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A Children's Climate Crusade: *Held v. State* and the Perils of Green Amendments

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In the early 1970's, some states undertook the novel experiment of guaranteeing environmental rights in their constitutions. Montana promised an "inalienable" right to a "clean and healthful environment"[1]—on par with rights like free speech and free exercise of religion—while simultaneously purporting to impose a constitutional duty on the state and all its citizens to "maintain and improve" the environment. Pennsylvania's 1971 constitutional amendment likewise provided that "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and promised that the "Commonwealth shall conserve and maintain them for the benefit of all the people."[2] In the intervening years, states including Hawaii, New York, and Massachusetts have adopted similar constitutional provisions.[3]

These "green" provisions first arose amid widespread public concern over chemical pollution—close in time to the passage of NEPA and the ESA, and the publication of Rachel Carson's *Silent Spring*. But they have taken on new and troubling dimensions in the era of climate change politics. Climate activists have begun to use these provisions to wage green lawfare, circumvent the political process, and impose Green New Deal-style climate policies through the courts.

Held v. State is one such example. In that case, several Montana youths have sued Montana claiming that the state's response to climate change has violated their right to a clean and healthful environment. The "youth plaintiffs" seek to impose judicially enforced environmental policy change in Montana on a massive scale. The case is scheduled for trial on June 12, 2023.

This Legal Backgrounder analyzes the interpretation of Montana's environmental constitutional provisions and *Held v. State* as a case study in the perils of green amendment provisions. The article first discusses the interpretive history of Montana's green constitutional provisions. Then it discusses how these questions have laid the groundwork for lawsuits like *Held*. Next, it analyzes some of the structural and substantive problems with applying the green amendment guarantees to questions concerning climate change. Finally, the article concludes that, at least in the context of climate change, green amendments present a political question that courts simply cannot adjudicate.

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[1] *See* Mont. Const. art. II, § 3.

[2] Penn. Const. art. I, § 27.

[3] *See* Sheila Birnbaum et al., *New York's Green Amendment: How Guidance from Other States Can Shape the Development of New York's Newest Constitutional Right*, JD Supra (Nov. 15, 2021), https://www.jdsupra.com/legalnews/new-york-s-green-amendment-how-guidance-2462721/; Victor E. Schwartz & Christopher E. Appel, *New York's Environmental Rights Constitutional Amendment Will Require Sound Judicial Interpretation*, Washington Legal Foundation (Jan. 14, 2022), https://www.wlf.org/2022/01/14/publishing/new-yorks-environmental-rights-constitutional-amendment-will-require-sound-judicial-interpretation/.

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The Origin and Interpretation of Montana's Green Amendment

Montana's constitutional guarantee of a "clean and healthful environment" provides a good case study in the dangers of adopting green constitutional rights. The 1972 Montana Constitution, guarantees to all Montanans the "inalienable right" to a "clean and healthful environment."[4] Article IX of the state's new constitution simultaneously imposed a "duty" on the state and all people to "improve and maintain" this "clean and healthful environment" and tasked the state's Legislature with "the administration and enforcement of this duty."[5] While the commitment of these questions to the Legislature is non-self-executing and should be exempt from judicial review under Montana law, including the right to a "clean and healthful environment" in the state constitution's list of "inalienable rights" is self-executing and subject to judicial review.[6]

Many delegates found these terms too nebulous or "metaphysical" to be capable of judicial interpretation. Delegates during the constitutional convention pointed out patent interpretive issues that this nebulous guarantee raised about what, exactly, is a "clean and healthful environment." As one delegate quipped, "Does [the provision] mean that, if you protect your wildlife, that you can't shoot a duck? Does it mean that, if you're going to protect your vegetation, that you can't mow down a blade of grass?"

The "duty" language in article IX of the Montana Constitution also raises significant interpretive questions. How can there simultaneously be a "duty" to improve an already "clean and healthful environment"? And what would it even mean to do so? Could one citizen sue another for failing to follow his constitutional duty to "improve and maintain" the environment? Plus, how can this duty simultaneously exist with a self-executing "inalienable right" to a "clean and healthful environment"?

Mae Nan Robinson—the youngest delegate at the convention and one of the main proponents of these provisions—responded to the objections with a punt. She too could not say what these new provisions meant. But she assured fellow delegates that "There are guidelines and there are standards to use; and I'm not going to attempt to tell you, you know, what these things mean; but I can guarantee to you that the Supreme Court will certainly be able to tell you."[7]

While Ms. Robinson's assurances were good enough to see the provision adopted as constitutional law, half a century later, the Montana Supreme Court has yet to answer many of the questions the delegates asked. It has held that questions of whether action violates the green amendments requires strict scrutiny, but offered little guidance about what those guarantees mean.[8] And in 2020, it held that dealings between a state agency and a private company are subject to the green amendments.[9] But even then, the Montana Supreme Court observed that it still had not answered several fundamental questions about the "clean and healthful" environment right, such as "what attributes constitute a 'clean' or 'healthful' environment … or what the judiciary's role should be in answering these questions."[10]

***Held v. State* Leverages Green Amendments for Climate Change**

The ambiguity inherent in Montana's green constitutional provisions has left fertile ground for environmental activists. Constitutional challenges have become a standard feature of nearly every environmental lawsuit against a state agency in Montana, converting routine permitting challenges into constitutional showdowns.

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[4] *See* MONT. CONST. art. II, § 3.

[5] *Id.* art. IX, § 1.

[6] *Id.* art. II, § 3.

[7] *Montana Constitutional Convention Proceedings*, 1971-1972, vol. 5, 1235, UNIV. OF MONTANA (1981), https://tinyurl.com/35rarzfb.

[8] *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 296 Mont. 207, 225 (1999).

[9] *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 402 Mont. 168 ¶ 78 (2020).

[10] *Id.*

But an even bigger problem looms in *Held v. State*. The case is part of a flurry of lawsuits filed by climate activist group "Our Children's Trust" in state courts across the country, but it is the first to survive the motion to dismiss stage. Several "youth plaintiffs" between the ages of two and eighteen ask a Montana state court to declare the state's energy policy unconstitutional, enjoin the use of fossil fuels, order the state to come up with a remedial plan to address climate change, and appoint a special master to oversee the implementation of that plan.[11] While the court dismissed some of the plaintiffs' claims for relief, it allowed others to proceed to trial,[12] which is set for June 12, 2023.[13]

Held illustrates the practical and structural limits of green amendment provisions. It is difficult to envision how a provision conceived to deal with the intrastate pollution issues of the 1970s can be invoked to combat a purportedly global phenomenon such as climate change. At the outset, there is the problem of standing, which requires that a plaintiff's injury be fairly traceable to the defendant's injunctions and capable of redress by the Court.[14] Since a Montana state court's authority is limited to areas over which Montana is sovereign, any plaintiff would have to show that its particular alleged climate change harm is specifically traceable to activities within or related to Montana. Given the asserted global nature of climate change, this is simply impossible.

Even if one were to conceive freedom from alleged climate change harms as part of the guarantee of a "clean and healthful environment," any relief would require changes to Montana's existing regulatory scheme to comply with a judicial interpretation of state constitutional environmental guarantees. And if the court declared that this scheme is insufficient, it would have to order the People's elected representatives in the Montana Legislature back to the drawing board for a different solution. So if the *Held* court decides to rule on the merits of Plaintiffs' claims, it will inherently be taking on a legislative role that violates the separation of powers.

And even further, Montana would only be able to enforce that provision on individuals and businesses subject to its jurisdiction. But Montana contributes less than one percent of the United States' annual greenhouse gas emissions, to say nothing of global emissions. So if *all* emissions in Montana ceased tomorrow, it wouldn't make a dent in global climate change nor redress the *Held* plaintiffs' alleged injuries. The Montana courts simply lack sufficient authority to issue any order that could provide effective relief for the alleged violation issue. Conversely, any order that would purport to provide that relief would exceed the power of a state court and violate the sovereignty of other states and nations. And because effective relief is impracticable, any injury is not redressable for purposes of a standing analysis.

A Political Question, Not a Litigation Controversy

The problems above show that courts should regard lawsuits over green amendments—at least as to purported climate change harms—as presenting political questions that cannot be adjudicated by the courts. The political question doctrine, which arises from federal jurisprudence, "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[15] The doctrine

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[11] *See Held v. State of Montana*, No. CDV-2020-307, Compl. 102–03, https://tinyurl.com/4dmf5xyj.

[12] *See id.*, Order on Mot. to Dismiss, https://tinyurl.com/5yk95r9m; *see also Historic Climate Trial*: *Held v. State of Montana*, Our Children's Trust, https://tinyurl.com/2fap85tk.

[13] *See State Legal Actions*, Our Children's Trust, https://tinyurl.com/4x8xpswv; *see also Historic Climate Trial: Held v. State of Montana*, Our Children's Trust, https://tinyurl.com/2fap85tk.

[14] Montana courts follow federal Article III standing precedents when applying the justiciability requirements of Montana's constitution. *See Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 355 Mont. 142, 143, 226 P.3d 567, 569 (Mont. 2010).

[15] *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *Brown v. Gianforte*, 404 Mont. 269 ¶¶ 21–23, 488 P.3d 548, 555 (Mont. 2021).

recognizes that courts are made to decide cases and controversies, while it is the legislature and executive who decide questions of policy. As the U.S. Supreme Court has observed in the context of environmental litigation, the "separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 559–60 (1992).

Courts lack jurisdiction to decide these political questions. This fundamental limit on judicial power is embodied in Hamilton's famous observation that the Judiciary has "neither force nor will, but merely judgment."[16] Were it otherwise, Hamilton's assurance that the "judiciary is beyond comparison the weakest of the three departments" of government, would ring hollow.[17]

It is impossible to apply green constitutional provisions to questions like climate change without intruding on policy judgments reserved to other branches. These cases would task the judiciary with making fundamentally subjective policy judgments about whether a state has done enough to achieve nebulous policy goals, like Montana's guarantee of a "clean and healthful environment" or Pennsylvania's promise to preserve "clean air, pure water" and the "natural, scenic, historic and esthetic values of the environment." Determining what constitutes a "clean and healthful" environment—and whether the purported long-term harms from climate change fit the bill—is a policy question without any clear legal rules.

Not only that, but policy decisions related to these goals require nuanced balancing of an almost infinite number of factors. For example, policymakers must decide how much to invest in "green" energy like wind and solar versus fossil fuels, how much to promote public transit, and how to regulate business and agriculture, and so on. Such decisions are typically reserved for the People to work out through the democratic process. Giving courts the authority to mandate these decisions would undercut those democratic principles under the guise of enforcing purported individual, inalienable rights. And without these limits, environmental activist groups can use green constitutional provisions to achieve policy wins in the courtroom that they could never obtain through the democratic process.

Federal courts have rejected similar litigation as posing non-justiciable political questions. In *Juliana v. United States*,[18] Our Children's Trust represented several child plaintiffs in a similar lawsuit against the federal government. The *Juliana* plaintiffs alleged that they had a right under the Fifth Amendment's Due Process Clause to "a climate system capable of sustaining human life" and that the government had violated this right by failing to take drastic measure to ameliorate climate change. These "youth plaintiffs" sought an "injunction ordering the federal government to implement a plan to phase out fossil fuel emissions and draw down excess atmospheric carbon dioxide."[19]

The Ninth Circuit properly dismissed the case on justiciability grounds, explaining that "it is beyond the power of an Article III court to order, design, supervise, or implement" a remedial plan that would "necessarily require a host of complex policy decisions" that belong to the "wisdom and discretion of the executive and legislative branches."[20] Despite acknowledging sympathy for the plaintiffs' concerns, the panel correctly noted that these decisions "must be made by the People's elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country."[21] While *Juliana* is a federal case, the principles of judicial restraint exercised by the panel should apply with equal force in the

[16] The Federalist No. 78 (Alexander Hamilton).

[17] *Id.*

[18] 947 F.3d 1159 (9th Cir. 2020). The Ninth Circuit remanded *Juliana* to the district court with directions to dismiss the Complaint, but the district court failed to do so. The district court has now granted leave to amend. *Juliana v. United States*, No. 6:15-cv-01517-AA (D. Or. June 1, 2023).

[19] *Id.* at 1165 (cleaned up).

[20] *Id.* at 1171.

[21] *Id.* at 1172.

state context. One state court should not set the energy policy for the entire state, removing the issue from the democratic process. The Montana courts should follow suit and dismiss *Held* as a non-justiciable political question.

Conclusion

Held should serve as a canary in the coal mine for states that do not already have green constitutional provisions like Montana's. While preserving the integrity and beauty of a state's environment is a laudable goal, enacting that policy goal as an individual right opens a Pandora's Box of problems and exposes states to costly and protracted litigation like the *Held* lawsuit. Judges are ill-suited to make scientifically and politically complex determinations about how granular environmental decisions in one state will alter a global problem like climate change. And the nebulous nature of a constitutional right to a "clean and healthful" environment makes it all too easy for a judge to impose subjective environmental policy preferences on an entire state without any democratic input. This concern is especially acute in Montana, where the political values of the state's voters appear to bear little resemblance to the relief that the *Held* plaintiffs seek. So, the voters, through their elected representatives, should decide these questions—not the courts.

