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Green Amendments Land Use and Transportation: What Could Go Wrong?

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PACE ENVIRONMENTAL LAW REVIEW

ARTICLE

GREEN AMENDMENTS, LAND USE, AND
TRANSPORTATION: WHAT COULD GO WRONG?

MICHAEL LEWYN*

ABSTRACT

As more states amend their constitutions to include a green amendment, the vague nature of these amendments leaves a concerning amount of interpretative power to courts. This article examines how some courts have interpreted green amendments and how these interpretations risk the misuse of green amendments. Additionally, this article examines how such misuse may be avoided.

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Seven states have amended their state constitutions to give the public the right to a clean environment.¹ One example is New York's amendment,

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1. See Stacey Sublett Halliday et al., *New York Becomes the Third State to Adopt a Constitutional Green Amendment*, NAT'L L. REV. (Dec. 10, 2021),

which was enacted in 2021² and provides that “[e]ach person shall have a right to clean air and water, and a healthful environment.”³ At first glance, these “green amendments”⁴ seem quite innocuous. Who could be against a “healthful environment”? However, the vagueness of these amendments gives judges virtually unlimited powers of interpretation. As a result, such amendments can easily be manipulated to support some not-very-healthful results.

Part I of this article describes existing amendments in more detail. Part II discusses examples of situations where green amendments could be misused to attack pro-environmental policies related to land use and transportation. For example, opponents of new housing in walkable areas might argue that the construction of such housing itself creates pollution, or that efforts to accommodate walkers and bikers create travel congestion. The article goes on to both discuss and critique such arguments. Part III explains why the risk of such misuse might justify refusal to enact green amendments. Part IV shows how green amendments might be revised to achieve more pro-environmental results.

I. BACKGROUND

Only three of the seven green amendment states— Pennsylvania, Montana, and New York— have allowed private claims against government based on those amendments.⁵ In the other four states, green amendments are only enforceable by state legislatures.⁶

<https://www.natlawreview.com/article/new-york-becomes-third-state-to-adopt-constitutional-green-amendment> [https://perma.cc/R8CL-QPND]https://perma.cc/R8CL-QPND (explaining that New York, Pennsylvania, and Montana have an environmental provision in their constitutions’ Bill of Rights; Hawaii, Illinois, Massachusetts, and Rhode Island also have environmental constitutional provisions).

2. *Id.*

3. N.Y. CONST. art. I, § 19; see discussion *infra* notes 8, 24 and accompanying text (providing the text of Pennsylvania and Montana amendments).

4. See Halliday et al., *supra* note 1 (using term).

5. See GENEVIEVE BOMBARD ET AL., ROCKEFELLER INST. OF GOV’T’S CTR. FOR L. & POL’Y SOLS., THE PRECEDENTS AND POTENTIAL OF STATE GREEN AMENDMENTS 9–11, 15–17 (2021) (focusing on case law in Pennsylvania and Montana); see discussion *infra* notes 39–48 and accompanying text (describing recent New York litigation).

6. In particular, the Illinois amendment does not create any new causes of action but merely expands standing for suits in nuisance cases. See *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956, 967 (Ill. 2012) (Amendment “does not create any new causes of action but, rather, does away with the ‘special injury’ requirement typically employed in environmental nuisance cases . . . [thus] there must nevertheless still exist a cognizable cause of action.”) (citations omitted); *Glisson v. City of Marion*, 720 N.E.2d 1034, 1043 (Ill. 1999) (Amendment “is limited to granting standing and does not create any new causes

The Pennsylvania amendment, enacted in 1971,⁷ provides in relevant part that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”⁸ For several decades, the Pennsylvania courts limited constitutional claims under the amendment to cases in which the state legislature had enacted additional legislation.⁹ Thus, the amendment was of little value to citizens who sought to enforce it.¹⁰

But in the 2013 case of *Robinson Township v. Commonwealth*,¹¹ a plurality of the Pennsylvania Supreme Court suggested for the first time that the amendment was judicially enforceable against governments.¹² That case addressed the constitutionality of state laws that required statewide uniformity among local zoning ordinances with respect to oil and gas regulation.¹³ As a practical matter, the state law introduced natural gas drilling into all zoning districts.¹⁴

of action.”). The Massachusetts courts have held that their state’s environmental amendment does not confer standing upon private persons to raise environmental claims. See *Hertz v. Sec’y of the Exec. Off. of Energy & Env’t Affs.*, 901 N.E.2d 1240, 1243 (Mass. App. Ct. 2009) (rejecting claim that amendment “confer[s] standing on the plaintiffs in this action to protect the aesthetic qualities of their environment.”) (citation omitted). The Hawaii Supreme Court has written that Hawaii’s amendment allows the legislature to define the right to a healthful environment, thus implying that the legislature’s discretion may not be challenged by the courts. See *In re Maui Elec. Co.*, 408 P.3d 1, 13 (Haw. 2017) (Although amendment creates right to a healthy environment, this right is one “stemming from and shaped by independent sources of state law” such as “statute, ordinance and administrative rule-making[.]”); *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 918 (Pa. 2017) (“Hawaii and Illinois, unlike Pennsylvania, expressly require further legislative action to vindicate the [environmental] rights of the people.”). Similarly, the Rhode Island courts have written that their state’s environmental amendment gives the state legislature “plenary” powers over the environment—language that suggests that private individuals have no right to challenge legislative action under that amendment. See *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 791 (R.I. 2014) (Areas where courts have “previously found [legislature’s] jurisdiction to be plenary” include the “duty to provide for the state’s natural environment[.]”) (citations omitted).

7. *United Artists’ Theater Cir., Inc. v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993).

8. PA. CONST. art. I, § 27.

9. See *Pa. Env’t Def. Found. v. Commonwealth*, 255 A.3d 289, 295 (Pa. 2021) (noting earlier case law applied amendment only where “the General Assembly had acted”).

10. *Id.* (stating pre-2013 case law “neutered” the amendment).

11. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality opinion).

12. *Id.* at 952–53; *Pa. Env’t Def. Found.*, 255 A.3d at 295 (The plurality opinion in *Robinson Twp.* suggested “for the first time, that this Court would view the ERA as a constitutional right of the people, enforceable by the judiciary and not a merely aspirational policy statement.”) (emphasis added).

13. *Robinson Twp.*, 83 A.3d at 915, 930–31.

14. *Id.* at 937.

A plurality of the court¹⁵ held that these laws violated Pennsylvania's green amendment on a variety of grounds.¹⁶ First, landowners had a reasonable expectation that local zoning would protect them from environmental harm, and by undoing such local zoning, the new law disrupted those expectations.¹⁷ Second, the law violated the state's obligation to prevent degradation of natural resources¹⁸ because it "compel[led] exposure of otherwise protected areas to environmental and habitability costs associated with this particular industrial use: air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape."¹⁹

In the 2017 case of *Pennsylvania Environmental Defense Foundation v. Commonwealth*,²⁰ the Pennsylvania Supreme Court endorsed the view of the *Robinson Township* plurality.²¹ The court held that because the state's green amendment created a right to clean air and water, "any laws that unreasonably impair this right are unconstitutional."²² Thus, the court

15. Three of the court's seven justices joined this portion of the opinion. *Id.* at 913. A fourth justice, Justice Baer, wrote that the relevant statutes violated substantive due process, and therefore found that there was no need to apply the ERA. *Id.* at 1000–01 (Baer, J., concurring).

16. *Id.* at 985, 1000.

17. *Id.* at 977–78 ("[O]ur citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment in which they were living, often for years or even decades. . . . [The new statute] directs municipalities to take affirmative actions to undo existing protections of the environment[.]" (plurality opinion)).

18. *See id.* at 957, 974–76; *see also* PA. CONST. art. I, § 27. ("Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."). The court held that the state law at issue violated this provision because some communities were more attractive to gas drillers than others and thus bore a heavier environmental burden from the law. *See Robinson Twp.*, 83 A.3d at 980.

19. *Robinson Twp.*, 83 A.3d at 979.

20. *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

21. *Id.* at 930 ("[W]e rely here upon the statement of basic principles thoughtfully developed in that plurality opinion.").

22. *Id.* at 931. The case related to another section of the Pennsylvania amendment, which provides that the state's natural resources should be held in trust for the people. *See* PA. CONST. art. I, § 27. In particular, the court held that the "trust" section of the amendment required the state to use revenues from oil and gas leases for purposes related to natural resources. *See Pa. Env't Def. Found.*, 161 A.3d at 939, 948 (State violated this clause when it used "proceeds from the sale of our public natural resources" for purposes unrelated to the state's "obligation to conserve and maintain our natural resources."). *See also* *Pa. Env't Def. Found. v. Commonwealth*, 255 A.3d 289, 314 (Pa. 2021) (holding that certain revenue streams were income generated from trust assets under amendment and thus must be used for purposes related to natural resources). Because most green amendments do not contain the trust language of Pennsylvania's amendment, the trust portion of the Pennsylvania amendment is beyond the scope of this article. *See, e.g.*, N.Y. CONST. art. I, § 19 (clause

suggested that state action violates the amendment if it 1) adversely affects the environment and 2) is unreasonable.

In 1972,²³ Montana amended its constitution to provide that all persons have certain "inalienable rights . . . includ[ing] the right to a clean and healthful environment[.]"²⁴ For over two decades, courts did not enforce this amendment against government entities.²⁵ But in the 1999 case of *Montana Environmental Information Center v. Department of Environmental Quality* ("MEIC"),²⁶ plaintiffs argued that a state's license to a mining company violated Montana's green amendment by degrading the state's waters.²⁷ According to plaintiffs' complaint, the license allowed the discharge of groundwater containing high levels of arsenic and zinc into two state rivers.²⁸ However, state law specifically allowed these discharges, based on a finding that discharges from water wells, like those intended to be used as part of the mining operation, "cause changes in water quality that are nonsignificant because of their low potential for harm to human health or the environment."²⁹

The Montana Supreme Court initially noted that the right to a clean environment created by the amendment was a "fundamental right"³⁰ and thus could be violated only if the state "establishes a compelling state interest [justifying its action] and that its action is closely tailored to effectuate that interest[.]"³¹ Applying this rule, the court found that the right to a healthy environment was implicated based on evidence that the discharges at issue "would have added a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water[.]"³² The court then remanded to the lower court for a finding as to whether there was a compelling state interest supporting the state law allowing these discharges.³³ *MEIC* shows that the Montana courts are willing to enforce the state's amendment against the government, and that

contains no trust language similar to Pennsylvania amendment); MONT. CONST. art. II, pt. II, § 3 (same); ILL. CONST. art. XI, § 2 (same); MASS. CONST. art. XCVII (same).

23. BOMBARD ET AL., *supra* note 5, at 12 (providing year of enactment).

24. MONT. CONST. art. II, pt. II, § 3.

25. See BOMBARD ET AL., *supra* note 5, at 16 (describing amendment as "dormant" until 1999).

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

27. *Id.* at 1237 (Licenses allowed tests to be performed at proposed gold mine, involving "discharges of water . . . which degrade high quality waters[.]").

28. *Id.* at 1237–38.

29. *Id.* at 1244 (citation omitted).

30. *Id.* at 1246.

31. *Id.*

32. *Id.* at 1249.

33. *Id.*

any activity that might impair water quality (or by analogy, air quality) is likely to violate the amendment in the absence of a compelling state interest.³⁴

The Montana Environmental Policy Act (“MEPA”), a state statute, requires environmental impact statements for actions significantly affecting environmental quality.³⁵ But in 2011, the state amended MEPA to provide that courts could not nullify a permit granted by a state agency, even if a project was completed without adequate environmental review.³⁶ In the case of *Park County Environmental Council v. Montana Department of Environmental Quality*, the Montana Supreme Court held that this provision violated the state’s green amendment.³⁷ The court reasoned that the legislative amendment deprived the state of its ability to provide “adequate remedies” for environmental degradation, because environmental review allows the state to stop environmental degradation before it happens, rather than relying on after-the-fact remedies.³⁸

In New York, one trial court decision has applied the state’s recently enacted green amendment.³⁹ Residents of Perinton, New York (a suburb in upstate New York) asserted that a local landfill violated their rights under the amendment because of the odors and emissions resulting from the landfill.⁴⁰ These plaintiffs alleged that the landfill violated a variety of state laws and regulations⁴¹ and urged the court to either issue an injunction closing the landfill, or to issue an injunction requiring that the defendants cover the landfill to make it less obnoxious.⁴²

34. See *Cape-France Enters. v. Est. of Peed*, 29 P.3d 1011, 1017 (2001) (Under amendment, private business could not “drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious health risks,” and contract allowing such drilling would be unlawful.).

35. MONT. CODE ANN. § 75-1-201(1)(b)(iv)(A) (2023).

36. See *Park Cnty. Env’t Council v. Mont. Dep’t of Env’t Quality*, 477 P.3d 288, 303 (2020) (citation omitted).

37. *Id.* at 310.

38. *Id.* at 307–08 (stating environmental review is the “only available legal relief” that can adequately “prevent . . . future environmental harms” because environmental review process enables state to make an “informed decision”); *id.* at 309 (noting that the state did not attempt to show any compelling state interest that supported the MEPA amendment).

39. *Fresh Air for the Eastside, Inc. v. State*, No. E2022000699, slip op. (Sup. Ct. Monroe Cnty. Dec. 7, 2022).

40. *Id.* at 3–4.

41. *Id.* at 8.

42. *Id.* at 5 (urging “a permanent cover” of the landfill and additional “monitoring” of landfill emissions).

Three defendants moved to dismiss the complaint; the court denied the motion as to one of the three defendants (the State of New York).⁴³ After addressing numerous procedural issues,⁴⁴ the court explained that according to the plaintiffs' complaint, the landfill's pollution "has risen to a level which violates [plaintiffs'] constitutional rights of clean air and a healthful environment,"⁴⁵ and the state had a duty to remedy this problem.⁴⁶ The court acknowledged that the state had made some efforts to mitigate the pollution from the landfill⁴⁷ but held that as long as the landfill is "still causing Odors and Fugitive Emissions which plague the community, . . . more needs to be done[.]"⁴⁸

Read literally, the court's opinion suggests that any amount of pollution violates New York's green amendment— obviously an impractical result, since even the most seemingly innocuous activities, such as the use of electricity, involve pollution somewhere in the supply chain.⁴⁹ So where should New York courts draw the line? The court's opinion gives us no guidance.⁵⁰

43. *Id.* at 10–12, 18–19 (granting the motion in favor of the City of New York, reasoning that if the city stopped transporting garbage to the landfill other customers would take its place, and granting the motion in favor of the landfill operator, holding that the green amendment could be enforced against governments but not against private entities).

44. *Id.* at 12–15 (holding that plaintiffs correctly sought declaratory judgment rather than review of past state actions, state was not immune from suit, action was timely, and plaintiffs were not required to exhaust administrative remedies).

45. *Id.* at 15.

46. *Id.* at 16.

47. *See id.* at 15 ("[T]he State attempts to defend itself by listing the various changes it has forced . . . at the landfill.").

48. *Id.* at 16.

49. *See, e.g., Electric Utilities*, AM. LUNG ASS'N, <https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/electric-utilities#:~:text=The%20most%20significant%20health%20impacts,Direct%20impacts> [<https://perma.cc/QC2B-QCH5>] (describing pollution from creation of electricity); *see also* Renee Cho, *Heating Buildings Leaves a Huge Carbon Footprint, but There's a Fix for It*, STATE OF THE PLANET (Jan. 15, 2019), <https://news.climate.columbia.edu/2019/01/15/heat-pumps-home-heating/> [<https://perma.cc/ZK7R-BSXB>] (describing pollution caused by home heating, which is less – but still present – with electric heating sources); *infra* notes 51–52 and accompanying text (describing environmental effects of automobiles).

50. At least eight other complaints have been filed under New York's amendment but have not yet led to any decisions. *See generally* *Cases*, PACE UNIV., <https://ny-green.pace.edu/cases/> [<https://perma.cc/FE7G-QBMN>]. In addition, residents in Perinton also sued the city of Perinton for approving the landfill discussed above. The court denied the city's motion to dismiss, but focused on procedural issues rather than on what the amendment requires of government. *See* *Fresh Air for the Eastside, Inc. v. Town of Perinton*, No. E2021008617, slip op. at 8–9 (Sup. Ct. Monroe Cnty. Dec. 8, 2022) (finding the amendment is only applicable to actions occurring after its ratification).

II. WHAT COULD GO WRONG?

The precedent discussed above suggests that almost any potentially harmful state action might violate a green amendment such as those enacted in Pennsylvania, New York, and Montana. When it is obvious what sort of activities harm the environment, this might seem like a good thing. But because the definition of “environmentally harmful” is often debatable, the unfettered judicial discretion created by such an amendment might actually lead to environmentally harmful results.

A. A Real-Life Example: The Urban Apartment Building

Automobile emissions are a leading cause of climate change; twenty-seven percent of U.S. greenhouse gas emissions come from transportation,⁵¹ and American vehicles contribute about half of the world’s vehicle-related greenhouse gas emissions.⁵² One way to reduce these emissions is to make it easier for Americans to walk to as many destinations as possible, or to use less-polluting technologies such as cycling and public transit.⁵³ And one way to reduce car use is to create more housing in walkable,⁵⁴ job-rich⁵⁵ areas such as New York’s Manhattan, as opposed to car-dependent suburbs.

51. Edward J. Sullivan & A. Dan Tarlock, *The Paradox of Change in the American West: Global Climate Destruction and the Reallocation of Urban Space and Priorities*, 37 J. ENV’T L. & LITIG. 23, 50 n.109 (2022) (citation omitted).

52. *Id.*; cf. EPA, FAST FACTS: U.S. TRANSPORTATION SECTOR GREENHOUSE GAS EMISSIONS 1990–2020 1 (2022) (noting that such car-related emissions increased between 1990 and 2020).

53. See Paul Gabrielsen, *Does Public Transit Reduce Pollution?*, UNIV. OF UTAH (Nov. 22, 2019), <https://sustainability.utah.edu/does-public-transit-reduce-pollution/> [<https://perma.cc/8TTF-2Q7N>] (showing public transit reduces pollution in densely populated areas and would reduce emissions even more if bus fleets modernized); see also Seb Stott, *How Green is Cycling? Riding, Walking, Ebikes and Driving Ranked*, BIKE RADAR (Oct. 30, 2020), <https://www.bikeradar.com/features/long-reads/cycling-environmental-impact/> [<https://perma.cc/Y4MC-6V5W>] (emphasizing positive environmental effects of cycling).

54. See *Living In New York*, WALK SCORE, https://www.walkscore.com/NY/New_York [<https://perma.cc/YG7J-4Y48>].

55. Manhattan (New York County) has over twenty percent of the New York Region’s jobs and less than ten percent of its population. See *County Employment and Wages in New York – Third Quarter 2022*, U.S. BUREAU LAB. STATS. (Apr. 19, 2023), https://www.bls.gov/regions/northeast/news-release/countyemploymentandwages_newyork.htm#:~:text=Among%20the%2018%20largest%20counties%20in%20New%20York%2C,made%20up%2072.8%20percent%20of%20total%20U.S.%20employment [<https://perma.cc/KEJ9-5FS7>] (showing New York County had over 2.3 million jobs in 2022); see also N.Y. DEP’T OF LAB., EMPLOYMENT IN NEW YORK STATE RESEARCH AND STATISTICS (Apr. 2022), <https://dol.ny.gov/system/files/documents/2022/04/april-einys-2022.pdf> [<https://perma.cc/2W99-R3P5>] (showing New York State as a whole had over 9.3 million jobs in 2022); see *New York County, New York*, U.S. CENSUS BUREAU, https://data.census.gov/profile/New_York_County,_New_York?g=050XX00US36061 [<https://perma.cc/2K4U-MA23>] (showing county had just under 1.7 million residents in 2022); see also *Population of the New*

However, opponents of new housing in Manhattan are already using New York's amendment as a tool of exclusion. For example, Manhattan's Two Bridges neighborhood, less than a mile from the City's financial district,⁵⁶ would be an ideal place to build housing for nondrivers; the majority of Two Bridges residents currently walk or take a subway to work.⁵⁷ Thus, new housing in this area makes more environmental sense than new housing in a car-dependent suburb.

But numerous plaintiffs have filed suit under New York's green amendment to prevent the construction of apartment buildings in that neighborhood.⁵⁸ The litigants claim, for example, that construction would generate greenhouse gas emissions.⁵⁹ Of course, this argument proves too much. Any construction project would create greenhouse gas emissions, if only because it might involve (for example) use of electric utilities generated by fossil fuels.⁶⁰ So, if the Two Bridges suit succeeds, any housing, or indeed any new buildings anywhere, might violate the green amendment. Nevertheless, New York's green amendment is so broadly written that nothing in the amendment's text prevents it from being used to stop construction.

Plaintiffs also claim that "[a]vailable parking will be diminished . . . causing adverse impacts to air quality[.]"⁶¹ Of course, parking makes it easier for people to drive, and automobiles are a major source of pollution and greenhouse gas emissions.⁶² Therefore, plaintiffs' use of the green amendment to require more parking is an obvious perversion of its purpose.

York-Newark-Jersey City Metro Area in the United States from 2010 to 2021, STATISTA (June 2, 2023), <https://www.statista.com/statistics/815095/new-york-metro-area-population/> [<https://perma.cc/TE4Q-UC5Y>] (showing metro area had over 19.7 million residents in 2021).

56. Walking Directions from Two Bridges, New York, NY to the Financial District, New York, NY, GOOGLE MAPS, <https://maps.google.com> [<https://perma.cc/S25T-RSC5>] (follow "Directions" hyperlink; then search starting point field for "Two Bridges, New York, NY" and search destination field for "Financial District, New York, NY").

57. *Two Bridges Neighborhood in New York, New York (NY), 10002, 10038 Detailed Profile*, CITY-DATA.COM, <https://www.city-data.com/neighborhood/Two-Bridges-New-York-NY.html> [<https://perma.cc/6XEP-4669>].

58. See Verified Complaint for Declaratory and Injunctive Relief at 5, *Marte v. City of New York*, 2023 N.Y. Misc. LEXIS 1781 (Sup. Ct. N.Y. Cnty. 2023) (No. 159068/2022). I note that this discussion is not a complete list of plaintiffs' claims: some claims were so technical and fact-specific as to be of little general relevance. For example, plaintiffs claim that construction might somehow affect the structural integrity of plaintiffs' own buildings. *Id.* at 4–5. If this claim has any factual merit, it is indeed unique to the *Marte* case. Plaintiffs also make vague assertions about the "loss of light and open space." *Id.* at 4. It is not clear what these assertions mean.

59. *Id.* at 5.

60. See AM. LUNG ASS'N, *supra* note 49.

61. Verified Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 5.

62. See Sullivan & Tarlock, *supra* note 51, at 50 n.109; EPA, *supra* note 52, at 1–2, and accompanying text.

Similarly, plaintiffs' claim that the new buildings will lead to "[an] increase of pedestrian activity, [and an] increase in transit riders[.]"⁶³ Given the negative effects of automobile-induced pollution, these are certainly things that the green amendment should be used to encourage.

Opponents of urban housing could also use language from the *Robinson Township* case. In *Robinson Township*, the court rejected the state's attempt to preempt local zoning because "our citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment in which they were living, often for years or even decades."⁶⁴ It could just as easily be argued that residents of Two Bridges or other established neighborhoods somehow relied on the absence of newer or more dense housing. This argument too should be rejected by courts; if the environment benefits from allowing more people to live near public transit or in walkable neighborhoods, any zoning that forbids such housing is obviously harmful to the physical environment. Thus, the courts should not use a green amendment to justify any alleged reliance on such anti-environmental zoning.

I note that even if lawsuits such as the Two Bridges suit are unsuccessful, they still can increase pollution merely by delaying the creation of new housing in walkable areas.⁶⁵ In addition, such delay may also make housing more costly; a developer who has already purchased urban land will be paying off its loans while fighting for permission in court.⁶⁶ The possibility of such litigation may deter developers from building urban housing, and even a developer who wins a lawsuit might be tempted to pass the costs of litigation on to tenants and home buyers.⁶⁷

63. Verified Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 5.

64. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 977 (Pa. 2013).

65. In fact, the *Marte* plaintiffs proposed to delay the Two Bridges housing in order to obtain additional environmental review for new housing, even though an environmental impact statement was prepared in 2018. See Verified Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 6, 21–22 (noting that an environmental impact statement was prepared in 2018 and proposing additional environmental review); see also Robert Steuteville, *Ten Environmental Benefits of Walkable Places*, PUB. SQUARE (Aug. 31, 2021), <https://www.cnu.org/publicsquare/2021/08/31/ten-environmental-benefits-walkable-places> [<https://perma.cc/PH9L-B4FU>] (listing reduction of carbon emissions with reduction in vehicle miles driven).

66. See Chad Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 13 KAN. J.L. & PUB. POL'Y 391, 402 (2004) ("[F]or a developer . . . the largest cost of a project is usually the holding of land before development. For a developer, time is money. Developers borrow money to fund their projects. The longer it takes a project to be completed, the more interest the developer will have to pay on the loan.").

67. Cf. Geraldene Sherr, *New Approach to Adjudicating Tenant's Abandonment of Premises*, 9 CARDOZO L. REV. 1811, 1823 n.76 (1988) (suggesting litigation costs are generally passed on to tenants).

B. Still a Hypothetical: The Bike Lane

As noted above, cycling creates less pollution than automobiles.⁶⁸ For example, one recent study showed that bike lanes promote cycling enough to reduce emissions by 22,000 tons per year in Bogotá, Colombia and 16,000 tons per year in Guangzhou, China.⁶⁹ In addition, cycling creates non-environmental benefits: cycling is less expensive for users than driving, and cycling is a significant form of physical exercise.⁷⁰ To achieve the benefits of expanded cycling, some cities have decided to build networks of bike lanes that are separated from automobile traffic, thus reducing the risk of car/bicycle collisions.⁷¹

However, bike lanes are controversial— primarily because bike lanes take road space away from cars, effectively narrowing streets.⁷² Bike lane opponents argue that if a city reduces the number of lanes available to cars, traffic will become more congested, causing more pollution.⁷³ Based on this logic, bike lanes could easily be challenged under a green amendment; bike lane opponents could argue that bike lanes will increase pollution by increasing automobile congestion, thus adversely affecting city residents' right to a healthy environment.

Cases under state environmental review statutes are relevant by analogy. Fifteen states have such statutes, which typically require environmental impact statements for any government projects significantly affecting

68. Stott, *supra* note 53.

69. *Protected Cycle Lane Networks Can Make a Big Impact on Climate Change*, INST. FOR TRANSP. & DEV. POL'Y (Oct. 24, 2022), <https://www.itdp.org/2022/10/24/protected-cycle-lane-networks-climate-change/> [<https://perma.cc/U7Y4-NLDC>].

70. *Id.*

71. See Michael Lewyn, *Bicycle-Friendly Policies*, 47 REAL EST. L.J. 346, 346–49, 357 (2018) (describing benefits of bike lanes and explaining why they should be protected from automobile traffic); Ernesto Hernandez-Lopez, *Bike Lanes, Not Cars: Mobility and the Legal Fight for Future Los Angeles*, 42 WM. & MARY ENV'T L. & POL'Y REV. 553, 569 n.101 (2018) (citing studies showing safety benefits of bike lanes).

72. Hernandez-Lopez, *supra* note 71, at 569–70 (noting that critics of Los Angeles bike lanes argue “that they take away road use that should be devoted to cars”); Janette Sadik-Kahn & Seth Solomonow, *The Bikelash Paradox: How Cycle Lanes Enrage Some but Win Votes*, GUARDIAN (Oct. 29, 2021), <https://www.theguardian.com/environment/bike-blog/2021/oct/29/the-bikelash-paradox-how-cycle-lanes-enrage-some-but-win-votes> [<https://perma.cc/AA8B-VQM9>] (noting that, in Italy, opponents of bike lanes were “concerned about the loss of parking and driving space.”).

73. See Hernandez-Lopez, *supra* note 71, at 573 (stating that opponents of bike lanes claim that reducing the number of lanes available to cars will lead to “more emissions and less air quality”). I note that this argument has also been used against new housing under New York's Green Amendment. See Verified Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 5 (New housing will lead to “increased traffic, increased density . . . and diminishment of air quality.”).

the environment.⁷⁴ For example, under the California Environmental Quality Act (“CEQA”)⁷⁵ governments must prepare an environmental impact statement “whenever it can be fairly argued on the basis of substantial evidence that [a] project may have significant environmental impact.”⁷⁶

This statute has been repeatedly weaponized against cycling. For example, in 2005, the city of San Francisco “[adopted] a comprehensive plan increasing the number of bike lanes in the city[.]”⁷⁷ A court halted the plan in 2006 because it lacked an environmental impact statement.⁷⁸ In 2009, the City issued an environmental impact statement which included a report of over 2,000 pages.⁷⁹ But in 2013, a court found that even *this* environmental impact statement was inadequate because it did not properly address alternatives.⁸⁰ Ultimately, the City was able to expand its bike lane program—but not without nearly a decade of CEQA-induced delay.⁸¹

In 2015, the city of Los Angeles announced a mobility plan that proposed hundreds of miles of bike lanes and bus-only lanes.⁸² Shortly thereafter, bike lane opponents filed suit under CEQA.⁸³ Even though the city prepared an environmental impact statement for the mobility plan, the

74. Brent Murcia, *Mending MEPA Analysis: Properly Addressing Climate Change Costs Under the Minnesota Environmental Policy Act*, 22 MINN. J.L. SCI. & TECH. 221, 226–27 (2021) (noting that fifteen states, as well as Puerto Rico and the District of Columbia, have such statutes, which generally require an impact statement for “government actions that will have significant environmental effects.”). I note that California Environmental Quality Act (“CEQA”) has also been used to delay renewable energy projects. JENNIFER HERNANDEZ ET AL., HOLLAND & KNIGHT, IN THE NAME OF THE ENVIRONMENT 8 (2015) (suggesting that CEQA commonly targets renewable energy projects). Because energy projects might create a wide variety of environmental impacts beyond those discussed above, I have chosen not to address them in this article. See, e.g., *Save Panoche Valley v. San Benito Cnty.*, 158 Cal. Rptr. 3d 719, 737–39 (Cal. Ct. App. 2013) (discussing environmental impact statement for solar energy project, made necessary by project’s effect on local wildlife).

75. California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21189.91 (2011).

76. *League to Save Lake Tahoe v. Cnty. of Placer*, 290 Cal. Rptr. 3d 218, 241 (Cal. Ct. App. 2022) (citation omitted).

77. Hernandez-Lopez, *supra* note 71, at 579.

78. *Id.*

79. *Id.*

80. See *id.*; *Rob Anderson v. City and Cnty. of San Francisco*, No. A129910, 2013 WL 144915, at *151–58 (Cal. Ct. App. Jan. 14, 2013) (unpublished).

81. *Id.* at 579–80 (“Eventually, much of the bike plan was implemented[.]”).

82. *Id.* at 562, 573 (describing the bike plan and noting that the bike plan was adopted in 2015).

83. See *id.* at 574.

plaintiffs asserted that it was inadequate.⁸⁴ Ultimately, the suit was settled in 2019, after nearly four years of litigation-induced delay.⁸⁵

Obviously, green amendments and environmental review statutes are not identical: the former can be used to completely halt projects, while the latter merely creates delay by forcing layer upon layer of environmental review.⁸⁶ Nevertheless, the environmental review cases do show that environmental arguments are occasionally used against seemingly pro-environmental policies such as bike lanes. Thus, a green amendment could also be used to delay or defeat such pro-environmental policies.

Do those arguments make sense? The basic theory behind these claims is that urban streets are more polluted in pedestrian-friendly areas with slow traffic than they are in car-dominated areas with fast traffic.⁸⁷ This argument is wrong for two reasons. First, the percentage of emissions caused by congestion is fairly small; for example, studies by the Texas A&M Transportation Institute (a research organization sponsored by the state of Texas and by Texas A&M University),⁸⁸ found only about eight percent of Los Angeles's travel-induced greenhouse gas emissions (1.3 million out of over 16 million tons) are caused by congestion.⁸⁹ Similarly, only approximately six percent of Miami's travel-induced emissions (just over 440,000 of about 7.5 million),⁹⁰ and seven percent of New York's travel-induced emissions (just over 1.95 million out of 26.5 million) are congestion-related.⁹¹

84. See *id.* at 576–77.

85. Settlement and Release Agreement at 1–2, *Fix the City, Inc. v. City of Los Angeles*, No. BS157831 (Cal. Super. Ct. L.A. Cnty. Sept. 9, 2015), <https://lede-admin.la.streetsblog.org/wp-content/uploads/sites/50/2020/09/Fix-the-City-Fully-Executed-Settlement-and-Release-Agreement-6-14-2019.pdf> [<https://perma.cc/Z46P-SQ5Y>]; Settlement and Release Agreement at 1–2, *Fix the City, Inc. v. City of Los Angeles*, No. BS159574 (Cal. Super. Ct. L.A. Cnty. Dec. 15, 2015), <https://lede-admin.la.streetsblog.org/wp-content/uploads/sites/50/2020/09/Fix-the-City-Fully-Executed-Settlement-and-Release-Agreement-6-14-2019.pdf> [<https://perma.cc/Z46P-SQ5Y>]. I note that CEQA no longer applies to cycling improvements. See S.B. 922, 2021–22 Reg. Sess. (Cal. 2022).

86. See, e.g., *supra* notes 84–85 and accompanying text (example of such delay).

87. See *supra* note 72 and accompanying text.

88. *About TTI*, TEX. A&M TRANSP. INST., <https://tti.tamu.edu/about/> [<https://perma.cc/ZS5H-WQWD>].

89. See *Performance Measure Summary – Los Angeles-Long Beach-Anaheim CA*, TEX. A&M TRANSP. INST., <https://static.tti.tamu.edu/tti.tamu.edu/documents/umr/congestion-data/cities/losan.pdf> [<https://perma.cc/TXJ4-MT8S>].

90. See *Performance Measure Summary – Miami FL*, TEX. A&M TRANSP. INST., <https://static.tti.tamu.edu/tti.tamu.edu/documents/umr/congestion-data/cities/miami.pdf> [<https://perma.cc/PCV2-4DZC>].

91. See *Performance Measure Summary – New York-Newark NY-NJ-CT*, TEX. A&M TRANSP. INST., <https://static.tti.tamu.edu/tti.tamu.edu/documents/umr/congestion-data/cities/newyo.pdf> [<https://perma.cc/5WJZ-QB6K>].

Second, as Table 1 below shows, greenhouse emissions in large metro areas are not highly correlated with congestion— but are highly correlated with car use.

Table 1: Emissions and Congestion in U.S. Metropolitan Areas with Over Four Million Residents⁹²

City	Annual hours of delay per motorist caused by congestion ⁹³	Per capita vehicle miles traveled ⁹⁴	Per-household auto-related CO ₂ emissions (pounds per household) ⁹⁵
Los Angeles, CA	91	7,672	23,553
Washington, D.C.	81	8,643	25,918
San Francisco, CA	83	8,779	23,970
New York, NY	72	5,889	18,081
Boston, MA	64	7,609	22,870
Chicago, IL	58	7,540	24,278
Atlanta, GA	57	11,199	29,425
Riverside, CA	57	12,307	26,380
Seattle, WA	62	8,552	25,234
Detroit, MI	54	9,958	27,403
Houston, TX	52	9,168	27,333
Miami, FL	52	9,250	24,187

92. Cf. THE WORLD ALMANAC AND BOOK OF FACTS 2022 615 (Sarah Janssen & Nan Badgett eds., 2021) (listing metro areas by population).

93. See *Urban Areas in the Study*, TEX. A&M TRANSP. INST., <https://mobility.tamu.edu/umr/data-and-trends/urban-areas-in-the-study/> [https://perma.cc/ATZ8-JPQD] (click on corresponding links for data on each metro area). I used 2005 data so that delay data would be consistent with vehicle mileage data at *infra* note 94 and accompanying text.

94. BLUEPRINT FOR AM. PROSPERITY, VEHICLE MILES TRAVELED (VMT) 1–2, https://www.brookings.edu/wp-content/uploads/2016/07/vehicle_miles_traveled.pdf [https://perma.cc/Z5RB-K884] (listing data as of 2005).

95. Edward L. Glaeser & Matthew E. Kahn, *The Greenness of Cities: Carbon Dioxide Emissions and Urban Development* 41 tbl.2 (Nat'l Bureau Econ. Rsch., Working Paper No. 14238, 2008); cf. Nadja Popovich & Denise Lu, *The Most Detailed Map of Auto Emissions in America*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/interactive/2019/10/10/climate/driving-emissions-map.html> [https://perma.cc/4CFD-2J79] (showing more recent data in graph form; results generally similar to those found by Glaeser & Kahn).

Dallas, TX	51	9,693	27,323
Philadelphia, PA	49	7,088	22,784
Phoenix, AZ	47	9,097	25,543

Table 1 shows that the five most congested regions (Los Angeles, Washington, San Francisco, New York, and Boston) generally had relatively low greenhouse gas emissions. Only one metro area in the group (Washington) had over 24,000 pounds of car-related carbon dioxide emissions per household.⁹⁶ By contrast, four of the five least congested regions had over 24,000 pounds of emissions per household.⁹⁷

By contrast, vehicle miles traveled correlates strongly with emissions: per-capita mileage averaged over 9,000 in seven regions (Riverside, Atlanta, Detroit, Houston, Miami, Dallas, and Phoenix)— and per-household emissions exceeded 24,000 pounds in each.⁹⁸ By contrast, there were five regions where per-capita mileage was lower than 8,000 miles (Los Angeles, New York, Boston, Chicago, and Philadelphia)— and only one city in that group emitted over 24,000 pounds of car-related carbon dioxide per household.⁹⁹ In sum, the correlation between driving and emissions is overwhelming, while the correlation between congestion and emissions is negative. It logically follows that policies that reduce driving are likely to reduce emissions whether they increase congestion or not.

III. ARE JUDGES MORE RELIABLE?

Even in states without green amendments, *someone* must decide whether a rezoning, a

bike lane, or any other policy change makes the air and water dirtier. Without a constitutional amendment, state legislatures, city councils, and government bureaucrats make these decisions; some are experts, some are not. By contrast, a green amendment increases the likelihood that a generalist judge will make these decisions. If a state legislature decides that new bike lanes harm the environment by increasing congestion, that decision can be reversed by a vote of the legislature, either because the legislature changed its mind or because an election replaced anti-bike legislators with pro-bike legislators.

By contrast, if state appellate courts make a similar decision under a constitutional amendment, that decision will be far more difficult to

96. See Glaeser & Kahn, *supra* note 95, at 41 tbl.2.

97. *Id.*

98. See BLUEPRINT FOR AM. PROSPERITY, *supra* note 94.

99. See Glaeser & Kahn, *supra* note 95, at 41 tbl.2.

reverse, for two reasons. First, under the doctrine of *stare decisis*, courts generally do not overrule themselves.¹⁰⁰ Second, if the legislature wishes to overrule the court, it must amend the state constitution— often not an easy task. For example, an amendment to the New York Constitution requires favorable votes in two separate sessions of the legislature, and approval of the amendment by popular vote.¹⁰¹ Because judicial errors in constitutional cases are harder to reverse than legislative errors, Americans should be very careful about giving judges substantial discretion to make policy decisions. Since green amendments are so vaguely worded, they do exactly that.

IV. IS THERE A BETTER WAY?

As explained above, it is not always easy to decide what the “pro-environmental” policy is. Although I believe that pro-pedestrian, pro-cyclist policies make the air cleaner by reducing automobile emissions, it is not clear to me that all judges would agree. Is there a way for states to guide judicial discretion?

If a state is determined to pass a green amendment, perhaps it should limit judicial discretion by telling judges what does *not* violate the right to clean air. For example, a state suffering from a housing shortage should add a clause to a green amendment providing that housing for human beings is never a violation— or at least, that housing for human beings in areas that are easily accessed without an automobile (such as city centers with ample mass transit) can never be a violation. Similarly, a state that wishes to limit automobile traffic might wish to include a clause in its green amendment providing that no policy designed to promote walking, cycling, or public transit would violate that amendment.¹⁰²

CONCLUSION

Green amendments are generally vague grants of power to the judiciary to do anything necessary to promote “clean air” and other environmental values. But because the slogan “clean air” is vague enough to support a

100. See, e.g., *Kimble v. Marvel Ent., Inc.*, 576 U.S. 446, 455 (2015) (describing *stare decisis*).

101. See *Constitutional Amendment Process*, ADIRONDACK COUNCIL, <https://www.adirondackcouncil.org/page/new-york-state-constitutional-amendment-process-153.html> [<https://perma.cc/DUS4-45LC>].

102. A more radical version of an amendment would outlaw policies that favor driving over these less-polluting modes, but because so many public policies do exactly that, such an amendment would probably be too radical to be politically feasible. Cf. MICHAEL LEWYN, *GOVERNMENT INTERVENTION AND SUBURBAN SPRAWL: THE CASE FOR MARKET URBANISM* 95–126 (2017) (citing examples of car-oriented policies).

wide variety of policy outcomes, these amendments can easily be used as a battering ram against pro-environmental policies. Because bad judicial decisions are not easily overruled, such amendments are potentially more harmful than an equally vague law granting discretionary authority to a legislature or an administrative agency. To end the risk of judicial decisions that freeze harmful policies in amber, green amendments should either be clarified or avoided.