3d at 1001 (Baer, J., concurring) ("[I]n a state as large and diverse as Pennsylvania, meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level.").

29. *Robinson Twp.*, 83 A.3d at 977.

30. Michael Gerrard, *Environmental Rights in State Constitutions,* CLIMATE L.: A SABIN CTR. BLOG (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

At the same time, the decision's legacy has been something of a disappointment to environmentalists. The plurality opinion includes language clarifying that their decision was grounded in a concern for environmental substance. Following a poetical paragraph recounting the damage wrought by the coal industry, they assert that Act 13 "has sanctioned a direct and harmful degradation of the environmental quality of life" of communities across the state.[31] But, the plurality also include a caveat: "The Environmental Rights Amendment does not call for a stagnant landscape," as "competing constitutional commands may exist, [and] sustainable development may require some degradation of the corpus of the trust."[32] A few years after it decided *Robinson Township,* the Pennsylvania Supreme Court dismissed an appeal from a Commonwealth Court decision upholding an Allegheny Township ordinance permitting oil and gas operations across all its zoning districts.[33] Strong control over land use apparently slowed oil and gas development enough to count as "sustainable" in the court's eyes.

The Montana Supreme Court's recent decision in *Held v. Montana*[34] may mark a significant shift. *Held* concerned a law that modified the Montana Environmental Protection Act ("MEPA") to bar environmental review from including evaluations of greenhouse gas emissions and corresponding impacts on the climate.[35] The plaintiffs in *Held*—sixteen young people, ranging in age from five years old to their early twenties—argued the law violated the Montana State Constitution's environmental rights language by impeding their right to a stable climate, and the state supreme court agreed. The State argued that Montana's contributions to global emissions—and thus any emissions that could reasonably be attributed to the law at issue in the case—were far too small to constitute a cognizable injury, but the court rejected the idea that the delegates who drafted the amendment

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Court, *Robinson Township v. Commonwealth*"); John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 358–59 (2015) (describing *Robinson Township* as a "landmark").

31. *Robinson Twp.*, 83 A.3d at 976 (describing Pennsylvania's "notable history" of exploiting its "bounteous" environment in a "shortsighted" way); *id.* at 980.

32. *Robinson Twp.*, 83 A.3d at 953, 980.

33. Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 701 (Pa. Commw. Ct. 2018), *appeal dismissed* (Pa. 2019); *see also* John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions,* 30 WIDENER COMMONWEALTH L. REV. 147, 169 (2021) ("In the cases decided thus far, the Commonwealth Court has rejected all Section 27 challenges to local government decisions permitting shale gas development.").

34. Held v. State, 560 P.3d 1235 (Mont. 2024).

35. *Id.* at 1250.

"would grant the State a free pass to pollute the Montana environment just because the rest of the world insisted on doing so."[36]

The *Held* decision is procedural in the sense that the remedy has no direct impact on environmental outcomes. But like the *Robinson Township* court, the *Held* court is clear that the constitutional injury is the harm to the environment to which the law at issue in the case theoretically contributes. And unlike the *Robinson Township* court, the *Held* court does not include any limiting language about "reasonable" degradation or "sustainable" development. It might turn out in the end that the *Held* court has something like the *Robinson Township* court's balancing test in mind—and it likely does, or else, when the time comes, it will have a hard time explaining why it is refusing the plaintiff's request for an order directing the immediate shutdown of all natural gas plants in the state and closing all Montana roads to gasoline-powered cars. But until that day comes, the sky appears to be the limit, and future climate litigants have reason to hope the court will be open to a less ambitious substantive claim.

There is also a chance that New York, the newest member of the Green Amendment club,[37] will soon discover its constitution protects substantive environmental rights. The first Green Amendment case to reach New York's highest court will likely be *Fresh Air for the East Side v. State*,[38] which concerns the High Acres Landfill just outside Rochester. The plaintiff, Fresh Air for the East Side ("FAFE"), is a community group representing the interests of people who live near the landfill.[39] FAFE alleges the landfill violates their environmental rights by emitting noxious fumes and GHGs.[40]

In 2024, the Fourth Department of the Appellate Division dismissed FAFE's complaint, applying the deferential "anti-abdication" standard that the United States Supreme Court established in *Heckler*

36. *Id.* at 1250; *see also id.* at 1254 ("Furthermore, we have rejected a similar argument regarding whether adding more pollutants to an already polluted waterbody or extending the time that the waterbody would remain polluted constituted material damage.").

37. New York adopted its Green Amendment in 2022. N.Y. CONST. art. I, § 19. *See generally* Katrina Fischer Kuh et al., *New York's Guarantee of Environmental Rights*, 27 N.Y.U. J. LEGIS. & PUB. POL'Y 101 (2025).

38. Complaint at 1–2, Fresh Air for the Eastside, Inc. v. State, Index No. E2022000699 (N.Y. Sup. Ct. 2022).

39. *See Help Us Restore the Eastside's Right to Fresh Air*, FRESH AIR FOR THE EASTSIDE, https://www.freshairfortheeastside.com/ [https://perma.cc/VA6P-ALQQ] (last visited Feb. 19, 2025).

40. Complaint at 1–2, Fresh Air for the Eastside, Inc. v. State, Index No. E2022000699 (N.Y. Sup. Ct. 2022).

v. Chaney[41] for evaluating nonenforcement decisions under the federal Administrative Procedure Act (APA).[42] But there is no guarantee the Court of Appeals will affirm. The court has an established track record of taking environmental constitutional rights seriously. Since 1895, the state constitution has featured a provision that provides that New York's Forest Preserve[43] "shall be forever kept as wild forest lands," and that such lands "shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."[44] Over the past 130 years, the Court has held that constructing projects including railroads, toboggan runs, and snowmobile trails within the confines of the Forest Preserve would violate the provision.[45] Concerning the last of these projects, Judge Jenny Rivera explained, "If the trails at issue here are equally important to New York as those projects were, then the people can express their will accordingly through the democratic process. Until they say otherwise, however, the door is closed . . . ."[46]

Then there was the recent settlement in *Navahine F. v. Hawai'i Department of Transportation*.[47] In 2022, twelve minors filed a complaint with the circuit court of Hawai'i's First Circuit alleging they were "being seriously injured because Defendants [the State of Hawai'i, the Governor, the Hawai'i Department of Transportation (HDOT), and the HDOT director] establish, maintain, and operate a state transportation system that violates Hawai'i's constitutional mandates to protect public trust resources and the environment by reducing greenhouse gas emissions and decarbonizing the

41. Heckler v. Chaney, 470 U.S. 821 (1985).

42. Fresh Air for the Eastside, Inc. v. State, No. 419 CA 23-00179, slip op. at 3 (N.Y. App. Div. 4th Dept. 2024) [https://perma.cc/9QZN-3PM8].

43. *See New York's Forest Preserve,* N.Y. Dep't. of Env't Conservation, https://dec.ny.gov/nature/forests-trees/forest-preserve [https://perma.cc/7ZCJ-ZA83] (last visited Feb. 19, 2025).

44. N.Y. Const. art. XIV, § 1. The Court of Appeals' current position appears to be that removing trees from the Forest Preserve is permissible so long as the removal does not "work a substantial change" to the Preserve. Protect the Adirondacks! Inc. v. N.Y. State Dep't. of Env't Conservation, 170 N.E.3d 424, 429 (N.Y. 2021).

45. People v. Adirondack Ry. Co., 54 N.E. 689 (N.Y. 1899) (railroad); Ass'n for Prot. of Adirondacks v. MacDonald, 170 N.E. 902 (N.Y. 1930) (toboggan run); Protect the Adirondacks! Inc., 170 N.E.3d at 424 (snowmobile trails).

46. Protect the Adirondacks! Inc., 170 N.E.3d at 431. Since 1895, the Provision has been amended 19 times to make exceptions for state highways, ski trails, and other uses. *Id.* at 428.

47. Joint Stipulation and Order re: Settlement, Navahine F. v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (June 20, 2024) [https://perma.cc/6CZZ-2CHM].

transportation sector."[48] To remedy their injury, plaintiffs sought (1) a declaratory judgment establishing that Hawai'i's fossil fuel-dependent transportation system was unconstitutional, and (2) an injunction directing the State to "take concrete action steps under prescribed deadlines" to decarbonize its transportation system in accordance with its statutory Zero Emissions Target.[49] In reply, the State argued that the Target was merely "aspirational" and did not generate a genuine obligation.[50] In his order denying the state's motion to dismiss, Judge Jeffrey Crabtree expressed bafflement at this idea:

> What are Defendants really arguing here? That a 'target' or 'goal' passed by the Legislature has no legal force or effect? That the Legislature did not intend to drive action by state agencies to plan for and respond meaningfully to the threats of climate change? The court gives the Legislature a lot more credit than that.[51]

Roughly one year later, the parties reached a settlement agreement requiring HDOT to develop and implement a "GHG Reduction Plan."[52] Under the settlement agreement, the Plan must include a range of measures including interim targets to reduce vehicle miles travelled (VMT) and expand public transit options, as well as a requirement that HDOT "develop a process and criteria for evaluating, selecting, and prioritizing projects" in accordance with the State's climate goals.[53] The agreement falls far short of a guarantee that the State's transportation infrastructure will decarbonize on schedule, as the parties are careful to stipulate that it does not "impose on Defendants any obligations to expend funds in furtherance of any action beyond those funds that are appropriated by the legislature, or otherwise available to HDOT, and are legally available for such action."[54] But it would appear, at the very least, to make it significantly easier to

48. Complaint at *2–3, Navahine F., No. 1CCV-22-0000631 (Apr. 6, 2023) [https://perma.cc/C9CU-7JYD].

49. *Id.* at *70; *see also* HRS § 225P-5(a) ("[A] statewide target is hereby established to sequester more atmospheric carbon and greenhouse gases than emitted within the State as quickly as practicable, but no later than 2045 . . . provided that the statewide target includes a greenhouse gas emissions limit, to be achieved no later than 2030, of at least fifty percent below the level of the statewide greenhouse gas emissions in 2005."). Note Hawai'i's environmental rights provision guarantees a right to a "clean and healthful environment *as defined by laws relating to environmental quality*." HAW. CONST. art. XI, § 9 (emphasis added).

50. Ruling re Motion to Dismiss at 7, *Navahine F.*, No. 1CCV-22-0000631 (Apr. 6, 2023) [https://perma.cc/65J2-FWQH].

51. *Id.* at 7–8.

52. Joint Stipulation and Order re: Settlement, *Navahine F.*, No. 1CCV-22-0000631 (June 20, 2024) [https://perma.cc/6CZZ-2CHM].

53. *Id.* at * 5–7.

54. *Id.* at *12.

challenge future actions by HDOT that would perpetuate or expand the state's dependence on gas-powered automobiles for transportation (e.g., a highway expansion project).

This is perhaps enough evidence to warrant the announcement of a climate-focused "vibe shift" in American environmental rights jurisprudence, but one should be wary of overstatement. It is important to remember the Pennsylvania Supreme Court has already rejected an environmental rights claim demanding that the State implement a decarbonization plan, as did the trial court in *Held*.[55] These decisions perhaps reflect an understanding that, even if they had the power to order the other branches of government to devise such plans, they would be ill-equipped to assess their adequacy or the effectiveness of their implementation.

Courts can punt on those questions. The New York Court of Appeals did so in the context of education rights by limiting its remedy for substandard schooling to an order that the Legislature and Governor revise the State's funding formula, and then subjecting that plan to an extremely permissive level of review.[56] Alternatively, courts could attempt to keep a productive "dialogue" open by hearing cases like *Navahine* that seek to improve and refine any plan the legislature might produce.[57]

Naturally, the success of that conversation will turn on the legislature's willingness to participate, as the court's ability to force the conversation is limited. Again, previous disputes between state courts and state legislatures over education rights have made that apparent. Consider, for example, the result in Washington, where the state high court actually entered a contempt order against the state legislature after it failed to fund the state's basic education program. Even then, it took the legislature four years to finally comply.[58] Today, the state's education system is now better funded, but more racially and economically inequitable than ever.[59]

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55. Funk v. Commonwealth, 71 A.3d 1097 (Pa. 2012); Order on Motion to Dismiss at *19, Held v. State, No. CDV-2020-307 (Aug. 4, 2021), [https://perma.cc/6VYB-PUB6]).

56. Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 52 (N.Y. 2006).

57. *See* Bookman, *supra* note 11.

58. McCleary v. State, No. 84362-7 (Wash. Sept. 11, 2014) (order of contempt); *McCleary Victory: Billions for Washington K-12 Public Schools and Students*, Wash. Educ. Advoc. Ass'n, https://www.washingtonea.org/advocacy/mccleary-school-funding/ [https://perma.cc/FLW8-EBLK] (in compliance in 2018).

59. David S. Knight & Margaret L. Plecki, Univ. of Wash.: Coll. of Educ., Establishing Priorities for Education Finance Under Fiscal Uncertainty: Recommendations for Washington State Policymakers (Feb. 2022), https://www.education.uw.edu/ejr/files/2022/04/Knight-Plecki_WEA_School-Finance-Equity-in-Washington_Feb2022-1_R.pdf [https://perma.cc/PV3Z-9YCT]. A similar

The hard truth is that structural reform is a slow and difficult business that frequently ends in failure.[60] It is no wonder, then, that courts are hesitant to take the leap. This Note recommends another route for climate litigation in light of that hesitancy. Rather than demand the fulfillment of positive rights, I recommend that climate activists focus on the negative—on what the government should *not* do in light of its obligations under environmental rights provisions. As I will explain in Part II and Part III, the history of zoning law provides some examples of success that provide relevant models for this new sort of climate litigation.

II. The Constitutionality of Zoning

Zoning is a form of land use regulation that segregates uses by designating "zones" that dictate what can be built where.[61] New York City, for example, is divided into zones of three basic categories: Residence (R), Commercial (C), and Manufacturing (M). Each of these categories is further subdivided into more specific use subcategories, as well as hierarchies of bulk and density in the case of Residence and Commercial zones, and hierarchies of performance standards in the case of Manufacturing zones. Zoning in New York City is also "noncumulative" to the extent that certain Commercial zones exclude housing, and Manufacturing zones exclude housing and certain commercial uses.[62]

New York City's original 1916 Zoning Resolution was the first comprehensive zoning ordinance to be enacted in the United States.[63] It emerged as a response to an admixture of Progressive concerns about the bad health effects of urban congestion and Fifth Avenue merchants'

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story has played out in New York. *See* Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 52 (N.Y. 2006*)*; Press Release, All. for Quality Educ., With Historic Milestone for Educational Equity, NY's Public Schools Begin a New Chapter (May 10, 2023), https://www.aqeny.org/2023/05/10/with-historic-milestone-for-educational-equity-nys-public-schools-begin-a-new-chapter/ [https://perma.cc/BJ64-JH4C].

60. *See* John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 Cal. L. Rev. 1387, 1421 ("Too often, structural decrees reflected an assumption of judicial omnicompetence. The rush to reform where reform was needed sometimes led courts to move too far, too fast, and too coercively."). *But see id.* at 1422 (arguing that remedies that "emphasize data collection, measurement . . . and participation" can be "accountability-reinforcing," and that structural remedies in general are justifiable on the grounds that no alternative is available).

61. *What is Zoning?*, NYC Plan., https://www.nyc.gov/site/planning/zoning/about-zoning.page [https://perma.cc/G97R-2KU3] (last visited Mar. 3, 2025).

62. *See generally About Zoning Districts*, NYC Plan., https://www.nyc.gov/site/planning/zoning/districts-tools.page [https://perma.cc/AYY9-U2RC].

63. *City Planning History,* NYC Plan., https://www.nyc.gov/site/planning/about/city-planning-history.page [https://perma.cc/L4MN-U6MF] (last visited Mar. 3, 2025).

desire to keep immigrant garment workers from crowding the sidewalks in front of their department stores.[64] Zoning quickly grew in popularity across the nation as a tool for protecting property values in single-family neighborhoods from the arrival of commercial uses and apartment buildings.[65] By 1926, more than 400 municipalities, together comprising half of the nation's population, had adopted zoning ordinances.[66] Now, zoning laws govern land use across more than 30,000 municipalities, "dictat[ing] virtually everything that gets built in the United States."[67]

The harmful effects of "exclusionary" zoning—rules like minimum lot sizes and multifamily housing bans—are well documented,[68] and economists and legal scholars broadly agree that the United States is in dire need of zoning reform.[69] In addition to driving the nation's housing affordability crisis and stultifying economic growth, exclusionary zoning rules also curtail climate action by limiting renewable energy development and constraining the density of housing near public transit.[70] In the remainder of this Part, I will provide an overview of the constitutional history of zoning that I will pull from in Part III to develop my argument for why such rules are unconstitutional under certain state constitutions.

A. The United States Supreme Court on Zoning

The constitutionality of zoning under the Due Process Clause of the Fourteenth Amendment rests on the premise that it imposes a reasonable burden on property rights in exchange for a benefit to the health, safety, and general welfare of the public, and thus constitutes a proper exercise of the State's police power.[71] The Supreme Court

64. *See generally* Raphaël Fischler, *Health, Safety, and the General Welfare: Markets, Politics, and Social Science in Early Land Use Regulation and Community Design,* J. URB. HIST. 675 (Sept. 1998).

65. *See generally* William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317 (Feb. 2004).

66. Garrett Power, *The Advent of Zoning*, 4 PLAN. PERSPS. 1, 1 (1989).

67. *See* NAT'L ZONING ATLAS, https://www.zoningatlas.org/ [https://perma.cc/D24K-SVSJ].

68. NOAH KAZIS, FURMAN CTR., POLICY BRIEF: THE CASE AGAINST RESTRICTIVE LAND USE AND ZONING (Jan. 2022), https://furmancenter.org/research/publication/the-case-against-restrictive-land-use-and-zoning [https://perma.cc/ZR4B-CRPY].

69. David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1317 (2021).

70. *See infra* Part III.

71. Lochner v. New York, 198 U.S. 45 (1905) ("There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.

held this was generally the case in *Village of Euclid v. Ambler Realty Company*.[72] In his influential amicus brief to the Court,[73] Alfred Bettman presents an argument for zoning you might call proto-Coasian. According to Bettman, the point of zoning was not to prohibit certain uses, but to prevent the intermixing of incompatible uses (e.g., industrial and residential), which he believed creates "blighted" districts and slums.[74] Justice Sutherland alludes to this theory of urban self-destruction in his opinion for the Court by analogizing zoning to traffic regulations, "which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable."[75] The claim is that a city without zoning is like an intersection without traffic signals, and the blighted district that Bettman describes is the equivalent of the inevitable car crash.[76]

Later in the opinion, Justice Sutherland goes on to devote special attention to the issue of single-family zoning, which he labels the "serious question of the case"[77]—likely because the court below found it amounted to socioeconomic discrimination.[78] Sutherland appears at first to address this concern with another argument pulled from Bettman's brief: he asserts that that the construction of single-family neighborhoods

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Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.").

72. 272 U.S. 365 (1926).

73. Robert Post, 10 The Oliver Wendall Holmes Devise History of the Supreme Court of the United States: Making Law for a Divided Nation 1921–1930 836 (2024) (describing Bettman's brief as "influential in *Euclid*'s resolution").

74. Brief for the Nat'l Conf. on City Plan. et al. as Amici Curiae Supporting Petitioner, at 33, Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("What happens in American cities is this . . . ."); *cf. also* R.H. Coase, *The Problem of Social Cost,* 3 J.L. & Econ. 1, 2 (1960) ("The Reciprocal Nature of the Problem").

75. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

76. Post, *supra* note 73, at 840 (2024) ("The interdependence of city real estate analogously drained moral significance from the freedom to use urban property.").

77. *Euclid*, 272 U.S. at 390; *see also* Alfred Bettman, *The Present State of Court Decisions on Zoning*, 2 City Plan. 24, 25 (1926) ("The single-family district from which the apartment house or multiple-family structure is excluded is the feature about whose validity the most anxiety has been felt.").

78. *See* Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926) ("The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket . . . . In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life."). It is worth noting that Judge Westenhaver was an unapologetic racist, and thought both socioeconomic and racial segregation made for good policy; his decision in *Euclid* was a reluctant application of what he took to be the Supreme Court's holding in Buchanan v. Warley, 245 U.S. 60 (1917). *Ambler Realty Co.*, 297 F. at 313 ("The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.").

is heavily deterred "by the coming of apartment houses."[79] In his brief, Bettman completes the thought with a bit of *realpolitik* by arguing that "those financially able to do so move further out, thus extending the residential territory which has to be served by water, gas, and other public utilities, placing an added drain and increasing the cost of the community's transportation, street, light, and other utility services."[80] He also includes an excerpt from a report produced by the Commission on Buildings Districts and Restrictions ahead of the adoption of the 1916 New York Zoning ordinance[81] that found preserving low-density neighborhoods is "necessary in order to retain in the city many citizens who would otherwise move to the suburbs," which would exact a blow "not only as regards the city's taxable values, but also as regards civic interest and civic leadership."[82] But Sutherland never gets around to making any of these points in his opinion, nor did he try to apply the proto-Coasian argument he used to justify the exclusion of industrial uses from residential areas. Instead, he proceeds with his now-infamous diatribe against apartment houses, deriding them as "parasite[s]" that "come very near to being nuisances."[83] In his telling, the preservation of suburban oases in metropolitan areas becomes a permissible—if not commendable—end in itself.[84] As for any negative effect it has on the poor: the Court had no comment.[85]

In the same opinion, Justice Sutherland hints that zoning ordinances could still face constitutional challenges in future cases.

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79. *Euclid*, 272 U.S. at 394.

80. Brief for the Nat'l Conf. on City Plan. et al. as Amici Curiae Supporting Petitioner, at 33, Euclid v. Ambler, 272 U.S. 365, 387 (1926).

81. Robert Post describes Bettman's decision to excerpt this report as "clever" because it was written by Clarence H. Kelsey, a longtime friend of Chief Justice Taft. POST, *supra* note 73, at 840.

82. Brief for the Nat'l Conf. on City Plan. et al. as Amici Curiae Supporting Petitioner, at 93, Euclid v. Ambler, 272 U.S. 365, 387 (1926) [https://perma.cc/RTF8-9S4E].

83. *Euclid*, 272 U.S. at 394–95; *see also* Richard H. Chused, Euclid*'s Historical Imagery*, 51 CASE W. RSRV. L. REV. 597, 613 (2001) (arguing that the nuisance analogy "permitted [a] crucial step—the introduction of 'politely' ugly discourse" about protecting upper-class children from exposure to poor people).

84. *Euclid*, 272 U.S. at 395 (1926); *see also* Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

85. *Cf.* Brief and Argument for Respondent at 79, Euclid v. Ambler, 272 U.S. 365 (1926) [https://perma.cc/3E3Z-UNB9] ("All the people who live in the village and are not able to maintain single family residences of the size and lot area herein prescribed, are pressed down into the low-lying land adjacent to the industrial area, congested there in two-family residences and apartments, and denied the privilege of escaping for relief to the ridge or lake.").

Ezra Rosser calls this hint the Euclid Proviso.[86] It appears in response to a bid for economic naturalism made by Newton Baker in his brief for the appellee, the Ambler Realty Company. Baker describes urban development as something that rolls out from the city center "under the operation of natural economic law"—like water rushing from a spring.[87] He thus compares Euclid's zoning ordinance to a "dam to hold back the flood" that redirects development toward "other less suited sites."[88] In his opinion, Justice Sutherland adopts Baker's metaphor to make the point that there are, indeed, limits to what the Due Process Clause will tolerate: redirecting the "industrial flow" to a certain degree is acceptable, but courts cannot "exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way"—where the dam must break.[89]

B. The State High Courts on Zoning

The Supreme Court has never struck down a zoning ordinance as unconstitutional for the precise reason envisioned by the Euclid Proviso,[90] but a few state courts have. *Dowsey v. Kensington* is the leading case in this vein.[91] The Village of Kensington, which is part of the township of North Hempstead, sits on Great Neck, Long Island, which the New York Court of Appeals described as "that section, contiguous to the city of New York, [where] homes have been built by many who sought there a grace and dignity of life difficult to attain in or near great urban industrial centers."[92] In 1926, Kensington passed a zoning ordinance banning all uses except for single-family homes, churches, schools, libraries, public museums, and police or fire stations from everywhere in the village save for a small area fronting Manhasset Bay. The plaintiff in the case owned land on the other side of Kensington, which fronted Middle Neck Road, "the most active thoroughfare" on Great Neck.[93] Other villages in North Hempstead and the township itself had adopted

86. Ezra Rosser, *The* Euclid *Proviso*, 96 WASH. L. REV. 811 (2021).

87. Brief and Argument for Respondent at 15, Euclid v. Ambler, 272 U.S. 365 (1926) [https://perma.cc/3E3Z-UNB9].

88. *Id.* at 14–15.

89. *Euclid*, 272 U.S. at 390.

90. It has struck down ordinances for other reasons. *See* Buchanan v. Warley, 245 U.S. 60 (1917); Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116 (1928); Moore v. East Cleveland, 431 U.S. 494 (1977); *see also* Nectow v. Cambridge, 277 U.S. 183 (1928) (holding that a zoning ordinance was unconstitutional as applied); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1980) (same).

91. 177 N.E. 427 (N.Y. 1931).

92. *Id* at 428.

93. *Id*.

zoning ordinances permitting businesses and apartment buildings along Middle Neck Road.[94] The plaintiff argued that Kensington's ordinance prohibiting the same was unreasonable and therefore violated due process, and New York's highest court agreed—finding the land was "peculiarly adapted" for those uses—and held that Kensington could not "destroy . . . the greater part of its value in order that the beauty of the village as a whole may be enhanced."[95]

It is important to emphasize that the court may very well have decided against the plaintiff were Kensington more secluded. Consider the contrary result in *Levitt v. Sands Point,* which concerned a two-acre minimum lot area requirement passed by a village with an "isolated geographical position in a fringe area" roughly two miles northeast of Kensington, on the tip of the next peninsula over.[96] The rule therefore appears to be that restrictive zoning rules are acceptable under the Euclid Proviso's test only in areas that are sufficiently distant from the urban core, where there is less risk of deadweight loss from banning high-density development.[97]

Subsequent decisions produced by other state high courts articulate this rule in a more explicit fashion. In *Forbes v. Hubbard*, reaching the same result in a case with very similar facts to *Kensington*, the Illinois Supreme Court found that "in applying the test whether [a zoning] ordinance is based on the public good, the considerations are not the comparative powers of neighboring villages but conditions as they exist."[98] In *Pleasant Ridge v. Cooper,* another very similar case, the Michigan Supreme Court held that the zoning ordinance encumbering the plaintiff's property was an impermissible attempt to delay the inevitable, as it was "extremely doubtful" that a residential district of such "high character" could be maintained at the intersection of two busy roads near a popular tourist destination like the Detroit Zoo.[99] Additionally, in a decision rendered many years later, the Supreme Court of Missouri held that suburban municipalities need to consider their zoning "from a *regional* standpoint" before banning apartment buildings and commercial uses entirely.[100]

94. *Id*.
95. *Id* at 430.
96. Levitt v. Sands Point, 160 N.E.2d 501, 502 (N.Y. 1959).
97. *Cf. Euclid*, 272 U.S. at 387 (1926) ("A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.").
98. 180 N.E. 767, 771 (Ill. 1932).
99. 255 N.W. 371, 372 (Mich. 1934).
100. Huttig v. Richmond Heights, 372 S.W.2d 833, 842–43 (Mo. 1963).

The clearest articulation and application of the Euclid Proviso arrived soon after, in 1965. In *National Land and Investment Company v. Easttown Township Board of Adjustment,* the Pennsylvania Supreme Court struck down a zoning ordinance that imposed a four-acre minimum lot requirement on certain sections of a Philadelphia suburb.[101] Finding that the town was "in the path of a population expansion approaching from two directions" (that is, from Philadelphia and the King of Prussia-Valley Forge area),[102] the court held that Pennsylvanians' interest in "suburban progress"[103] overpowered Easttown's current residents' interest in "look[ing] out upon land in its natural state," and that "[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid."[104] Currently, the *Easttown* doctrine lives on in statutory form and is credited with enabling the development of a significant amount of multifamily housing.[105]

State courts have also struck down zoning ordinances on the grounds that they constitute socioeconomic discrimination.[106] The New Jersey Supreme Court's decisions in the *Mount Laurel* cases are the most famous examples. The court held in *Mount Laurel I* that each municipality in the state bore a duty to permit its "fair share" of affordable housing within its borders.[107] In *Mount Laurel II*, it held that plaintiff-developers could seek a "builder's remedy," enabling them to develop a particular project in a noncompliant municipality,[108] which

101. Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965).
102. *Id.* at 605.
103. *Id.* at 610 n.27.
104. *Id.* at 611–12. The Pennsylvania Supreme Court on one occasion suggested that its due process doctrine limiting zoning rules was grounded in concerns about socioeconomic discrimination. Surrick v. Zoning Hearing Bd., 382 A.2d 105, 108 (Pa. 1977) (stating that the Pennsylvania Supreme Court had previously adopted "the 'fair share' principle, which requires local political units to plan for and provide land-use regulations which meet the legitimate needs of all categories of people who may desire to live within its boundaries"). It set the record straight in Bac., Inc. v. Bd. of Supervisors, 633 A.2d 144, 147 (Pa. 1993) ("In Surrick, we recognized a clear distinction between restrictions on uses of property and exclusions of classes of people. We stressed that only the former is the proper subject of the analysis we synthesized.").
105. Noah Kazis, *Ending Exclusionary Zoning in New York City's Suburbs*, Furman Ctr. (Nov. 9, 2022), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf [https://perma.cc/BT4Y-QM9P].
106. For an early example, see Bd. of Cnty. Supervisors v. Carper, 107 S.E.2d 390, 395–96 (Va. 1959).
107. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 67 N.J. 151, 174 (N.J. 1975).
108. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 218 (N.J. 1983). The New Jersey Legislature enacted a statute based on

triggered a flood of litigation[109] that in turn prompted the legislature to enact a statutory framework and create a new state agency to administer the Mount Laurel Doctrine,[110] which has produced 70,000 units of affordable housing since 1980.[111]

Less well known are the many instances in which state courts have struck down zoning ordinances that forbid religious and educational uses from residential areas.[112] The leading case is *State ex. rel. Synod of Ohio v. Joseph.*[113] The plaintiff was a denomination of the Lutheran United Church (the Synod) seeking to compel the issuance of a special permit to build a church in an area of Upper Arlington, Ohio zoned for single-family homes. Prior to filing its lawsuit, the Synod had negotiated for months with the zoning commission about where to locate the church, and the commission had ultimately declined to issue the permit, giving no reason for its decision.[114] The Synod argued that the commission's decision violated due process under the United States and Ohio constitutions by failing to provide a sufficient justification for the deprivation of its property rights, and the Supreme Court of Ohio agreed. Justice Gilbert Bettman explained the court's reasoning in an oft-quoted passage:

> The church in our American society has traditionally occupied the role of both teacher and guardian of morals . . . . Fully to accomplish its great religious and social function, the church should be integrated into the home life of the community which it serves . . . . To require that churches be banished to the business district, crowded

Mount Laurel II in 1985, which the New Jersey Supreme Court upheld in Hills Dev. Co. v. Bernards in Somerset (*Mount Laurel III*), 103 N.J. 1, 19 (N.J. 1986). To see an example of how New Jersey's Fair Housing Act is enforced today, see, e.g., Mike Hayes, *A Wealthy NJ Town is Resisting Affordable Housing Plans. Its Defiance Could Be Costly*., GOTHAMIST (Mar. 21, 2024), https://gothamist.com/news/a-wealthy-nj-town-is-resisting-affordable-housing-plans-its-defiance-could-be-costly [https://perma.cc/FA8S-A9ZF].

109. Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 850 (2011) ("The decision spawned well over a hundred developer lawsuits . . . .").

110. *See Mt. Laurel III*, 510 A.2d at 631.

111. Amy Scott & Sofia Terenzio, *The Mount Laurel Doctrine and the Quest for Affordable Housing*, MARKETPLACE (July 31, 2024), https://www.marketplace.org/2024/07/31/the-mount-laurel-doctrine-development-of-70000-affordable-homes-housing-new-jersey/ [https://perma.cc/CUD4-AFK8].

112. *See* Note, *Churches and Zoning*, 70 HARV. L. REV. 1428, 1428 (1957); *see also, e.g.*, *supra* notes 13–14.

113. State *ex rel*. Synod of Ohio v. Joseph, 39 N.E.2d 515 (Ohio 1942).

114. *Id.* at 520.

> alongside filling stations and grocery stores, is clearly not to be justified on the score of promoting the general welfare.[115]

Having determined the decision was unconstitutional under the Due Process Clause of the Fourteenth Amendment and Article I, Sections 1 and 19 of the Ohio Constitution, the court declined to consider the Synod's claim that the decision violated its rights of freedom of worship.[116] Other courts, though, including the New York Court of Appeals, have more readily framed similar cases as implicating both due process and religious rights.[117] As the New York Court of Appeals puts it, "the status of religious uses as protected under the First Amendment is the source of their desirability in the community."[118] The fact that the Constitution affords protection to religious rights is definitive proof of a "presumed beneficial effect on the community"[119] that generally takes precedence over the concerns about traffic, property values, and community character that motivate restrictive land use ordinances.[120]

This doctrine once enabled a plaintiff to secure a builder's remedy in New York,[121] but that is no longer the case.[122] The New York Court of Appeals' current position is instead that municipalities are barred from requiring that religious and educational uses seek variances by showing practical difficulties or unnecessary hardship—but they can require such uses to seek a special permit, and they can deny the application for a permit if there is substantial evidence the use will, on balance, detract from the general welfare due to a "significant impact on traffic congestion, property values, municipal services, and the like."[123]

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115. *Id.* at 524; *see also Churches and Zoning*, *supra* note 112, at 1429–30 (describing the passage as "often quoted").

116. *Joseph*, 39 N.E.2d at 525.

117. *See, e.g.*, Cmty. Synagogue v. Bates, 136 N.E.2d 488, 496 (N.Y. 1956) ("[A] court may not permit a municipal ordinance to be so construed that it would appear in any manner to interfere with the 'free exercise and enjoyment of religious profession and worship'.") (quoting N. Y. Const., art. I, § 3); Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Bd. of Appeals of Chi., 182 N.E.2d 722, 725 (Ill. 1962) ("[T]he right of freedom of religion, and other first amendment freedoms, rise above mere property rights.").

118. Jewish Reconstructionist Synagogue of N. Shore v. Inc. Vill. of Roslyn Harbor, 342 N.E.2d 534, 540 (N.Y. 1975).

119. Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 515 (N.Y. 1986).

120. Laurie Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U. L. Rev. 767, 793–94 (1984).

121. *See, e.g.*, Concordia Collegiate Inst. v. Miller, 93 N.E.2d 632, 632 (N.Y. 1950).

122. *See* Cornell Univ. v. Bagnardi, *supra* note 119, at 516–17 (remitting the matter to the Zoning Board of Appeals for consideration of plaintiffs' special use permit application in accordance with the opinion).

123. *Id.* at 515. *Compare id. with* Westchester Reform Temple v. Brown, 239 N.E.2d 891, 896 (N.Y. 1968) ("We have said that factors such as potential traffic

Alternatively, the municipality can impose reasonable conditions on the permit to mitigate the proposed use's negative impact, so long as these conditions "do not operate indirectly to exclude the use altogether."[124]

III. The Right to Climate Action

Joshua Weishart argues in *The Right to Teach* that teachers enjoy a "judicially enforceable freedom to educate" under the provisions of state constitutions that guarantee a right to education.[125] According to Weishart, these provisions guarantee to students "democratic experiences" and "fair opportunities [to learn]" that teachers can only deliver if they enjoy a certain amount of discretion over their teaching methods; consequently, laws that forbid teachers from speaking about certain subjects—as well as "authoritarian" teacher evaluation systems based on student testing—are constitutionally suspect.[126] Given state courts' relatively lax justiciability doctrines, he argues they ought not hesitate to recognize teachers' standing to challenge these infringements of their professional autonomy and vindicate the right to teach "embedded" in the right to education.[127]

This Note draws upon state constitutional law regarding zoning to present an argument that is analogous to Weishart's. I argue the right to a healthful environment gives rise to the right to climate action in the same manner he argues the right to education gives rise to the right to teach.

Courts have found that individual rights interrelate similarly in other contexts. Consider the way the Supreme Court talks about rights in decisions that apply the Equal Protection Clause to jury selection. In *Strauder v. West Virginia*, the Court specifies that the question before it is one about whether defendants have a right to a trial by a jury "selected and impaneled without discrimination against his race or color, because of race or color."[128] It answers in the affirmative, and in doing so, the Court also takes time to recognize the excluded jurors' interest in the case. It says their exclusion is "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race

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hazards, effects on property values and noise and decreased enjoyment of neighboring properties cannot justify the exclusion of such structures.").

124. Trs. of Union Coll. v. Members of Schenectady City Council, 690 N.E.2d 862, 866 (N.Y. 1997); *see also, e.g.*, Pine Knolls All. Church v. Zoning Bd. of Appeals of Moreau, 838 N.E.2d 624, 627 (N.Y. 2005).

125. Joshua Weishart, *The Right to Teach*, 56 U.C. Davis L. Rev. 817, 825 (2022).

126. *Id.* at 882–83.

127. *Id.* at 823.

128. Strauder v. West Virginia, 100 U.S. 303, 305 (1879).

prejudice which is an impediment to securing [equal justice]."[129] After nearly a century, the Court held for the first time that this interest was judicially cognizable in *Carter v. Jury Commission of Greene County*.[130] Quoting the famous "brand upon them" line from *Strauder*, it stressed the obvious necessity of its holding, "[w]hether jury service be deemed a right, a privilege, or a duty."[131]

Many of the zoning decisions covered in Part II engage in the same sort of rights reasoning. In the *Mount Laurel* decisions, for instance, something like an equal "right to live in the suburbs"[132] gives rise to a specialized right to build affordable homes.[133] The Euclid Proviso and cases like *Easttown Township* can be framed along similar lines as vindicating a positive right to the economic prosperity that accompanies urban growth.[134]

Weishart's argument in *The Right to Teach,* the United States Supreme Court's opinions in *Carter* and *Strauder*, and the aforementioned zoning decisions each give voice to a general principle, namely that positive rights have negative corollaries. If someone has a right to something—an adequate education, a jury selected and impaneled without racial discrimination, economically-integrated suburbs, or economic growth—then others have the right to provide it to them absent government interference. Governments cannot curtail freedom or discriminate in ways that make it difficult or impossible for people to bring about the kind of world a positive right prescribes.

Held v. Montana[135] can be thought of as an application of this general principle to environmental rights. One of the laws at issue in *Held*—an amendment to the Montana Environmental Protection Act (MEPA), which the court refers to as the MEPA Limitation—barred environmental agencies from considering the impact of GHG emissions

129. *Id.* at 308.

130. Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320, 329 (1970).

131. *Id.* at 330; *see also* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (describing the right to receive information as an "inherent corollary" to the right to free speech); Jacob Charles, *Ancillary Rights*, 173 Penn. L. Rev. ___ (forthcoming 2025).

132. Charles M. Haar, Suburbs under Siege: Race, Space, and Audacious Judges 133 (1996).

133. *See supra* notes 106–11 and accompanying text; *see also* Golden v. Plan. Bd. of Ramapo, 285 N.E.2d 291, 300 (N.Y. 1971) ("[T]hough the issues are framed in terms of the developer's due process rights, those rights cannot, realistically speaking, be viewed separately and apart from the rights of others in search of a comfortable place to live.") (cleaned up).

134. *See supra* notes 90–105 and accompanying text.

135. Held v. Montana, No. CDV-2020-307, at 98 (Mont. 1st Dist. Ct., Aug. 14, 2023), *aff'd*, 560 P.3d 1235 (Mont. 2024).

in environmental reviews.[136] The court held that limiting state employees' discretion in this manner was impermissible because it amounts to "failing to meet [an] affirmative duty to protect Plaintiffs' right to a clean and healthful environment."[137] In other words, it held that Montana's Green Amendment guarantees a certain level of professional discretion to agency employees in the realm of environmental protection.

My proposal is that Green Amendments also guarantee certain negative rights to private individuals. I gather these rights under the heading of the *right to climate action*. The basic claim is that the right to a healthful environment gives rise to a right to use one's property in ways that make the environment more healthful. Examples include erecting a wind energy facility on a former dairy farm, or developing an apartment building near public transit. Each of these actions improves the environment by lessening our collective dependence on fossil fuels—and each of them is illegal in many places under existing zoning rules.[138] I argue that many of these rules are invalid under constitutions that feature Green Amendment provisions, if they are not already unconstitutional under the doctrines operationalized in decisions like *Mount Laurel I–II* and *Kensington v. Dowsey*.[139]

One could stylize a right to climate action claim a few different ways. Indeed, pulling from the same constitutional history I laid out in Part II, Grant Glovin argues effectively that substantive due process doctrine provides a sufficient basis for a right to climate action on its own.[140] Alternatively, one could attempt to derive a right to climate action solely from the right to a healthful environment by way of an argument that parallels Weishart's one in favor of the right to teach—that is, by arguing that every guarantee of positive rights is also a guarantee of certain negative rights. In the case of Montana, the argument is even more straightforward, as the state's Green Amendment provision provides that "the state *and each person* shall maintain and improve a clean and healthful environment,"[141] meaning a litigant in Montana can argue that zoning rules that stymie climate action interfere with her ability to fulfill certain duties she has under the Constitution. A litigant in Hawaii could argue the same point by reading the Green Amendment provisions in their state constitution

136. *Id.* at 74.
137. *Id.* at 99.
138. *See* Part III(A)(i)–(ii).
139. *See* notes 90–111 and accompanying text.
140. *See generally* Glovin, *supra* note 12.
141. MONT. CONST. art. IX, § 1 (emphasis added).

in a "conjoint"[142] fashion alongside basic rights provisions that assign to individuals "corresponding responsibilities" to uphold those basic rights, including environmental rights.[143]

The least innovative option—and thus the most plausible—is a conjoint reading of Green Amendment provisions and state and federal due process provisions. The New York Court of Appeals' due process doctrine regarding the exclusion of religious and educational institutions from residential areas, which I covered in Part II(B), provides the model. In decisions like *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor,*[144] the court treats the New York State Constitution as an authoritative statement regarding the statewide community's conception of its flourishing and thus delimits the reach of the state government's police powers.[145] In accordance with that approach, it reads the inclusion of protections for religious rights as proof that New Yorkers view religious observance as integral, and therefore holds that local governments lack the power to exclude churches from single-family neighborhoods. The New York Court of Appeals and the high courts of other Green Amendment states ought to afford their environmental rights provisions the same treatment. If landowners are barred from installing solar panels, wind turbines, and batteries to generate emissions-free electricity, or from contributing to the growth of low-carbon communities by developing high-density housing in urban areas, there can be no right to a healthful environment. Land use rules must pay heed to the people's right to climate action.

The remainder of Part III proceeds as follows. In Section A, I will explore various applications for the right to climate action in the realms of renewable energy and transit-oriented development (TOD). Next, in Section B, I will argue the right to climate action requires a robust builder's remedy to be effective, and I will consider the possibility the

142. *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1897 (2023) (discussing how "state courts have recognized that the conjunction of multiple clauses may define and deepen a right"). The term "conjoint" is pulled from Sheff v. O'Neill, 678 A.2d 1267, 1281 (Conn. 1996).

143. Haw. Const. art. I, § 2.

144. Jewish Reconstructionist Synagogue of N. Shore v. Inc. Vill. of Roslyn Harbor, 342 N.E.2d 534, 540 (N.Y. 1975) ("As Mr. Justice Meade correctly noted in his decision below, the status of religious uses as protected under the First Amendment is the source of their desirability in the community.").

145. *Cf.* Judith S. Kaye, *Dual Constitutionalism in Practice and in Principle*, 61 ST. JOHN'S L. REV. 399, 421 (1987) ("A constitution, in short, is that set of values to which we have bound ourselves . . . that 'counteract the impulses of interest and passion.'") (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* THE WRITINGS OF JAMES MADISON 273 (G. Hunt ed. 1904)).

legislature might discharge its obligation under the right to climate action by devising a land use plan that is compatible with rapid decarbonization. In Section C, I address a previous argument I have made against the justiciability of certain environmental rights claims, as well as the concerns about democratic legitimacy that typically accompany the adjudication of positive rights.

A. Applying the Right to Climate Action

1. Renewables

In order to reach net zero carbon emissions while preserving something like current standards of living, the United States will need to build enough zero-emissions electricity-generation capacity to meet the enormous growth in demand that will accompany the electrification of buildings, transportation, and various industrial processes.[146] The scale of that task is mind-boggling. According to one estimate from the Nature Conservancy, doing so would require somewhere between 3,100 and 3,500 gigawatts (GW) of new wind and solar energy capacity—roughly three times the nation's current total capacity, including fossil fuel plants.[147] For further perspective, note that in 2023, the United States installed just twenty-six GW of new wind and solar energy capacity.[148] Therefore, to actually achieve the goal of net zero by 2050 identified in the Paris Agreement,[149] the

146. Heraldl Bauer et al., *Global Energy Perspective 2023: Industrial Electrification Outlook*, McKinsey & Co. (Jan. 16, 2024), https://www.mckinsey.com/industries/oil-and-gas/our-insights/global-energy-perspective-2023-industrial-electrification-outlook [perma_link] ("Due to increased electrification . . . .").

147. The Nature Conservancy, Power of Place-National: Executive Summary 8 (May 2023), https://www.nature.org/content/dam/tnc/nature/en/documents/FINAL_TNC_Power_of_Place_National_Executive_Summary_5_2_2023.pdf; *Electricity Explained: Electricity Generation, Capacity, and Sales in the United States*, U.S. Energy Info. Admin., https://www.eia.gov/energyexplained/electricity/electricity-in-the-us-generation-capacity-and-sales.php [https://perma.cc/VV9W-5SHH] ("At the end of 2023, the United States had 1,189,492 MW…of total utility-scale electricity-generation capacity . . . .").

148. Am. Clean Power Ass'n, Clean Power Annual Market Report 2023 11 (2024) [https://perma.cc/GSU8-A9M7].

149. *For a Livable Climate: Net-Zero Commitments Must Be Backed by Credible Action*, United Nations, https://www.un.org/en/climatechange/net-zero-coalition [https://perma.cc/M7LM-4AHY]. In January 2025, President Trump signed an order withdrawing the United States from the Agreement for the second time. Nate Perez & Rachel Waldholz, *Trump is withdrawing from the Paris Agreement (again), reversing U.S. climate policy*, NPR (Jan. 21, 2025), https://www.npr.org/2025/01/21/nx-s1-5266207/trump-paris-agreement-biden-climate-change [https://perma.cc/Q3FH-88RP].

country will need to increase the rate at which it installs renewables by an order of magnitude within the next few years.

Accelerating renewables development to that degree in such a short period of time is difficult for multiple reasons. High interest rates, supply constraints, and interconnection delays are all limiting factors and will likely remain so for some time.[150] But the most intractable problem is local opposition to new renewable energy projects, which remains one of the top reasons for project delays and cancellations.[151] The top five explanations for opposition reported by developers are the visual impact of projects, their impact on property values, their impact on community character, the sound generated by wind turbines, and the loss of agricultural land.[152] For these reasons and many others, local governments across the country have instituted land use rules that severely inhibit renewable energy development, such as excessive setback requirements, height limits, energy capacity limits, moratoria, and outright bans.[153] According to an investigation conducted by *USA Today*, such restrictions cover 15% of counties in the United States, many of which are located in the most productive areas for wind and solar energy.[154]

Some states have responded to these developments by enabling state agencies to preempt local zoning rules to site renewables.[155] A

150. Jinjoo Lee, *Green Energy Is Stuck at a Financial Red Light*, The Wall St. J. (Mar. 31, 2023), https://www.wsj.com/articles/green-energy-financing-interest-rates-3f0e3dc3 [https://perma.cc/VD4V-2PD6].

151. Robi Nilson et al., Survey of Utility-Scale and Wind and Solar Developers Report 11 (2024), https://emp.lbl.gov/publications/survey-utility-scale-wind-and-solar [https://perma.cc/L4AK-Q8QW].

152. *Id.* at 21.

153. *See* Pacific Nw. Nat'l Lab'y, Restrictions and Barriers to Renewable Energy in Local Zoning Ordinances, https://www.pnnl.gov/sites/default/files/media/file/Restrictions%20in%20Local%20Zoning%20-%20Memo%20-%20Jul22.pdf [https://perma.cc/YZK4-U6PR].

154. Elizabeth Weis & Suhail Bhat, *Across America, clean energy plants are being banned faster than they're being built*, USA Today (Feb. 4, 2024), https://www.usatoday.com/story/news/investigations/2024/02/04/us-counties-ban-renewable-energy-plants/71841063007/ [https://perma.cc/L5GM-DJH5]; *see also, e.g.*, Ruhl & Salzman, *supra* note 19, at 45 ("[T]he state of Iowa relies on wind for the largest percentage of its energy, fifty-seven percent of the state's electricity. Yet sixteen of the state's ninety-nine counties have passed ordinances that restrict wind power installations . . . Most of these were passed in the past three years. As a result, analysts reported, wind development is no longer available in forty-nine to seventy-seven percent of the state.").

155. N.Y. Pub. Serv. § 142(5) (Consol. 2025) ("ORES may elect not to apply, in whole or in part, any local law or ordinance that would otherwise be applicable if it makes a finding that, as applied to the proposed facility, it is unreasonably burdensome in view of the CLCPA targets, and the environmental benefits."); Assemb. B. No. 205, Ch. 61, § 25545.1(b)(1) (Cal. YEAR) (providing that the issuance of a certificate by the California Energy Commission shall "be in lieu of any permit, certificate, or similar

justiciable right to climate action would provide developers an alternative route for avoiding and/or undoing problematic zoning rules, and it may incentivize states that lack a preemption regime to adopt one.[156] A right to climate action would also provide developers the opportunity to challenge restrictions on clean energy infrastructure that fall outside the authority of state agencies in states with preemption regimes. In New York, for instance, the Office of Renewable Energy Siting (ORES) is only responsible for permitting renewable energy projects that have a capacity of 25 megawatts or more,[157] and its authority does not extend to standalone battery plants, which perform critical functions for the clean energy grid.[158]

A more aggressive approach would be to challenge regulations that make the installation of clean energy technology significantly more expensive, or that make installations significantly less productive but do not ban them outright. One example would be historic preservation rules. Consider the propriety of the solar installation rules imposed by The Old Kings Highway Historic District on Cape Cod. The rules require that solar installations have a "minimum visual impact" and that all homeowners with homes built more than 75 years ago plead their case for solar panels before their town historic committee.[159] Michael Gerrard described a similar regime imposed by the Landmark Preservation Committee in New York as "so arduous that few solar companies want[ed] to undergo it,[160] and it appears the same is true on

document required by any state, local, or regional agency"); Mich. Pub. Act No. 233, 102nd Leg., Reg. Sess. § 223(3)(c) (2023) [https://perma.cc/U8BB-7UA8] (enabling the state public service commission to preempt local zoning to site a renewable energy project if (i) the local unit fails to timely approve or deny the application, (ii) the project meets certain statutory criteria and is denied, or (iii) the local unit amends its zoning rules to be stricter than state law); Mass. S. B. No. 2967, § 69T (enabling the state Energy Facilities Siting Board to issue "consolidated permits" for large renewable energy projects, and to provide exemptions from local rules); *see also* Ill. HB 4412, 102nd Gen. Assemb., Reg. Sess. [https://perma.cc/6A66-SWF2] (prohibiting local governments from enacting zoning rules that prohibit commercial wind and solar development; see Sec. 5-12020). Note that a law preempting local zoning to site climate-friendly uses may be unconstitutional in Pennsylvania under *Robinson Township*. *See supra* notes 25–29 and accompanying text.

156. *See* Part III(B)(ii).

157. N.Y. Comp. Codes R. & Regs. tit. 16, § 1100-1.2(ag).

158. *See generally* Thomas Bowen et al., Nat'l Renewable Energy Lab, Grid-Scale Battery Storage (Sept. 2019), https://www.nrel.gov/docs/fy19osti/74426.pdf [https://perma.cc/M3NN-C7H5].

159. Eve Zuckoff, *Solar Panels in Historic Districts: Who Decides Where 'Modern' Fits?,* WGBH (Nov. 10, 2023), https://www.wgbh.org/news/2023-11-10/solar-panels-in-historic-districts-who-decides-where-modern-fits [https://perma.cc/8DLM-ZPED].

160. Michael B. Gerrard & Edward McTiernan, *Potential Tensions Between New York's Climate Change Laws and Historic Preservation Laws*, N.Y.L.J. (Nov. 10,

the Cape.[161] It is fair to question the reasonableness of the burden such rules impose on climate rights. While the majority rule has long been that aesthetic regulations are compatible with substantive due process,[162] that may no longer be true in states that have environmental rights provisions in their constitutions.

2. Transit-Oriented Development (TOD)

Zoning rules that limit the growth of cities and dense housing near transit, or transit-oriented development (TOD), also clearly infringe on the right to climate action. Increasing population density leads to lower per-capita emissions, particularly where residents are not dependent on personal automobiles for transportation.[163] The New York metro area provides a vivid illustration. Increasing the population of New York City and nearby transit-oriented communities would be extremely beneficial to the environment,[164] and the high price of housing in the region reveals there is enormous demand to live

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2021), https://climate.law.columbia.edu/sites/climate.law.columbia.edu/files/content/docs/Michael%20Gerrard/NYLJ11102021525975Arnold.pdf [https://perma.cc/LE5D-YGQ3]. The New York Landmark Preservation Commission recently changed its rules for solar. *LPC Approves New Rules Streamlining Agency Procedures to Support Key Business Initiatives and Climate Resiliency and Sustainability Updates*, N.Y.C. Landmark Pres. Comm'n (July 11, 2023), https://www.nyc.gov/site/lpc/about/pr2023/lpc-approves-new-rules-streamlining-procedures.page [https://perma.cc/U6S4-DMC3].

161. Zuckoff, *supra* note 159 (quoting a partner at a Cape Cod solar company as saying that the recent exemption for newer homes was "sort of a game changer," but that installing solar in historic districts remained costly and time-consuming).

162. *See* State v. Jones, 290 S.E.2d 675, 679 (N.C. 1982).

163. *See* Nate Luce, *How Zoning Affects Greenhouse Gas Emissions*, Vand. L. Sch. (May 22, 2024), https://law.vanderbilt.edu/how-zoning-affects-greenhouse-gas-emissions/ [https://perma.cc/KM2V-LMKL].

164. *See* Michael A. Rodriguez et al., Foot Traffic Ahead: Ranking Walkable Urbanism in America's Largest Metros, Smart Growth Am. 2 (Jan. 2023) https://smartgrowthamerica.org/wp-content/uploads/2023/01/Foot-Traffic-Ahead-2023.pdf [https://perma.cc/R42C-JSW9] (ranking New York the "most walkable" city in the United States); Am. Pub. Transp. Ass'n, 2022 Public Transportation Fact Book 12 (Jan. 2023), https://www.apta.com/wp-content/uploads/APTA-2022-Public-Transportation-Fact-Book.pdf [https://perma.cc/JU64-HZYF] (reporting that New York has the highest percentage of public transit commuters of any metropolitan area in the United States—27.9%, versus 13.2% for the runner-up, San Francisco); Ashlee Valentine, *Car Ownership Statistics 2025*, Forbes (Mar. 28, 2024), https://www.forbes.com/advisor/car-insurance/car-ownership-statistics/ [https://perma.cc/3MVQ-NSDM] (reporting that the New York-New Jersey metro area has the lowest rate of car ownership of any metro area in the United States, with only 69.5% of households having at least one vehicle, versus 81.8% of households in the runner-up: Ithaca, New York).

there.[165] But instead of growing, the region's population is shrinking as former residents move to cheaper, more car-dependent, more climate-vulnerable areas.[166] Research suggests that the increasing cost of living is the main factor driving the exodus.[167] Given that the cost of housing comprises a substantial portion of the typical New Yorker's overall cost of living,[168] that the lack of housing supply is the main driver of the cost of housing,[169] and that zoning is a major impediment to increasing supply,[170] it makes sense to attribute at least part of the

165. *See* Robinson Meyer, *Kamala's Climate Platform Should Be Cheaper Housing*, HEATMAP (Aug. 14, 2024), https://heatmap.news/economy/kamala-harris-housing-policy [https://perma.cc/7S9N-2X4S] (Ben Furnas, former director of the New York City mayor's office for climate and sustainability: "The prices in [New York City] suggest there's huge pent-up demand for people to live [there] . . . And even just lowering the regulatory barriers to let that kind of development happen and that kind of growth occur would both make it more affordable, and let people live closer to their families, *and* be good for the climate in terms of per capita emissions.").

166. Winnie Hu & Stefanos Chan, *New York City's Population Shrinks by 78,000, According to Census Data*, N.Y. TIMES (Mar. 14, 2024), https://www.nytimes.com/2024/03/14/nyregion/nyc-population-decline.html [https://perma.cc/BN2E-PTKV]; Sara Chernikoff, *More Than Half a Million People Left New York in 2022. Here's Where They Resettled.*, USA TODAY (Nov. 29, 2023), https://www.usatoday.com/story/news/nation/2023/11/29/new-yorkers-moving-census-bureau-inflation/71730570007/ [https://perma.cc/YD63-G4YC] (reporting that out of the 541,500 residents that left New York in 2022, 91,201 left for Florida).

167. *See* Stefanos Chen, *New York's Millionaire Class is Growing. Other People are Leaving*, N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/2023/12/05/nyregion/nyc-working-class-tax-rich.html [https://perma.cc/AG3F-JFZU]; Thomas P. DiNapoli, *The Changing Face of Post-Pandemic New York City*, OFF. N.Y. COMPTROLLER (Dec. 18, 2023), https://www.osc.ny.gov/press/releases/2023/12/changing-face-post-pandemic-new-york-city [https://perma.cc/462V-DTWG] ("DiNapoli Finds NYC Is Getting Older, Wealthier as Cost of Living Rises").

168. Brad Lander, *Spotlight: New York City's Rental Housing Market*, OFF. N.Y.C. COMPTROLLER (Jan. 17, 2024), https://comptroller.nyc.gov/reports/spotlight-new-york-citys-rental-housing-market/ [https://perma.cc/L2JA-K46S] (reporting that a majority of renter-households are rent-burdened, i.e., rental costs consume more than 30% of their income, and nearly 30% of low-income renters spend more than half of their income on rent); OFF. N.Y. COMPTROLLER, THE COST OF LIVING IN NEW YORK CITY (Jan. 2024), https://www.osc.ny.gov/files/reports/osdc/pdf/report-17-2024.pdf [https://perma.cc/UNJ4-5YXZ] (reporting that the housing costs have increased by 68% over the last decade in New York).

169. Alex Horowitz & Adam Staveski, *New York's Housing Shortage Pushes Up Rents and Homelessness*, PEW (May 25, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/05/25/new-yorks-housing-shortage-pushes-up-rents-and-homelessness [https://perma.cc/A6HA-KUHP].

170. *See* John Burn-Murdoch, *What Texas Can Teach San Francisco and London About Building Houses*, FIN. TIMES (Feb. 23, 2024), https://www.ft.com/content/de34dfc7-c506-4a81-b63d-41d994efaa89 [https://perma.cc/XV2A-2XBQ] ("Homes in Texan cities are cheap and their populations soaring because the state has made urban development easy. California, New York and London are overheating and squeezing out young families because their planning systems place artificial constraints on supply, making urban development extremely difficult.").

environmental harm that accompanies the shrinking of the New York metro area's population to its zoning, and to question whether the city's zoning rules are compatible with the right to climate action.

Opportunities for upzoning abound. According to the NYU Furman Center, low-density neighborhoods comprising mainly one- and two-family homes cover approximately 45% of the total land in the city and contain just 28% of its population.[171] Many of these neighborhoods abut subway lines and offer their residents quick commutes to Manhattan. A particularly striking example is the Lefferts Manor Historic District, which sits one block from the Prospect Park subway station, is zoned R-2, and consists entirely of standalone single-family homes.[172] Similar neighborhoods run along the Q line south of the park as well.[173]

Higher-density neighborhoods that sit near to and within the city center are also ripe for upzoning. These are sites of "super-gentrification,"[174] where rents have doubled over the past decade and the price of homes has increased by a factor of sixty since 1975.[175] Predictably, the demographics of such neighborhoods have also changed, becoming whiter and richer over time.[176] There is increasing research that suggests less displacement would have occurred over the years had more development been allowed.[177] Even if it didn't reduce displacement, allowing more development would have enabled more people to live near downtown Manhattan, rather than in areas where driving to work is the norm.

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171. Ben Hitchcock & Elizabeth Miller, *Tackling New York City's Housing Crisis is a 'Shared Responsibility'*, THE STOOP: N.Y.U. FURMAN CTR. BLOG (Feb. 13, 2024), https://furmancenter.org/thestoop/entry/tackling-new-york-citys-housing-crisis-is-a-shared-responsibility [https://perma.cc/FDW9-TFTM].

172. *See Zola: New York City's Zoning & Land Use Map*, https://zola.planning.nyc.gov/ [https://perma.cc/D7QF-5K2A].

173. *See id.*

174. Loretta Lees, *Super-gentrification: The Case of Brooklyn Heights, New York City, in* THE GENTRIFICATION DEBATES 45 (Japonica Brown-Sacarino ed., 2013).

175. *See, e.g., Fort Greene/Brooklyn Heights: Demographics*, N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL'Y (May 21, 2024), https://furmancenter.org/neighborhoods/view/fort-greene-brooklyn-heights#demographics [https://perma.cc/ABZ9-AG2A].

176. *See, e.g.*, N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL'Y, *supra* note 182.

177. *See* Kate Pennington, *Does Building New Housing Cause Displacement? The Supply and Demand Effects of Construction in San Francisco* 1 (June 15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3867764 [https://perma.cc/5KCT-6WN6]; Karen Chapple et al., *The Role of Local Housing Policies in Preventing Displacement: A Literature Review*, 38 J. OF PLAN. LITERATURE 200, 200 (2022); Brian J. Asquith et al., *Local Effects of Large New Apartment Buildings in Low-Income Areas*, 105 REV. OF ECON. & STAT. 359 (2023), https://doi.org/10.1162/rest_a_01055 [https://perma.cc/T2MS-GMCF].

Ample opportunities for TOD also exist in the city's suburbs. As a representative example, Noah Kazis highlights in a Furman Center report the Village of Bronxville in Westchester County, which offers a forty-minute commute by train to Grand Central Station.[178] Bronxville currently has a population of around 6,500, a median household income of $207,000, and median rents of $3,400.[179] As Kazis observes, the village's zoning code is "shrink wrapped" to its existing built environment, allowing for a minimal amount of multifamily development near the train station. Kazis found that the village had allowed just one multifamily project to proceed between 2010 and 2020, namely an 11-unit conversion of a storage facility in the downtown area. The developers for the project first submitted plans in 2012,[180] and the project was finally completed one decade later, in 2022.[181] One of the units in the development recently sold for slightly more than $1 million.[182]

In light of Kathy Hochul's recent failed bid for a housing construction mandate,[183] it is unlikely that a political solution to the region's dire housing shortage will soon emerge. At a more local level, New York City has succeeded in passing a significant upzoning plan known as City of Yes, which will enable the addition of more than 80,000 units to its housing supply.[184] However, this figure pales

178. Google Maps Citation [https://perma.cc/H297-7SGZ].

179. *QuickFacts: Bronxville village, New York,* U.S. Census Bureau, https://www.census.gov/quickfacts/bronxvillevillagenewyork [https://perma.cc/TE9J-ZZBN].

180. Noah Kazis, N.Y.U. Furman Ctr., Ending Exclusionary Zoning in New York City's Suburbs (Nov. 9, 2022), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf [https://perma.cc/BT4Y-QM9P].

181. *100 Pondfield Road Celebrates Grand Opening*, Real Est. Wkly. (Oct. 24, 2022), https://rew-online.com/100-pondfield-road-celebrates-grand-opening/ [https://perma.cc/Q6L8-JR94].

182. *100 Pondfield Road, Unit 2A*, Compass, https://www.compass.com/listing/100-pondfield-road-unit-2a-bronxville-ny-10708/1289032705778788001/ [https://perma.cc/F7SA-YJMU].

183. Sam Mellins, *The State Assembly Is Foreclosing Hochul's Housing Supply Plan*, N.Y. Focus (Apr. 18, 2022), https://nysfocus.com/2023/04/18/hochul-housing-compact-dead-assembly-budget [https://perma.cc/3WF4-CU6E] (Assembly source: "There were a lot of members who thought they'd get killed in re-election if they were overriding local control."). Among the many community leaders who spoke out was former Assemblymember Steven Englebright—the main sponsor in the Assembly for both the CLCPA and the Green Amendment—who opposed the proposal on environmental grounds. Rita J. Egan, *Elected Officials Say Hochul Is Misguided with Affordable Housing Proposal*, TBR News Media (Jan. 23, 2023), https://tbrnewsmedia.com/elected-officials-say-hochul-is-misguided-with-affordable-housing-proposal/ [https://perma.cc/4GEY-PZG8].

184. Emma G. Fitzsimmons, *New York City Approves a Plan to Create 80,000 New Homes*, N.Y. Times (Dec. 5, 2024), https://www.nytimes.com/2024/12/05/nyregion/nyc-housing-city-of-yes.html [https://perma.cc/Y76W-3EQZ].

in comparison to the amount required to make housing affordable in the region.[185] Furthermore, the significant negative response City of Yes received from local community boards provides a good reason to doubt the city will be able to pass similarly large upzonings in the near future.[186]

The New York judiciary has a role to play here. The "new exclusionary zoning"[187] that governs the New York metro area is already vulnerable to a constitutional challenge under *Berenson v. New Castle,* the state's answer to the Mount Laurel Doctrine, which requires that zoning ordinances account for "regional needs" for different forms of housing."[188] But the region's housing shortage is not only at the root of an affordability crisis; it is also an enormous missed opportunity for addressing the climate crisis. New York municipalities are artificially constraining climate action for purposes of preserving the character of neighborhoods by preventing the construction of "out-of-context" buildings[189] and preserving "open space" within a half-hour commute

185. *See* Simon Shkury, *New York City Housing Shortage Highlights Need for More Development*, Forbes (Mar. 20, 2024), https://www.forbes.com/sites/shimonshkury/2024/03/20/new-york-city-housing-shortage-highlights-need-for-more-development/ [https://perma.cc/6H42-JQEV] ("To keep up with demand, the Regional Plan Association projects New York City will need 473,000 more units of housing by 2032.").

186. Sophia Lebowitz, *Map: How Did Community Boards Vote on 'City of Yes' Housing Plan*, Streetsblog N.Y.C. (July 22, 2024), https://nyc.streetsblog.org/2024/07/22/community-board-vote-city-of-yes-mayor-adams [https://perma.cc/66PH-EWX3].

187. John Mangin, *The New Exclusionary Zoning,* 25 Stan. L. & Pol'y Rev. 91, 91 (2014) (coining term).

188. Brenson v. Town of New Castle, 341 N.E.2d 236, 242 (N.Y. 1975). The opinion does not refer to "affordable" or "low-income" housing; it only refers to "multi-family" housing, meaning it is possible to interpret the decision as implementing something like Pennsylvania's *Easttown* doctrine. Later, however, the New York Court of Appeals clarified that *Berenson* is a condemnation of socioeconomic discrimination. Asian Ams. for Equality v. Koch, 517 N.E.2d 265, 271 (N.Y. 1988).

189. *See, e.g., Carroll Gardens Rezoning*, N.Y.C. City Plan. Comm'n (Sept. 23, 2009), https://www.nyc.gov/assets/planning/download/pdf/about/cpc/090462.pdf [https://perma.cc/4QYG-CQ7C]; *see also Unplanned Shrinkage*, Citizens Hous. & Plan. Council (July 2024), https://chpcny.org/publication/unplanned-shrinkage/ [https://perma.cc/M8PH-29QZ] ("To the extent that the goals of downzonings were articulated aloud, protection of 'neighborhood character' and preventing 'out-of-context buildings' were frequently cited.").

of the world's financial center.[190] These are not tradeoffs that serve the general welfare; they are another reason the dam must break.[191]

As is the case for renewables development, TOD is also limited by a host of regulations beyond simple bans. A common one that could be challenged under the right to climate action is the parking minimum, which frequently deters developers from maximizing the size of housing projects under existing zoning rules while at the same time perpetuating car dependency.[192] Litigants might also challenge mandatory inclusionary zoning (IZ) rules that condition upzonings on developers including a certain amount of affordable housing in their projects. Although the basic concept of IZ is attractive, the practice can be ineffective at driving housing production and affordability if the municipality sets the affordable housing requirement too high, such that IZ projects simply do not "pencil out" and are never built.[193]

But challenging IZ rules may be a poor strategic choice, as it would muddy what is perhaps the most powerful Green Amendment argument against exclusionary zoning in urban, transit-rich areas. Zoning not only constrains the population of such areas, but also turns the climate-friendly lifestyles they offer into a kind of luxury good by enabling the

190. *See Zoning Maps and Resolution*, N.Y.C CITY PLAN. COMM'N (Dec. 15, 1961), https://www.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zoning_maps_and_resolution_1961.pdf [https://perma.cc/VA5X-AQYB] (identifying the prevention of "congestion" and the preservation of "open space" as the city's purpose in "regulating the density of population and the bulk of buildings in relation to the land around them"). New York's 1961 rezoning reduced the city's housing capacity by 80%, cutting its theoretical maximum population from fifty-five million down to twelve million. Jacob Anbinder, Cities of Amber: Antigrowth Politics and the Making of Modern Liberalism 137 (Aug. 28, 2023) (Ph.D. dissertation, Harvard) (on file with author). Housing production subsequently fell in precipitous fashion. *See* N.Y.C RENTAL GUIDELINES BD., 1996 HOUSING SUPPLY REPORT 11 (June 1996), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/96HSR.pdf [https://perma.cc/YVB5-SNUW].

191. *See supra* notes 86–89 and accompanying text.

192. *See, e.g.*, Sophia Lebowitz, *City of Yes: Parking Mandates Have Shaped New York … For Worse*, STREETSBLOG N.Y.C. (July 2, 2024), https://nyc.streetsblog.org/2024/07/02/city-of-yes-parking-mandates-have-shaped-new-york-for-worse [https://perma.cc/4M6A-QEZQ] ("Four-story-plus-penthouse buildings are so common in R6 districts like Wingate [i.e., a district that would allow larger residential buildings] because they strike the balance of maximizing floor-area ratio . . . while staying under the 10-unit threshold that triggers the parking requirement."); Henry Grabar, *How Parking Reform Is Helping Transform American Cities*, YALE ENV'T 360 (Jan. 31, 2024), https://e360.yale.edu/features/free-parking-reform [https://perma.cc/PYE6-CMYR].

193. *See, e.g.,* Jacob Krimmel & Betty Wang, *Upzoning with Strings Attached: Evidence from Seattle's Affordable Housing Mandate,* 25 CITYSCAPE 257, 257 (2023); *see also infra* note 209 and accompanying text (discussing unfunded inclusionary zoning rule struck down by a New Jersey court because it violated the Mount Laurel Doctrine).

wealthy to bid up rents and the price of homes. In doing so, it inflicts a kind of moral injury[194] or "contributive" injustice[195] on those who cannot afford to move in, or to simply stay in place. A constitutional provision articulating a positive right is a promise a polity makes to itself. All should be welcome to work to keep it.

B. Refining the Right to Climate Action: The Builder's Remedy and the Right to a Plan

Countless rules currently work in tandem to forestall renewables development and TOD across the nation, and if they were struck down, states and municipalities would likely devise new rules to replace them.[196] The underlying problem is an enduring culture of antigrowth that has long feared the destructive effects of urban sprawl and industry,[197] which will not be undone by a single lawsuit or round of legal reform. Management consultants have a saying: culture eats policy for breakfast.

For that reason, to fully vindicate the right to climate action, courts should follow the model that Chief Judge Wilentz of the New Jersey Supreme Court laid down in *Mount Laurel II*. Although extremely controversial, *Mount Laurel I* was something of a non-event: litigants were not particularly successful in securing adequate remedies, and municipalities widely ignored the ruling.[198] It was not until Wilentz substantially augmented the Mount Laurel Doctrine in *Mount Laurel II* that it began to have a real impact on land use rules in the state. One of the major steps he took was to designate three judges to handle *Mount Laurel* litigation to ensure that cases were

194. *See* The Moral Injury Project, *Welcome*, SYRACUSE U., https://moralinjuryproject.syr.edu/ [https://perma.cc/4JH9-3Q9S].

195. *See* Jeremy Waldron, Contributive Justice 2 (N.Y.U. Sch. of L. & Econ. Rsch. Paper Series, Working Paper No. 24–24, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4400112.

196. *Cf.* Ben Christopher, *These Cities Have a New Tactic to Evade California Housing Laws. Legal Experts Are Dubious*, CAL. MATTERS (June 18, 2024), https://calmatters.org/housing/2024/06/california-housing-law-charter-city/ [https://perma.cc/YG5N-CN7Z] (describing various attempts made by local government to evade requirements under state housing laws).

197. Anbinder, *supra* note 190 (attributing the "permanent housing shortages, exorbitant real estate values, unsustainable exurban commutes, and intensified segregation that plague cities today" to "liberals' deliberate attempts to redress the harms of the postwar urban order" through historic preservation, environmental conservation, and participatory democracy).

198. Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 850 (2011).

handled in an efficient and consistent manner.[199] These judges were armed with a range of remedies to incentivize municipalities to fulfill their obligations under the doctrine: for example, a judge might order a municipality to halt all other construction until it had devised an adequate zoning ordinance or until enough lower-income housing had been constructed within its borders.[200]

Wilentz's most important innovation was to award builder's remedies to plaintiff-developers. Importantly, he established simple criteria for eligibility: projects needed to include a "reasonable minimum" of affordable housing[201] and to accord with "sound land use planning" principles.[202] Rather than require plaintiff-developers show that their projects were, in fact, sound, Wilentz imposed the burden on municipalities to show the opposite.[203] In doing so, he provided developers enough certainty regarding how to secure builder's remedies to effectively "marry the profit motive with a public interest," addressing an institutional failure by inviting a flood of litigation. The end results were numerous rezonings and a legislative response in the form of New Jersey's 1985 Fair Housing Act (FHA), which codified the Mount Laurel Doctrine and established an agency, the Council on Affordable Housing (COAH), to administer it.[204]

To fully vindicate the right to climate action, courts in Green Amendment states should afford renewable energy projects and TOD projects the same treatment. That is to say: courts should identify clear and simple criteria for which projects receive protection under their states' constitutions and award builder's remedies to those who come to court to challenge zoning rules that impede them. The lesson of the Mount Laurel Doctrine is that, absent that enticement, something like the right to climate action is not worth much at all. Plaintiff-developers need to be compensated sufficiently, or else very few will materialize, and there will be no systematic change.

Another takeaway from New Jersey's experience under the Mount Laurel Doctrine is that the right to climate action might function best as a disposable means to a more fundamental right to a well-ordered land use plan. This idea comes from *Mount Laurel III*, which upheld the constitutionality of the 1986 FHA. One of the provisions challenged

199. Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 33–34 (1988).
200. *Id.* at 34 n.26.
201. S. Burlington Cnty. NAACP v. Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 452 n.37 (N.J. 1983).
202. *Id.* at 452.
203. *Id.* at 452.
204. HAAR, *supra* note 132, at 146.

instituted a five-month grace period for the COAH to adopt criteria and guidelines, during which courts were barred from awarding builder's remedies. According to the court, this was constitutional because *Mount Laurel II* had not "elevated the judicially created builder's remedy . . . to the level of a constitutionally protected right."[205] Instead, the court held that the builder's remedy was "simply a method" for achieving the constitutionally-mandated goal of providing a realistic opportunity for a sufficient level of affordable housing development in the state—an "obligation [that] is best left to the Legislature."[206] In short: the builder's remedy it offered in *Mount Laurel II* was not a freestanding constitutional right, but a means of provoking a legislative response, which it deemed in this case was "sufficient to trigger [its] 'readiness to defer.'"[207]

To assuage concerns about judicial aggrandizement, a court that awards a builder's remedy under the right to climate action might frame their decision along similar lines. They could say the builder's remedy is really an inefficient, imprecise stopgap that invites replacement by way of its inefficiency and imprecision—a disposable means of prompting the legislature to fulfill its constitutional duty to devise a well-ordered land use plan that is compatible with rapid decarbonization, and which warrants judicial deference.

But not total deference. Local opposition will likely incentivize state legislatures and local governments to draft plans that, at some cursory level, appear to accord to the letter of the constitutional minimum but are practically infeasible. One can imagine, for example, a map that sets aside a sufficient amount of land for utility-scale renewables to power a net zero grid, but the zones identified are very small, and they are located so as to maximize transmission costs—the end result being that very few potential projects pencil out, and nothing gets built. Just as they must afford a builder's remedy to encourage litigants to come forward in the first place, courts should remain open to the possibility they may need to strike down legislatures' bad-faith efforts at compliance, or else the right to climate action will mean little.

This is the approach the New Jersey judiciary has taken under the Mount Laurel Doctrine. When it upheld the 1985 FHA in *Mount Laurel III*, the New Jersey Supreme Court made clear that its reason for showing comity was not the mere fact the state legislature had taken action. According to the court, the legislature's response to the litigation it invited

205. Hills Dev. Co. v. Twp. of Bernards in Somerset (*Mount Laurel III*), 510 A.2d 621, 645 (N.J. 1986).
206. *Id.* at 643, 645.
207. *Id.* at 634.

in *Mount Laurel II* counted for much more than that: the 1985 FHA was the response it "always wanted and sought," it said, and represented an "unprecedented willingness" to fulfill the government's constitutional obligation to meet the housing needs of lower-income New Jersey residents.[208] In the years since, New Jersey courts have occasionally struck down COAH rules that ran afoul of that obligation, such as one that permitted municipalities to meet their fair share requirement by implementing an unfunded inclusionary zoning rule.[209]

If anything, courts should be even less forgiving of climate action plans than the New Jersey courts have been of municipalities' housing plans and COAH rules. One important step that courts could take to adapt the Mount Laurel Doctrine to the climate context would be to show far more skepticism toward development moratoria, which courts have upheld in the affordable housing context based on the idea there is no "constitutional timetable" for development,[210] and that such ordinances serve the rational function of leaving public services and facilities (e.g., sewer lines) the time to catch up to growing public need.[211] Even as it upheld such moratoria, the New York Court of Appeals felt the need to admit there is something "inherently suspect" about a zoning scheme that "effects a restriction upon the free mobility of a people until sometime in the future."[212] In the context of climate change, that suspicion becomes certainty, as each moment of delay embeds additional warming and greater environmental harm.[213]

C. Defending the Right to Climate Action

1. Revisiting the Green Amendment Dilemma

I argued previously in this Journal that courts ought to defer to the political branches in "Green Amendment Dilemma" cases that pit competing environmental interests against one another.[214] The

208. *Id.* at 633.
209. In re Adoption of N.J.A.C. 5:94 & 5:95 By N.J. Council on Affordable Housing, 914 A.2d 348, 389 (N.J. Super. Ct. App. Div. 2007).
210. *Mount Laurel III*, 510 A.2d at 642.
211. Golden v. Plan. Bd. of Ramapo, 285 N.E.2d 291, 301 (N.Y. 1971); Construction Indus. Ass'n v. Petaluma, 522 F.2d 897 (9th Cir. 1975).
212. *Golden*, 285 N.E.2d at 300.
213. *See* Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 Ecology L.Q. 732, 747 (2019) ("Present levels of emissions pose existential threats if unchecked . . . delay in reducing emissions locks in statistically certain death, and also exponentially increases the difficulty of achieving future reductions adequate to reign in serious climate harms.").
214. *See* Dan Fisher, Note, *New York's Green Amendment Dilemma*, 26 N.Y.U. J. Legis. & Pub. Pol'y 1127, 1154–1161 (2024).

sort of case I had in mind was one in which a private individual or an environmental group sues the state government for issuing a permit for a large renewable energy project that threatens to inflict some degree of environmental harm at the local level. One such case had emerged in New York: in *Association of Property Owners of Sleepy Hollow Lake*, *Inc. v. Greene County Industrial Development Agency*, a property association alleged that the construction of a large solar project threatened to violate their right to a healthful environment by polluting their water supply.[215] I argued that courts ought to apply a low level of scrutiny in such cases because they concerned conflicts of incommensurable constitutional rights, which are best handled by more democratic institutions.[216]

In this Note, I have focused on Green Amendment Dilemma cases of another sort, namely those where the plaintiff is asserting their right to a stable climate at the expense of a municipality's concerns about the local environment (e.g., concerns about water pollution and habitat destruction), and I have argued the plaintiff ought to prevail.

These two arguments are in tension with one another. Granted, my aim remains the same. As in *New York's Green Amendment Dilemma,* I have attempted here to articulate an approach to interpreting Green Amendments that permits the massive amount of infrastructure development required to address climate change.[217] But the two approaches are distinct. In *New York's Green Amendment Dilemma*, I presented various arguments for showing judicial deference. My intention in doing so was to reduce the risk of protracted litigation and leave room for the legislature and state agencies to take steps on their own to reduce the regulatory burden on climate-friendly development.

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215. Ass'n of Prop. Owners of Sleepy Hollow Lake v. Greene Cnty. Indus. Dev. Agency, No. 84, Index No. EF2023–573, slip op. at 11 (N.Y. Sup. Ct. Greene Cnty. July 23, 2024). The court dismissed the case for lack of jurisdiction, as it amounted to a collateral challenge to a Siting Board decision. The plaintiffs have appealed. Notice of Appeal, Ass'n of Prop. Owners of Sleepy Hollow Lake v. Greene Cnty. Indus. Dev. Agency, No. 95, Index No. EF2023–573 (N.Y. Sup. Ct. Greene Cnty. Aug. 20, 2024). There have been a few other Green Amendment Dilemma cases. *See, e.g.,* W. N.Y. Youth Climate Council v. N.Y. State Dep't of Transp., No. 67, Index No. 808572/2024, slip op. at 24 (N.Y. Sup. Ct. Erie Cnty. Nov. 15, 2024) (dismissing a Green Amendment claim against a plan to cover a highway running through Buffalo with greenspace); Mulgrew v. U.S. Dep't of Transp., 2024 U.S. Dist. LEXIS 110041 (S.D.N.Y. 2024) (dismissing a Green Amendment claim against New York's congestion pricing plan); Plaxton v. Lycoming Cnty. Zoning Hearing Bd., 986 A.2d 199 (Pa Commw. Ct. 2009) (dismissing a Green Amendment claim against a zoning change permitting the construction of a wind energy facility).

216. Fisher, *supra* note 214, at 1159.

217. *See infra* notes 228–30 and accompanying text.

Here, I have done the opposite. I have argued that courts should *not* show deference; I have *invited* Green Amendment Dilemma litigation.

A court could adopt both approaches anyway. It could show great deference in cases that challenge permit approvals for renewable energy facilities one day and then strike down a zoning ordinance restricting renewables development the next. There are things the judge could say. She might emphasize the distinction in the legal basis for each doctrine—that the first is about the incommensurability of competing environmental rights, while the second is about the interaction between environmental rights and substantive due process. But I do not find this idea all that plausible. The incommensurability issue is present in both sorts of Green Amendment cases; it either matters, or it does not.

So, I will not attempt here to reconcile the Green Amendment Dilemma and the Right to Climate Action. Instead, I will say that my intention in writing *New York's Green Amendment Dilemma* and this Note has been to offer courts two separate options for how to apply Green Amendments in the context of climate action. The first may be the right choice for some states; and the reverse may be true for others. And it is likely that the second option—the one I offer here—is appropriate in fewer instances than the first. As I will explain in the next section, the usual legal-theoretical reasons for judicial restraint do not apply with the same force in the context of the right to climate action. But the usual pragmatic considerations—the threat of political controversy and instability most of all—remain as relevant as ever.[218] The Mount Laurel Doctrine remains something of an anomaly for a reason. Not every court is comfortable making such a substantial intervention in the legal and political order.[219]

Any court that is should also be comfortable with dismissing "Type I" Green Amendment Dilemma cases for reasons besides judicial humility. The most straightforward is the absence of a genuine allegation of environmental harm. Many of the concerns that opponents of climate-friendly development typically raise—community character,

218. *But see infra* the last paragraph of Part II.C.2.

219. *Cf.* DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN THE AMERICAN SUBURB 43 (2013) ("[The Mount Laurel Doctrine] created a firestorm of political and municipal opposition across New Jersey…group of state legislators made an unsuccessful attempt to amend the state constitution to repeal the Mount Laurel Doctrine; and moderate Republican Governor Tom Kean went so far as to label the doctrine a 'communist concept' and proposed a moratorium on the builders' remedies that had been authorized by the court.").

open space, the preservation of rural and suburban "ways of life,"[220] etc.—are quite minor, if they count as "environmental" concerns at all.[221] The same can be said for their health concerns, which are often overstated and quite speculative.[222] A court has the option of rejecting these sorts of Green Amendment claims on the grounds they fail to allege cognizable injuries. Doing so does not require addressing the tricky question regarding the "net" environmental effect of individual projects.

This may not be true for projects that are especially large, where the local the environmental impact is undeniable. But in such cases, litigants seeking to stop such projects run into another problem, namely the fact that the ecological threats posed by renewables development and TOD are not unique. Wind turbines may kill birds—but so do farms and suburban homes.[223] The environmental argument against renewables

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220. *See, e.g.,* Sarah Maslin Nir, *He Set Up a Big Solar Farm. His Neighbors Hated It.*, N.Y. TIMES (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/nyregion/solar-energy-farms-ny.html [https://perma.cc/USG6-XKUZ] ("Don't drop [a solar farm] in the middle of an agricultural, residential community. You're talking about disrupting a way of life.").

221. Note that only the Pennsylvania and Massachusetts have environmental rights provisions that explicitly mention a right to "esthetic" qualities or values. PA. CONST. art. I, § 27; MASS. CONST. art. XLIX.

222. *See* Elizabeth Weise, *Do Wind Turbines Kill Birds? Are Solar Panels Toxic? The Truth Behind Green-Energy Debates*, USA TODAY (Feb. 6, 2024), https://www.usatoday.com/story/news/investigations/2024/02/04/green-energy-fact-checked/72390472007/ [https://perma.cc/QR84-BDVH]; *cf. also* Seneca Lake Guardian v. N.Y. Dep't of Env't Conservation, No. 49, Index No. EF2022-0533, slip op. at 4–6 (N.Y. Sup. Ct. Tompkins Cnty. 2023) (dismissing plaintiffs' Green Amendment claim because harm alleged—the risk of water pollution resulting from the nearby transport of liquid waste—was too speculative and generalized to warrant standing). Another reason to expect that Green Amendment Dilemma litigation will be rare is that there may not be that many people who are willing to bring such cases. Note that the plaintiffs in *Sleepy Hollow Lake* took care to mention in the second sentence of their complaint that they "d[id] not oppose the Project," and that anyone claiming it was trying to block a solar farm was making a "straw man" argument. Complaint at 1, Ass'n of Prop. Owners of Sleepy Hollow Lake v. Greene Cnty. Indus. Dev. Agency, No. 2, Index No. EF2023-573 (Sup. Ct. Greene Cnty. Aug. 11, 2023) [https://perma.cc/6LSB-RNFD] ("d[id] not oppose"); Plaintiffs' Memorandum of Law in Opposition to Respondents' Objections in Point of Law Seeking Dismissal of the Petition at 2, Ass'n of Prop. Owners of Sleepy Hollow Lake v. Greene Cnty. Indus. Dev. Agency, No. 60, Index No. EF2023-573 (Sup. Ct. Greene Cnty filed Sept. 29, 2023) ("straw man"). Such disclaimers indicate a fear of being cast as adversaries to climate action or as abusers of environmental rights, which could restrain others from pursuing similar lawsuits.

223. Damien Gayle, *Intensive Farming Is Biggest Cause of Bird Decline in Europe, Study Says,* GUARDIAN (May 15, 2023), https://www.theguardian.com/environment/2023/may/15/intensive-farming-is-biggest-cause-of-bird-decline-in-europe-study-says [https://perma.cc/YXD2-MKYC]; Christine Sheppard & Bryan Lenz, *Getting Clear on Birds and Glass*, AM. BIRD. CONSERVANCY (Jan. 14, 2023), https://abcbirds.org/blog/truth-about-birds-and-glass-collisions/ [https://perma.cc/WB6G-HKL7] (reporting that

ends up proving too much. The same thought further reinforces the case for the right to climate action: If equivalent environmental concerns fail to disqualify agriculture or low-density residential development, local land use rules should not block renewables or TOD, either.[224]

2. *The Countermajoritarian Difficulty and Tradeoff Denial*

According to one poll, 74% of Americans say it is important for the United States to mitigate the effects of climate change, but at the same time, 79% 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."[225]

This pair of statistics captures in miniature the pervasive phenomenon of "tradeoff denial." Michael Gerrard coined this term in an article titled *A Time for Triage*, wherein he argues that we cannot "just plod along with business-as-usual environmental regulation toward a world of killing heat and mass human migration and species extinction," and must instead accept that "we need to intrude into the critical habitat of . . . endangered species" and reject the impulse to "spend years negotiating every project until everyone is happy."[226] Many find it difficult to accept this idea and retreat to the nostrums of rooftop solar and brownfield renewables development.[227] But these resources

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one study found that "homes and other buildings one to three stories tall accounted for 44 percent of all bird fatalities, about 253 million bird deaths annually").

224. *Cf.* Frost v. Glen Ellyn, 195 N.E.2d 616, 619 (Ill. 1964) (striking down an ordinance excluding drive-in restaurants from business districts on the grounds that the court "fail[ed] to see how a drive-in restaurant of the nature here planned is significantly more detrimental to the public health, safety, welfare or morals than a restaurant fully enclosed within four walls…and many more of the sixty-two businesses permitted in [business] districts"). *Cf. also* Elijah Group v. City of Leon Valley, 643 F.3d 419, 421–22 (5th Cir. 2011) (holding that a zoning ordinance permitting private clubs but not churches along a retail corridor violated the "equal terms" provision of RLUIPA).

225. 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 Benenson Strategy Group, Heatmap #5998 Launch Research, dated Feb. 15–20, 2023 [https://perma.cc/E4YK-U2UT]; *see also* Lauren Feldman, *Oyster Bay Residents Plead with Town Board to Extend Battery Moratorium*, Anton Media Grp. (Oct. 15, 2024), https://antonmediagroup.com/east-oyster-bay-residents-plead-with-town-board-to-extend-battery-moratorium/ [https://perma.cc/F58C-NHRG] ("I'm not anti-green, but what is our hurry to do this?").

226. Michael B. Gerrard, *A Time for Triage*, 39 Env't F. 38, 39–40 (2022).

227. *See, e.g.,* Jerusalem Demsas, *Why America Doesn't Build*, 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

can supply only a small fraction of the United States' future demand for electricity.[228] The difficult truth is that a zero-emissions energy system is far more land-intensive than one that runs on fossil fuels, meaning decarbonization necessitates copious amounts of greenfield "industrial"[229] development.[230] For that reason, it is deeply worrying that opposition to new utility-scale projects seems to be increasing—likely because less-controversial development opportunities have been used up.[231]

Jeremy Waldron argues in *The Core of the Case Against Judicial Review* that the practice is likely only acceptable—if it is acceptable at all—as a hedge against "legislative pathologies" like misogyny and racism.[232] Here we encounter a pathology of another sort. There are different ways of telling the story of how it emerges. One can give a

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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.").

228. 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] ("the National Renewable Energy Laboratory has estimated U.S. rooftops could generate 1,432 terawatt-hours of power per year. That's nearly 39% of the electricity Americans used a decade ago — but just 13% of what we'll need come 2050 as more people drive electric cars and heat their homes with electricity, according to Princeton University research").

229. Elizabeth Weise, *They Hoped Solar Panels Would Secure the Future of Their Farm. Then Their Neighbors Found Out*, USA Today (Mar. 11, 2024), https://www.usatoday.com/story/news/investigations/2024/02/04/solar-power-in-kansas/71920670007/ [https://perma.cc/RFZ3-LFNS] (using the term "industrial" to describe a utility-scale solar development).

230. The Nature Conservancy, *supra* note 147, at 8 (estimating the total amount of land required to generate electricity for a net zero America is somewhere between the size of Arizona and Texas).

231. *See* N.Y. Dep't of Pub. Serv. & N.Y. State Energy Rsch. And Dev. Auth., Draft Clean Energy Standard Biennial Review 35 (2024), Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard ("Already complex, the generation siting process is likely to increase in difficulty over time, from a developer perspective, as 'good' sites are exhausted and resource protection laws become more stringent."); David Gelles, *The U.S. Will Need Thousands of Wind Farms. Will Small Towns Go Along?*, N.Y. Times (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/climate/wind-farm-renewable-energy-fight.html [https://perma.cc/N6KR-4WX3] (Sarah Banas Mills, a lecturer at the school for environment and sustainability at the University of Michigan who has studied renewable development in the Midwest: "Projects have been getting more contentious . . . . The low hanging fruit places have been taken").

232. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1352 (2006).

historical account of tradeoff denial as the maladaptive response of "old-school," technophobic, antidevelopment environmentalist values to the threat of climate change.[233] Alternatively, one could give a game-theoretical account of layered collective-action problems. Global GHG emissions violate environmental rights in a fundamental way by destabilizing the climate—but no individual, municipality, state, or nation contributes enough to the problem on their own to meaningfully mitigate the damage done by zeroing out their emissions. Striving to do so anyway has value because it encourages others to do the same—but that value is abstract, and it can feel minute in comparison to that of a particular forest or a cherished viewshed. Finally, one might conclude that tradeoff denial provides cover for hard political realities, namely that fighting climate change is exceedingly expensive[234] and is not particularly high on voters' list of priorities.[235] Each story reinforces the conclusion that tradeoff denial will likely endure, and that courts therefore have little reason to fret over the countermajoritarian difficulty[236] before intervening to redress the harm it inflicts on Americans' environmental rights.

It is also worth remembering that state courts do not suffer from the countermajoritarian difficulty to the same extent as federal courts. As Jessica Bulman-Pozen and Miriam Seifter have noted, most state judges are elected, and state constitutions are generally easier to

233. *Contra* Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy,* 119 YALE L.J. 1122 (2010) (denying that American environmentalism is "an essentially negative politics: suspicious of human agency, always on the defensive against incursions into natural systems, and temperamentally associated with sacrifice, austerity, and guilt").

234. *See* JEAN PISANI-FERRY & SELMA MAHFOUZ, THE ECONOMIC IMPLICATIONS OF CLIMATE ACTION: A REPORT TO THE FRENCH PRIME MINISTER 88 (2023) ("Overall, the transition represents a negative supply shock, with an accompanying need to finance investments whose profitability cannot be taken for granted. In other words, by putting a price—financial or implicit—on a free resource (the climate), the transition increases production costs, with no guarantee that the reduction in energy costs will eventually offset them, while the investments it calls for do not increase productive capacity but must nevertheless be financed.").

235. Anthony Leiserowitz, *Climate Change in the American Mind: Politics & Policy, Spring 2024,* YALE PROGRAM ON CLIMATE CHANGE COMMC'N (June 13, 2024), https://climatecommunication.yale.edu/publications/climate-change-in-the-american-mind-politics-policy-spring-2024/toc/3/ [https://perma.cc/38P5-92KB] ("Of 28 issues asked about, global warming is the 19th most highly ranked voting issue among registered voters (based on the percentage saying it is 'very important'). When then asked to choose their most important voting issue, three percent of registered voters chose global warming, making it the 12 highest-ranked most important issue.").

236. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

amend than the United States Constitution, meaning it is easier for unpopular judicial decisions to be undone through popular political processes.[237] For this reason, they argue that state courts' echoes of federal anxieties about judge-made law are inapt, and that state courts should treat government actions with less deference, particularly in the context of positive state constitutional rights.[238] Helen Hershkoff has similarly argued that federal rationality review is the wrong framework for approaching cases concerning such rights because it is too deferential and prefers that state courts consider, in a more exacting way, "whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end."[239]

In the current era of climate crisis, it is exceedingly difficult for a state that has adopted an environmental rights provision to its constitution to argue that addressing climate change somehow fails to make the list of prescribed ends. Furthermore, cases like New York and Hawaii reveal that statutes identifying emission reduction goals or renewable energy targets are insufficient means for achieving those ends.[240] This is in large part because land use rules across the country are too restrictive, and they hobble the forms of development that are necessary for achieving those goals. A suitable land use plan for expanding renewables development and TOD is a critical component of any competent decarbonization plan, meaning courts seeking to apply Hershkoff's guidance should be open to considering the propriety of existing land use rules. Any decision invalidating those rules will almost certainly be highly controversial—but that is almost exactly the point.[241]

The same could be said for a decision directly ordering the legislature to devise a land use plan compatible with rapid decarbonization. As I explained in Part I, courts have declined to consider claims requesting

237. Bulman-Pozen & Seifter, *supra* note 142, at 1889.

238. *Id.* at 1910.

239. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999).

240. Colin Kinniburgh, *Missed Deadlines Pile Up As New York's Climate Law Turns Five*, N.Y. FOCUS (June 19, 2024), https://nysfocus.com/2024/06/19/new-york-climate-law-progress [https://perma.cc/XK9L-EYJY]; Paula Dobbyn, *Hawaii's Clean Energy Transition Faces Steep Hurdles, Study Finds,* HONOLULU CIV. BEAT (July 21, 2023), https://www.civilbeat.org/2023/07/hawaiis-clean-energy-transition-faces-steep-hurdles-study-finds/ [https://perma.cc/MMX6-XWBM].

241. *See* Kaye, *supra* note 145, at 421 ("It is a fact of human nature, and of the democratic process, that our actions—both as individuals and as a community—sometimes conflict with our most basic, or overarching, values. Therefore, what we set out to embody in a constitution are those values we do not wish to sacrifice to more transient choices.").

this sort of order based on their understanding of the proper role of courts in government. This reticence is ultimately rooted in pragmatism, not principle: Courts rightfully worry that the political branches will defy the order and that this will undermine the legitimacy of the judicial branch.[242] But this concern does not apply with the same weight to the right to climate action. The Mount Laurel Doctrine is living proof that courts can give force to such a right, if they are willing to take a stand.

Conclusion

As of 2024, lawmakers in at least ten states are seriously considering adding Green Amendment provisions to their constitutions.[243] Opponents of these provisions frequently raise the worry they will invite cases like *Sleepy Hollow Lake* to block new renewable energy projects.[244] The purpose of my previous Note, *New York's Green Amendment Dilemma*, was to explain why such lawsuits, were they to materialize, ought to fail. The purpose of this Note has been to explain how Green Amendments can be used for the opposite purpose of enabling renewables development and TOD in face of local opposition—of empowering individuals to engage in climate action and to make their environment more healthful.

Climate litigation to date has been limited by courts' general aversion to assessing policy outcomes and their much stronger aversion to dictating policy. They are, however, more comfortable enforcing the constitutional limits of state power. I mentioned at the end of Part I the possibility of the courts entering a climate policy "dialogue" with the political branches.[245] The right to climate action offers another way to structure that conversation—and perhaps to make it more productive.

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242. *Cf. supra* notes 58–59 and accompanying text (discussing Washington's experience with education rights).

243. Evan George, *States May Be Warming to Green Amendments,* LegalPlanet (Mar. 12, 2024), https://legal-planet.org/2024/03/12/states-may-be-warming-to-green-amendments/ [https://perma.cc/X4NK-5SUP].

244. *See, e.g.*, *NJBIA Explains Opposition to 'Green Amendment',* N.J. Bus. & Indus. Ass'n (Mar. 7, 2024), https://njbia.org/njbia-explains-opposition-to-green-amendment/ [https://perma.cc/EAH7-4E5D] ("NJBIA is opposing a constitutional amendment that attempts to establish that every person has a legal right to a clean environment because it will lead to a surge in costly litigation and create uncertainty that would jeopardize financing for public infrastructure and private development projects [including renewable energy projects]."); 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].

245. *See* Bookman, *supra* note 11.