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Articles

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ARTICLES

PUBLIC PROBLEMS AND PRIVATE LANDOWNERS: LESSONS FROM NEW YORK CITY'S GROUNDBREAKING CLIMATE MOBILIZATION ACT

Rebecca Bratspies*

ABSTRACT

Climate change discourse has historically focused on the international realm—on treaties, declarations, and other state-to-state agreements. Yet, climate adaptation and mitigation rely on implementation at the subnational level as much as on standards set at the national level. During the Trump Administration, when the United States national government abdicated its role in responding to climate change, subnational actors like New York City stepped up to fill the vacuum. Declaring "we're still in" (the Paris Agreement) New York City enacted the Climate Mobilization Act. Its key component, Local Law 97 requires private landowners to retrofit existing buildings to attain deep emissions cuts. Local Law 97 is the first law of its kind in the United States and possibly the world. All eyes are on New York. If the law can work here, it will surely be adopted elsewhere. But the opposition has been intense and has involved all three branches of government. Private landowners unsuccessfully challenged Local Law 97 in court and failed in their attempts to repeal or significantly amend the law. However, their administrative advocacy seeking relaxed penalties for noncompliance was more successful. This Article traces the process of enacting Local Law 97 and documents the fight over implementation. It draws lessons from the New York experience that might be useful for other cities seeking to adopt similar laws.

> *We won the battle to pass the law but now they are trying to gut the law in its implementation.*[1]

Discussions about how to respond to climate change generally focus on international law—on obligations under treaties, declarations, and other state-to-state agreements.[2] This framing centers the nation-state as the primary climate actor. Much of this conversation focuses on national carbon reduction commitments under the Paris Agreement,[3] and interrogates the credibility and ambition of these commitments.[4] These are important conversations. Yet, alongside increasingly dire reports from the Intergovernmental Panel on Climate Change ("IPCC"),[5] and the carefully

* *Professor, CUNY School of Law, Director, Center for Urban Environmental Reform.* *Thank you to Pete Sikora, Costa Constantinides, and my CUNY colleagues Sarah Lamdan and Andrea McArdle for substantive feedback, to librarians Kathy Williams and Jonathan Saxon for help in getting so many obscure sources, to my co-op board for working to decarbonize our buildings, to Dean Randy Abate for inviting me to the Shapiro Symposium, and to the George Washington Law student editors who made this work much better through their careful attention to detail.*

1. Stefanos Chen & Winston Choi-Schagrin, *What's Holding Up New York's Climate Progress? Apartment Buildings*, N.Y. Times (Mar. 10, 2023), https://www.nytimes.com/2023/03/10/nyregion/greenhouse-gas-law-nyc.html [https://perma.cc/5WHV-C252] (quoting Pete Sikora, Climate & Inequality Campaign Director, Communities for Change).
2. As of publication, there are three separate proceedings assessing various aspects of state responsibility before the International Court of Justice, the Inter-American Court of Human Rights, and the Law of the Sea Tribunal. *See* G.A. Res 77/276 (Mar. 29, 2023); Request for an Advisory Opinion Submitted by the Republic of Colombia and Republic of Chile to the Inter-American Court of Human Rights (Jan. 9, 2023); Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (COSIS), Case No. 31 (Dec. 12, 2022).
3. The Paris Agreement was built around the idea of nationally determined contributions ("NDCs"), or pledges from individual states to reduce their emissions by specified amounts over specific time periods.
4. *See, e.g.*, Sophie Boeme et al., State of Climate Action 2023 vii (documenting NDCs and comparing them against the stated goal of keeping warming below 2º Celsius (C)); David G. Victor et al., *Determining the Credibility of Commitments in International Climate Policy*, 12 Nature Climate Change 793, 793 (2022) (assessing credibility of NDCs).
5. The IPCC was created by the United Nations to assess global impacts of climate change. All 195 member states of the United Nations are also

choreographed annual Conference of the Parties ("COP") of United Nations Framework Convention on Climate Change,[6] a parallel dialogue looks to cities as increasingly significant international climate actors in a rapidly urbanizing world.[7] The U.S. Supreme Court's decision in *West Virginia v. EPA*, which undercut the U.S. Environmental Protection Agency's ("EPA's") national authority to regulate greenhouse gases, gives new urgency to state and local efforts.[8] New York City, famous for its towering skyscrapers, offers a prime example of what those efforts might look like. In urban settings like New York, the lion's share of carbon emissions come from buildings.[9] Many of the city's largest buildings predate concerns about climate impacts, or about pollution emissions more generally.[10] Their heating, cooling, and lighting systems were not designed to minimize carbon emissions.[11] These large buildings account for nearly 70% of New York City's greenhouse gas emissions.[12] Despite growing awareness of the outsized role that buildings play in creating the urban climate footprint, a surprising number of newer buildings also fail to incorporate sustainability into their designs. Retrofitting these inefficient buildings to meet the climate challenges of the 21st century will be essential to the city's overall climate planning. This is not just a New York City issue—the majority of Americans now live in cities.[13]

To meet this challenge, New York City enacted the Climate Mobilization Act—one of the most ambitious local climate mitigation initiatives ever attempted.[14] The Act mandates that private landowners retrofit their existing buildings to drastically reduce carbon emissions on a relatively short timeline.[15] The law is an important reminder that achieving carbon emission reductions requires action on the local level, not just standards set on the national or international stage. This law is the first law of its kind in the United States and possibly the world.[16] All eyes are on New York because if this kind of law can work here it will surely be adopted elsewhere.[17]

This Article examines the key provisions of the Climate Mobilization Act, describes the ongoing struggle between private landowners and the city over climate retrofits to existing buildings, and draws lessons for other urban centers looking to implement comparable climate mitigation strategies. Part I of this Article highlights the urgency of climate action and the critical role that cities play in addressing climate change. Part II introduces the Climate Mobilization Act and its significance as the first-of-its-kind legislation in the world. Part III analyzes the critical challenges for translating this law on the books into facts on the ground, highlighting the law's key opponents and their tactics for blunting the law's force. Finally, Part IV concludes by drawing lessons from the struggle to implement this legislation and makes recommendations for how to move forward.

members of the IPCC. The IPCC's Sixth Assessment Report was released in 2023. IPCC, AR6 Climate Change 2023: Synthesis Report, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf [https://perma.cc/9N34-ZLSC].

6. Political geographer Farhana Sultana characterized the COPS as "theater of climate colonialism." Farhana Sultana, *The Unbearable Heaviness of Climate Coloniality*, 99 Pol. Geography 1, 2 (2022). It is not hard to see why. The most recent meeting, COP28 was held in Dubai. The COP president, Sultan Al Jaber, is better known as the CEO of the Abu Dhabi National Oil Company, one of the largest oil producers in the world. Rosie Frost, *UAE Names Oil Company Boss as President of COP28 Climate Talks*, Euronews.green (Jan. 13, 2023), https://www.euronews.com/green/2023/01/12/uae-names-oil-boss-as-cop28-president-critics-say-it-could-torpedo-climate-talks [https://perma.cc/UK8G-3KH3]. The oil industry had the largest delegation at COP26. In his role as COP president, Al Jaber characterized calls to phase out fossil fuels as "alarmist." Damian Carrington & Ben Stockton, *COP28 President Says There Is "No Science" Behind Demands to Phase-Out Fossil Fuels*, The Guardian (Dec. 3, 2023), https://www.theguardian.com/environment/2023/dec/03/back-into-caves-cop28-president-dismisses-phase-out-of-fossil-fuels [https://perma.cc/BM47-6SHC].
7. Sociologist Saskia Sassen coined the term "global cities" to capture this sense of the city not merely as a subordinate political entity within the state and the nation. Saskia Sassen, The Global City—New York, London, Tokyo 3–10 (rev. ed. 2001). For Sassen, these cities *are* the global cities. Saskia Sassen, A Sociology of Globalization (Contemporary Societies) 105–06 (2007). As a result, they create a space for urban actors to bypass the nation state and act directly on the global sphere. *Id.* at 102. For a description of how this might play out in the climate context, see Hillary Angelo & David Wachsmuth, *Why Does Everyone Think Cities Can Save the Planet?*, 11 Urb. Stud. 2201, 2203 (2020) (describing the evolution from "the city as sustainability problem to the city as sustainability solution"). For a deep exploration of the nature of cities, see generally Sheila Foster & Christian Iaioni, Co-Cities 37–47 (2022).
8. *See generally* 597 U.S. 697 (2022).
9. *See* Nariman Mostafavi et al., *The Relationship Between Urban Density and Building Energy Consumption*, 11 Buildings 455 (2021).
10. Four out of five housing units in the city were built before 1974, with half predating 1947. U.S. Census Bureau, 2023 New York City Housing and Vacancy Survey: Selected Initial Findings 3 (2023) [hereinafter 2023 New York City Housing and Vacancy Initial Survey]. Roughly 450,000 units are cooperative apartments. *Id.* at 7.
11. *See* Alexis Abramson, *NYC Is Requiring Landlords to Green Their Buildings. Here's How to Make the Upgrades Less Daunting*, Fast Co. (Feb. 28, 2024) (describing inefficient heating and cooling systems in old buildings).
12. City of New York Mayor's Off. of Long-Term Planning & Sustainability, One City Built to Last 5 (2016).
13. Michigan Ctr. for Sustainable Sys., *U.S. Cities Factsheet*, https://css.umich.edu/publications/factsheets/built-environment/us-cities-factsheet [https://perma.cc/89FE-8FV5].
14. The Climate Mobilization Act was a package of bills referred to as New York City's Green New Deal. Press Release, New York City Council, Council to Vote on Climate Mobilization Act Ahead of Earth Day (Apr. 19, 2019), https://council.nyc.gov/press/2019/04/18/1730/ [https://perma.cc/YFB5-J8RG] (outlining the components of the Act). Each of the laws in the Climate Mobilization Act will be discussed in Part II, *infra*.
15. N.Y. Dept. of Buildings, *Local Law 97*, NYC Sustainable Buildings, https://www.nyc.gov/site/sustainablebuildings/ll97/local-law-97.page [https://perma.cc/45V6-FA85].
16. Abramson, *supra* note 11 (describing Local Law 97 as "a trial run for similar policies under discussion in other cities").
17. This sense of history-making has been clear from the beginning. In his City Council testimony on Local Law 97 of 2019, climate activist Pete Sikora noted that "[t]he world will be watching this bill . . . [i]t will be a model for bold action worldwide . . . ." Testimony of Pete Sikora, Transcript of the Minutes of the Committee on Environmental Protection, New York City Council (Dec. 4, 2018); *see* City of New York, Getting 97 Done: A Plan to Mobilize New York City's Large Building to Fight Climate Change 11 (2023) ("[Local Law 97] is also a model for other cities who [sic] are making policy on building performance standards.") [hereinafter Getting 97 Done]. Indeed, as former New York City Department of Environmental Protection Commissioner Cas Holloway stated in the context of climate change, "New York City has always seen itself as a model for the urban world." Danielle Spiegel-Feld & Katrina M. Wyman, *Local Action, Global Problems: Why and How New York City Is Tackling Climate Change*, 50 Fordham Urb. L.J. 1187, 1205 (2023).

I. Climate Change and the Urban Environment

The global climate is changing at an unprecedented rate. The 10 warmest years on record have all occurred since 2010.[18] In 2023, we crossed the unenviable mark of an entire month in which global mean temperature was 1.5° Celsius ("C") above pre-industrialization levels. The new year continued this trend, with January, February, and March 2024 also clocking in at records for the hottest ever recorded.[19]

As the planet warms, ice and snow levels have decreased dramatically.[20] Melting ice in Greenland and Antarctica has led to between 8-9 inches of sea-level rise since 1880.[21] This is only the beginning—the IPCC predicts that we have likely locked in about half a meter of sea-level rise, even if states achieve the Paris Agreement goal of keeping warming below 2°C.[22] Warmer oceans mean, inter alia, stronger hurricanes.[23] Climate change also drives storm surge, flooding, wildfires, and extreme heat—phenomena causing increasingly significant losses, both economic and human. More and more people are in jeopardy.

Cities are particularly vulnerable to the effects of climate change. The IPCC predicts with high confidence that by 2100, coastal cities will commonly experience coastal erosion and extreme flooding events.[24] New York City has already been experiencing this firsthand.[25] Indeed, the devastation from Superstorm Sandy in 2012 prompted significant reflection on the city's vulnerability.[26] Since then, New York City has engaged in regular climate planning.[27] Yet, all that planning did not prevent the city from bungling its response when Canadian wildfire smoke turned New York City skies orange. In June 2023, New York City had the worst air quality in the world.[28] Despite days of predictions that this crisis was coming, the mayor, Eric Adams, took no proactive steps, claiming afterwards "there is no planning for an incident like this."[29] Terrible air quality is not the only way that New Yorkers have experienced climate devastation this year. Between July and October 2023, New York experienced multiple "thousand-year" floods.[30]

Yet, even with these disturbing and dangerous manifestations of a rapidly changing climate, national greenhouse gas emissions reduction commitments under the Paris Agreement fall far short of the necessary level of ambition. Climate policy at the state and local level can be one way to fill this gap.[31] By prioritizing decarbonization, subnational actors can drive significant reductions in carbon emissions regardless of national priorities.[32] While one city alone cannot solve the problem, it might inspire other cit-

18. Nat'l Ctrs. Env't Info., *Annual Global Climate Report 2022*, NOAA (Jan. 2023), https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202213 [https://perma.cc/UT2B-7W26].
19. Doyle Rice, *It's Hot, So Hot Here: Warmest March on Record Was Part of a 10-Month Streak*, USA Today (Apr. 10, 2024), https://www.usatoday.com/story/news/weather/2024/04/09/warmest-march-on-record-2024/73260522007/ [https://perma.cc/3DEA-G4FF]; Seth Borenstein, *Last Month Was the Hottest February Ever Recorded. It's the Ninth-Straight Broken Record*, AP (Mar. 7, 2024), https://apnews.com/article/hot-climate-change-records-oceans-0af09f155051b25d245a0fd28fe23af6 [https://perma.cc/64N9-MHHQ]; Raymond Zhong & Elena Shao, *2024 Begins With More Record Heat Worldwide*, N.Y. Times, Feb. 9, 2024, at A24.
20. U.S. Env't Prot. Agency, *Climate Change Indicators: Snowfall* (July 21, 2023), https://www.epa.gov/climate-indicators/climate-change-indicators-snowfall [https://perma.cc/FY8D-XDQF] (reporting a 0.19% decrease in snowfall per year since 1930); Rebecca Lindsey & Michon Scott, *Climate Change: Arctic Sea Ice Summer Minimum*, Climate.gov (NOAA) (Oct. 18, 2022), https://www.climate.gov/news-features/understanding-climate/climate-change-arctic-sea-ice-summer-minimum [https://perma.cc/6E82-QX4Z] (documenting a 13% decrease in sea ice per decade over the past half-century).
21. Rebecca Lindsey, *Climate Change: Global Sea Level*, Climate.gov (NOAA) (Apr. 19, 2022), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level [https://perma.cc/2B2Z-EYNG].
22. Michael Oppenheimer et al., *Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, *in* IPCC Special Rep. on the Ocean and Cryosphere in a Changing Climate 324 (2019).
23. Angela Colbert, *A Force of Nature: Hurricanes in a Changing Climate*, Nat'l Aeronautics & Space Admin. (June 1, 2022), https://science.nasa.gov/earth/climate-change/a-force-of-nature-hurricanes-in-a-changing-climate/ [https://perma.cc/R99X-BBQ2]. Oceans are acidifying as they are warming, wreaking havoc with coral reefs and other ocean ecosystems. NOAA Pac. Marine Env't Lab'y Carbon Program, *Ocean Acidification: The Other Carbon Dioxide Problem*, https://www.pmel.noaa.gov/co2/story/Ocean+Acidification [https://perma.cc/4F7A-W44V].
24. Oppenheimer et al., *supra* note 22, at 324.
25. *See* Andrea McArdle, *Storm Surges, Disaster Planning, and Vulnerable Populations at the Urban Periphery: Imagining a Resilient New York After Superstorm Sandy*, 50 Idaho L. Rev. 19, 22–24 (2014) (detailing the toll Superstorm Sandy took on New York City).
26. *See generally* Linda I. Gibbs & Caswell F. Holloway, NYC Hurricane Sandy After Action: Report and Recommendations to Mayor Michael R. Bloomberg 1 (2013), *available at* https://a860-gpp.nyc.gov/concern/nyc_government_publications/t435gd485?locale=en [https://perma.cc/YR5M-7JQ9].
27. In 2019, the City Council enacted Local Law 122 which required the city to create and to regularly update a climate adaptation plan. N.Y.C., N.Y. Local Law 122 (July 2, 2019). The first plan, *AdaptNYC*, was published in 2023. N.Y.C. Mayor's Off. of Climate & Env't Just., https://climate.cityofnewyork.us/initiatives/adaptnyc/ [https://perma.cc/99ZA-3EGV]. It helps that New York has a greenhouse gas emissions inventory that dates back to 2007 and is regularly updated. *See generally* N.Y.C. Mayor's Off. of Long-Term Planning & Sustainability, Inventory of New York City Greenhouse Gas Emissions (2007), *available at* https://climate.cityofnewyork.us/wp-content/uploads/2022/10/greenhousegas_2007.pdf [https://perma.cc/3KKQ-7B87]. Similarly, N.Y.C. Local Law No. 84 of 2009 requires buildings to report their annual energy and water consumption. This kind of data makes planning possible.
28. Mike Favetta, *Worst Air Quality in the World: Wildfire Smog Smothers New York*, Royal Meteorological Soc'y (June 12, 2023), https://www.rmets.org/metmatters/worst-air-quality-world-wildfire-smog-smothers-new-york [https://perma.cc/N72S-M7TY].
29. Mara Gay, *On the Smoke Crisis, New York City's Mayor Chokes*, N.Y. Times (June 9, 2023), https://www.nytimes.com/2023/06/09/opinion/wildfire-smoke-new-york-mayor.html [https://perma.cc/WEZ2-XGVN].
30. Brian Niemitetz et al., *Storm in New York's Hudson Valley Kills One, Brings 9 Inches of Rain: "1000 Year Event,"* Daily News (July 10, 2023), *retrieved from* https://www.aol.com/news/storm-york-hudson-valley-kills-133600309.html [https://perma.cc/HX83-XLN5]; Lisa Hassan & Aaron Gregg, *Floodwaters Clear as New York Emerges From Historic Rainfall*, Wash. Post (Sept. 30, 2023), https://www.washingtonpost.com/weather/2023/09/30/new-york-flooding-update/ [https://perma.cc/YC4H-J3NY].
31. *See generally*, *e.g.*, Sara J. Fox, *Why Localizing Climate Federalism Matters (Even) in the Biden Administration*, 99 Tex. L. Rev. Online 122, 123 (2021) (creating a taxonomy of local government climate actions and pointing out the political limits of home rule).
32. While the focus of this Article is on cities, this same point is true about a wide array of private actors including universities, corporations, and individuals. Greater decarbonization actions from these actors can deliver emissions reductions far beyond the limited ambition enshrined in formal national commitments. This is the premise behind the Carbon Disclosure Project. *Why Disclose as a Company?*, Climate Disclosure Project, https://www.cdp.net/en/companies-discloser [https://perma.cc/6TSQ-CPU2]; *see also* Data-Driven EnviroLab, Global Climate Action 2022: Progress and Ambition of Cities, Regions and Companies 4–6 (2022), *available at* https://datadrivenlab.org/wp-content/uploads/2022/11/Global-Climate-Action_CitiesRegionsCompanies_Final.pdf [https://perma.cc/494Q-BLUV] (describing increasing levels of ambition by cities and private actors).

ies and states to take similar action. This kind of bottom-up climate action creates new jobs and new markets for clean technologies, while offering the kind of demonstration projects that can lead to significant national policy changes. Through the Climate Mobilization Act described in the next section, New York City stepped into this role of climate entrepreneur.[33]

II. The Climate Mobilization Act

Just before Earth Day in 2019, the New York City Council passed the package of bills known collectively as the Climate Mobilization Act.[34] This ambitious legislation was designed to dramatically reduce the city's carbon footprint. It did so by targeting the city's biggest polluters: buildings.[35] With a goal of lowering building emissions 40% by 2030 and 80% by 2050, the Act was designed to bring New York City policies in line with the Paris Agreement and the city's own 1.5°C Climate Action Plan and to create green jobs in the process.[36] The law remains the most rigorous policy for reducing greenhouse gas emissions from existing buildings.[37] To understand the Climate Mobilization Act, it is important to recognize the context in which it was enacted. The Act was a direct response to the Donald Trump Administration's abdication on climate policy.[38] When the United States national government abandoned any pretense of a commitment to climate mitigation, subnational actors like New York City stepped up to fill the void.[39]

A. *Historical Context*

Since the United Nations Framework Convention on Climate Change came into force in 1994, the United Nations' member states have met annually to share information and negotiate in an annual COP.[40] The 1997 Kyoto Protocol, adopted at COP3, would have committed 37 industrialized states to reduce their emissions from a 1990 baseline.[41] The agreement failed, largely because of United States' opposition.[42] Successive subsequent COPs failed to make significant progress, most notable the 2009 Copenhagen COP15, where the quest to negotiate a legally-binding successor to the Kyoto Protocol collapsed into chaos.[43] At the last minute, members agreed to the Copenhagen Accord after negotiations for a binding successor to the Kyoto Agreement foundered.[44] Finally, in 2015, at the Paris COP21 meeting, global leaders managed to negotiate a new climate plan, the Paris Agreement. The centerpiece of the Paris Agreement was a declared goal of limiting "the increase global temperature increases to well below 2°C above pre-industrial levels,"[45] and to pursue efforts "to limit the temperature increases to 1.5°C."[46] To achieve this goal, each state identified a nationally determined commitment ("NDC") to emissions reductions. These NDCs specified unilateral cuts in the emissions of greenhouse gases that each country would make during the first five-year compliance period,[47] with the commitment to make a new pledge for the following five-year period.[48] Many observers feared that this voluntary approach would fall far short of the ambition needed to meet the climate challenge.[49] On September 3,

33. Renewable Rikers is another initiative in which New York City's climate entrepreneurship is on display. I have elsewhere written extensively about the Renewable Rikers Project. For a discussion of this project and the local laws behind it, see generally Rebecca Bratspies, *Energy Justice and Renewable Rikers*, 78 U. Miami L. Rev. 347 (2024); *What Makes It a Just Transition? A Case Study of Renewable Rikers*, 40 Pace Env't L. Rev. 1 (2023); *Decarceration With Decarbonization: Renewable Rikers and the Transition to Clean Power*, 13 San Diego J. Climate & Energy L. 1 (2022); *Renewable Rikers: A Plan for Restorative Environmental Justice*, 66 Loyola L. Rev. 371 (2020).
34. Press Release, New York City Council, Council to Vote on Climate Mobilization Act Ahead of Earth Day (Apr. 18, 2019), https://council.nyc.gov/press/2019/04/18/1730/ [https://perma.cc/7F77-LSWZ].
35. More than 70% of New York City's carbon emissions come from buildings. *Climate Mobilization Act*, New York City Council, https://council.nyc.gov/data/green/ [https://perma.cc/S2ER-PTFQ].
36. *See generally* New York City Mayor's Off. of Sustainability, 1.5° C: Aligning New York City With the Paris Climate Agreement 5 (2017), https://www.nyc.gov/assets/sustainability/downloads/pdf/publications/1point5-AligningNYCwithParisAgrmt-02282018_web.pdf [https://perma.cc/4M6E-V7Z3].
37. Press Release, New York City Off. of the Mayor, DeBlasio Administration Receives International Acclaim for Groundbreaking Global Warming Leadership (Oct. 2, 2019), https://www.nyc.gov/office-of-the-mayor/news/456-19/de-blasio-administration-receives-international-acclaim-groundbreaking-global-warming-leadership [https://perma.cc/93V8-U926].
38. *Id.* ("While the Federal government has abdicated climate leadership, we are taking direct action to meet the challenge of climate change in our city.")
39. Boston, St. Louis, and Washington, D.C., have also adopted building performance standards with penalties for buildings that do not meet greenhouse gas emissions limits. Danielle Spiegel-Feld, *Frontiers in Regulating Building Emissions: An Agenda for Cities*, 47 Wm. & Mary Env't L. & Pol'y Rev. 103, 104–05 (2022).
40. U.N. Framework Convention on Climate Change (UNFCCC), *UNFCCC—25 Years of Effort and Achievement: Key Milestones in the Evolution of International Climate Policy*, https://unfccc.int/timeline/ [https://perma.cc/U8EC-BMFM].
41. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2302 U.N.T.S. 30822. A detailed description of the Kyoto Protocol is beyond the scope of this Article. It is enough for the reader to know that, unlike the Paris Agreement, the Kyoto Protocol would have mandated across-the-board reductions in emissions for developed countries from a 1990 baseline. *Id.* at art. 3.
42. Douglas Jehl with Andrew C. Revkin, *Bush, in Reversal, Won't Seek Cut in Emissions of Carbon Dioxide*, N.Y. Times, Mar. 14, 2001, at A1.
43. John Vidal et al., *Low Targets, Goals Dropped; Copenhagen Ends in Failure*, The Guardian (Dec. 18, 2009), https://www.theguardian.com/environment/2009/dec/18/copenhagen-deal [https://perma.cc/25UA-XVP6]. Instead, at the last minute, President Barack Obama brokered the Copenhagen Accord with a handful of key countries. UNFCCC, Copenhagen Accord, Dec. 18, 2009, U.N.Doc. FCC/CP/2009/L.7, *available at* https://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf [https://perma.cc/TJR2-BYHC].
44. The Copenhagen Accord "recogniz[ed] the scientific view that the increase in global temperature should be below 2 degrees," Copenhagen Accord, *supra* note 43, at art. 1, but did not include emissions reductions to meet that goal. For a day-by-day account of the Copenhagen COP, see Lin Feng & Jason Buhi, *The Copenhagen Accord and the Silent Incorporation of the Polluter Pays Principle in International Climate Law: An Analysis of Sino-American Diplomacy at Copenhagen and Beyond*, 18 Buff. Env't L.J. 1 (2011).
45. UNFCC, Paris Agreement, art. 2.1(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.
46. *Id.*
47. *Id.* at art. 4.2.
48. *Id.* at art. 4.9.
49. Robert O. Keohane & Michael Oppenheimer, *Beyond the Climate Dead End Through Pledge and Review?*, 4 Pol. & Governance 142, 143 (2016) (noting that the NDCs do not make it likely that the world will avoid the benchmark 2ºC of warming but do "materially shrink" the chances of 4ºC of warming).

2016, the United States joined the Paris Agreement, which President Barack Obama called "the single-best chance that we have" for addressing climate change.[50]

When President Trump took office in 2017, he appointed climate deniers[51] and oil company executives[52] to key government positions. Having run on "bringing back coal,"[53] many of President Trump's policies involved undermining environmental protections and climate responsiveness.[54] For example, during its first six months, the Administration vocally promoted the use of coal and other fossil fuels,[55] gutted critical environmental regulation,[56] disbanded EPA's Environmental Justice Office,[57] and approved controversial oil pipelines.[58] This pattern culminated with President Trump's June 1, 2017, announcement that the United States would withdraw from the Paris Agreement.[59]

The same day that President Trump made his announcement, the governors of New York, Washington, and California made an announcement of their own. Denouncing President Trump's move as a "reckless" move with "devastating repercussions for the planet,"[60] they announced formation of the United States Climate Alliance, with the goal of "upholding the Paris Climate Agreement and taking aggressive action on climate change."[61] All three state governors were explicit—they were committing their states to comply with the Paris Agreement and to fill the climate action void created by the Trump Administration's abdication.[62] The next day, New York City Mayor Bill de Blasio signed an executive order adopting the goals of the Paris Agreement and declaring that "New York City must step up to stop climate change."[63] Former New York City Mayor Michael Bloomberg chaired the American Cities Climate Challenge,[64] a coalition of cities committing to meet the Paris goals under the banner "We Are Still In."[65] Collectively, these sub-national initiatives represent a movement for achieving the United States' NDCs from below, despite federal intransigence.

In New York City, these commitments coalesced into the city's 1.5°C Climate Action Plan, which aligned city policy with the Paris Agreement,[66] and the Climate Mobilization Act, the groundbreaking 2019 legislation for achieving that goal. The Climate Mobilization Act was the brainchild of City Council's Environmental Chair Costa Constantinides and owes its passage to his legislative acumen.[67]

50. Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, White House Blog (Sept. 3, 2016), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-Obama-United-states-formally-enters-Paris-agreement [https://perma.cc/NT2Z-ELHH].
51. Mazin Sidahmed, *Climate Change Denial in the Trump Cabinet: Where Do His Nominees Stand?*, The Guardian (Dec. 15, 2016), https://www.theguardian.com/environment/2016/dec/15/trump-cabinet-climate-change-deniers [https://perma.cc/CAL2-VUXW].
52. Juliet Eilperin et al., *The Oil and Gas Industry Is Quickly Amassing Power in Trump's Washington*, Wash. Post (Dec. 14, 2016), https://www.washingtonpost.com/politics/the-oil-and-gas-industry-is-quickly-amassing-power-in-trumps-washington/2016/12/14/0d4b26e2-c21c-11e6-9578-0054287507db_story.html [https://perma.cc/6FN3-VB3P].
53. Jennifer A. Dlouhy et al., *Trump Promised to Bring Back Coal. It's Declining Again*, Bloomberg (Aug. 21, 2018), https://www.bloomberg.com/politics/articles/2018-08-21/trump-promised-to-bring-back-coal-it-s-declining-again [https://perma.cc/7GNZ-967W].
54. Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. Times (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html [https://perma.cc/Y6ZX-WY59].
55. Alister Doyle, *Trump's Coal Plan Sends U.S. Energy "Back to the Past": Vatican*, Reuters (June 16, 2017), http://www.reuters.com/article/us-climatechange-vatican-idUSKBN197216 [https://perma.cc/2XCJ-PFB4].
56. President Trump issued Executive Orders with Orwellian titles; for example, Promoting Energy Independence and Economic Growth, Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (setting the stage for eliminating the Clean Power Plan); Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule, Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017) (calling for radially narrowing the definition of "Waters of the United States").
57. Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 Wake Forest L. Rev. 101 (2019). In response, Mustafa Ali, EPA's Chief Environmental Justice Officer, resigned noisily. Final Resignation Letter from Officer Mustafa Santiago Ail to Administrator Scott Pruitt (Mar. 8, 2017), *available at* https://www.documentcloud.org/documents/3514958-Final-Resignation-Letter-for-Administrator.html [https://perma.cc/6LHH-L6HN].
58. Presidential Memorandum on Construction of the Dakota Access Pipeline, 82 Fed. Reg. 8661 (Jan. 24, 2017), *reprinted as amended in* 82 Fed. Reg. 11129 (Feb. 17, 2017); Presidential Memorandum on Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663 (Jan. 24, 2017).
59. *President Trump Announces U.S. Withdrawal From the Paris Climate Accord*, Trump White House Archives (June 1, 2017), https://trumpwhitehouse.archives.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/ [https://perma.cc/72QF-65XN]. Of course, the Paris Agreement required three years to pass from the date of its ratification, and 12 months' notice by the country wishing to leave. Matt McGrath, *Climate Change: US Formally Withdraws From Paris Agreement*, BBC (Nov. 4, 2020), https://www.bbc.com/news/science-environment-54797743 [https://perma.cc/JSX4-F7VV]. This meant President Trump could not unilaterally withdraw the United States, but could only announce his intention of doing so. By the time the United States could legally withdraw from the Paris Agreement, President Trump lost his 2020 election bid. *Id.* One of President Joseph Biden's first acts on his first day in office was to rejoin the Paris Agreement. Oliver Milman, *Biden Returns US to Paris Climate Accord Hours After Becoming President*, The Guardian (Jan. 20, 2021), https://www.theguardian.com/environment/2021/jan/20/paris-climate-accord-joe-biden-returns-us [https://perma.cc/LN84-YZ9S].
60. Press Release, Jay Inslee, Governor, State of Wash., Inslee, New York Governor Cuomo, and California Governor Brown Announce Formation of the United States Climate Alliance (June 1, 2017), https://governor.wa.gov/news/2017/inslee-new-york-governor-cuomo-and-california-governor-brown-announce-formation-united-states [https://perma.cc/H3VU-Q7FM]. For Gov. Mario Cuomo's Executive Order No. 166, see N.Y. Comp. Codes R. & Regs. tit. 9, § 8.166 (2021).
61. Press Release, *supra* note 60.
62. Gov. Jay Inslee characterized it as "the inaction in D.C. [being] met by an equal force of action from the states." *Id.* Likewise, Governor Cuomo emphasized that New York would act on climate change despite "Washington's irresponsible actions." *Id.* Gov. Jerry Brown declared that "[i]f the President is going to be AWOL in this profoundly important human endeavor, then California and other states will step up." *Id.*
63. City of New York, Office of the Mayor, Exec. Order No. 26, Climate Action Executive Order (June 2, 2017), https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2017/eo_26.pdf [https://perma.cc/XL9E-AXU5]; *see also* Press Release, N.Y.C. Mayor's Off., Mayor de Blasio Signs Executive Order to Adopt Goals of Paris Climate Agreement for New York City (June 2, 2017), https://www.nyc.gov/office-of-the-mayor/news/386-17/mayor-de-blasio-signs-executive-order-adopt-goals-paris-climate-agreement-new-york-city#/0 [https://perma.cc/QG6P-GXKM].
64. *See American Cities Climate Challenge*, Bloomberg Philanthropies, https://www.bloomberg.org/environment/supporting-sustainable-cities/american-cities-climate-challenge/ [https://perma.cc/UK6G-2WWQ].
65. *We Are Still In Declaration*, We Are Still In, https://www.wearestillin.com/we-are-still-declaration [https://perma.cc/7HFW-CN5L].
66. New York City Mayor's Off. of Sustainability, *supra* note 36, at 1 (declaring that "when our national government falls down, local governments have to step up.").
67. Alexa Beyer, *Constantinides Spearheads Major Climate Change Bills That Target Big Buildings*, Astoria Post (Apr. 19, 2019), https://astoriapost.com/constantinides-spearheads-major-climate-change-bills-that-target-big-buildings [https://perma.cc/JE2J-L63M].

B. *Key Provisions of the Climate Mobilization Act*

There is no question that the Climate Mobilization Act will dramatically reduce New York City's climate footprint. By its 2030 interim point, the Climate Mobilization Act is projected to eliminate six million tons of carbon emissions, reducing the city's overall emissions by 10%.[68] Moreover, the Act delivers these climate benefits alongside a suite of more localized benefits. For example, the Act is expected to create more than 27,000 green jobs by 2030.[69] Because many of the carbon reduction strategies also generate significant pollution co-benefits, the Act will also prevent up to 130 premature deaths and 150 hospital visits annually by 2030.[70] The climate-related modifications required under the law increase efficiency and therefore should also reduce ongoing operating costs for covered buildings.[71]

1. Local Law 97

The heart of the Climate Mobilization Act is Local Law 97, a first-of-its-kind urban climate mitigation program. The law mandates phased carbon emissions reductions from New York City's largest buildings, which contribute 70% of the city's' overall carbon footprint.[72] These carbon emissions limits become more stringent over a series of compliance periods that begin in 2024 and extend to 2050. When fully implemented in 2050, Local Law 97's emission caps will reduce carbon emissions from New York City buildings by 80%.[73] The law also imposes an interim target of 40% emissions reductions by 2030.[74]

Local Law 97 does this by imposing enforceable carbon emissions caps on the city's 50,000 commercial and residential buildings that are larger than 25,000 square feet.[75] The law assigns various categories of buildings with emissions intensity coefficients.[76] Each building then calculates its emissions limit by multiplying the building's assigned building emissions coefficient by the square footage of the building.[77] The emissions intensity coefficients decrease over time, thereby requiring more energy efficiency and fewer carbon emissions.[78]

By the first compliance period in 2024, Local Law 97 required covered buildings with disproportionately large emissions profiles to make relatively modest energy efficiency retrofits.[79] These 2024 standards were designed to get the worst-performing buildings moving toward sustainability.[80] These worst-performing buildings included luxury buildings like Trump Park Avenue, and Trump Tower,[81] but also included some middle-income co-operatives.[82] These emissions standards will become progressively more stringent. By 2030, roughly 75% of covered buildings will need to achieve a 26% cut in carbon emissions through decarbonization modifications.[83] For many of the worst-performing buildings, achieving significant building emissions reductions could be as simple as switching to LED lighting, insulating exposed heating pipes, and maximizing system efficiencies by tuning boilers and correctly operating HVAC systems. For others, and certainly for later compliance periods, more intensive retrofits will be required like weatherization or system upgrades like electrifying heat and hot water systems, replacing boilers with heat pumps, or installing solar panels.

To ensure equitable implementation, Local Law 97 also created an advisory board tasked with providing the city guidance on achieving sustainability goals while promoting environmental justice. The advisory board includes members appointed from multiple stakeholder groups, including environmental justice groups.[84] The law also tried to address displacement concerns by explicitly incorporating protections for rent-regulated tenants.[85]

To appreciate the significance of this law, consider that the avoided emissions just from meeting Local Law 97's interim 2030 target will be equivalent to all of San Francisco's current emissions.[86] Even more importantly, New York City's Local Law 97 offers a proof of concept that

68. Climate Mobilization Act (Brief), N.Y.C. Mayor's Off. of Climate & Sustainability, *available at* https://www.nyc.gov/assets/nycaccelerator/downloads/pdf/ClimateMobilizationAct_Brief.pdf [https://perma.cc/8FTA-PSDQ].
69. *Id.*
70. *Id.*
71. *See, e.g.*, *The Influence of Energy-Efficient Buildings on Reducing Building Maintenance Costs*, Energy5 (Dec. 5, 2023), https://perma.cc/8RTD-FH4V.
72. N.Y.C. N.Y., Local Law No. 97 (2019). Subsequent amendments to the Law were enacted via Local Law 147 of 2019, Local Law 95 of 2020, Local Law 116 of 2020, and Local Law 117 of 2020. References to Local Law 97 include both the initial law and the subsequent amendments [hereinafter Local Law 97].
73. N.Y.C., N.Y., Local Law No. 97 (2019). For an explanation of the provisions, see *Local Law 97*, NYC Sustainable Bldgs., https://www.nyc.gov/site/sustainablebuildings/ll97/local-law-97.page [https://perma.cc/6SZJ-MJQJ].
74. Section 3 of Local Law 97 amends Section 24-803(a)(1) of the City's Administrative Code to adopt a 40% citywide emissions reduction target.
75. *New York City's Climate Mobilization Act*, NYC Accelerator, https://accelerator.nyc/sites/default/files/2022-08/NYCA_LL97.pdf [https://perma.cc/ZEJ2-SJ8Z].
76. These coefficients are found in Section 5 of Local Law 97, which amended Title 28 of the New York City Administrative Code by adding § 320.3.1, "Building Energy and Emissions Limits." For the 2024-2029 compliance period, the emissions coefficients codified in Section 320 range from that range from 0.00426 tCO_2e/sf for Group S and U buildings (warehouses) to 0.02381 tCO_2e/sf for buildings in B buildings (ambulatory health care and civic administrative facilities). For an explanation of the building codes used in this part of the law, see generally New York City Building Code, ch. 3 (2014).
77. N.Y.C., N.Y., Local Law No. 97 (2019).
78. For the 2030-2034 compliance period, the coefficients for Group B decrease to 0.01193 tCO_2e/sf and for Groups S and U to 0.00110 tCO_2e/sf. N.Y.C., N.Y., Local Law No. 97, § 5 (2019); N.Y.C., N.Y., Admin. Code § 28-320.3.2.
79. *Local Law 97*, Urban Green Council, https://www.urbangreencouncil.org/what-we-do/driving-innovative-policy/ll97/ [https://perma.cc/PM2G-BH8Y].
80. *Id.*; Jeff St. John, *NYC's Big Building Decarbonization Law Faces Its First Challenge*, Canary Media (Sept. 20, 2023), https://www.canarymedia.com/articles/carbon-free-buildings/nycs-big-building-decarbonization-law-faces-its-first-major-test [https://perma.cc/W3JB-42EX].
81. *Elite Emissions: How the Homes of the Wealthiest New Yorkers Help Drive Climate Change*, Climate Works for All Coalition (2015) https://alignny.org/resource/elite-emissions-how-the-homes-of-the-wealthiest-new-yorkers-drive-climate-change/ [https://perma.cc/6MXY-88QV].
82. NYC Building Emissions Law: Local Law 97, Urban Green Council (2023), *available at* https://www.urbangreencouncil.org/wp-content/uploads/2023/02/LL97-Summary_2.8.2023.pdf [https://perma.cc/7XQD-ERVW].
83. *Id.*
84. N.Y.C., N.Y., Admin Code § 28-320.2.1.
85. N.Y.C., N.Y., Local Law 97, §§ 5–6.
86. Urban Green Council, *supra* note 79.

building retrofits can be done—both politically and technically. If this plan can succeed in New York City, climate initiatives focusing on building retrofits will likely become more common across the country and around the world.

2. Other Parts of the Climate Mobilization Act

In addition to Local Law 97, the Climate Mobilization Act included several other laws geared toward reducing New York City's carbon footprint. Local Laws 92 and 94 required that new buildings and existing buildings undergoing major roof renovation or replacement must install green, solar, or high albedo roofs.[87] Local Law 95 required that as of Fall 2019 all buildings covered by Local Law 97 prominently display letter grades declaring the building's energy performance.[88] Local Law 96 created the Property Accessed Clean Energy ("PACE") program that established financing tools to support the required retrofits through subsidies and low-interest-loans.[89] Local Law 98 directed the Department of Buildings to provide clear design and construction standards for wind turbines and to make wind energy part of the agency toolbox.[90] And finally, Local Law 99 mandated that New York City investigate the feasibility of replacing in-city gas-fired power plants with renewable energy and battery storage.[91] While the Climate Mobilization Act will not single-handedly reverse the effects of climate change, it "will be the largest emissions reduction policy in the history of New York City or any city anywhere."[92]

These laws represent a pioneering effort in local climate policy. They were a political victory for its environmentalist and community justice proponents and a defeat for the law's main opponents—the Real Estate Board of New York ("REBNY").[93] As the requirements take effect, the Climate Mobilization Act offers both lessons and cautions for other municipalities seeking effective climate action.

III. Passing the Law Was Only the Beginning

While the Climate Mobilization Act promises substantial emissions reductions and job creation, it also poses challenges. Building owners must navigate the costs and the technical complexities of building retrofits to comply with the law.[94] The city must strike a careful balance between incentives and penalties to promote compliance. The Act's success hinges on effective implementation and stakeholder cooperation. From the law's earliest days, the real estate lobby, represented prominently by REBNY, has mounted a formidable multi-pronged challenge against Local Law 97. REBNY frames their challenge not in light of the economic interests of its multi-millionaire members, but as a burden on working New Yorkers. Working with a few closely affiliated cooperatives, REBNY has flooded the airwaves and print with statements about how "[t]he burden of compliance sits squarely on the shoulders of working-class families living in some of New York's older buildings . . . ."[95]

Affordable housing is a real issue in New York City. As rents rise, many middle-class families are priced out of neighborhoods. Local Law 97 created alternative prescriptive requirements for buildings with a significant portion of rent-regulated units because of concerns that the costs of retrofits would be passed on to renters, driving displacement of low- and middle-income renters.[96] Asserting that New York City should also pay attention to the economic burdens on middle-income homeowners thus fits into Local Law 97's overarching framework. Yet, notice the irony of this campaign—the same REBNY that opposes rent stabilization measures,[97] and whose members are the ones raising rents—cloaks opposition to Local Law 97 with spurious concerns about affordability. Their primary tactic in opposing Local Law 97 has been to channel their message through the voice of middle-class homeowners.

A. Litigating to Undermine Local Law 97

Leveraging middle-class co-op owners as their named plaintiffs, REBNY initiated legal action in an attempt to block the implementation of Local Law 97.[98] This lawsuit,

87. N.Y.C., N.Y., Local Law 94 (2019); *see also* N.Y.C., N.Y., Local Law 92 (2019).
88. N.Y.C., N.Y., Local Law 95 (2019). These letter grades were based on benchmarking data the city required buildings to generate and submit under an earlier local law. N.Y.C., N.Y., Local Law 84 (2009). Local Law 84 added a provision to the city code requiring buildings to track and report their annual energy and water usage. N.Y.C., N.Y., Admin. Code § 28-309.4.
89. N.Y.C., N.Y., Local Law 96 (2019).
90. N.Y.C., N.Y., Local Law 98 (2019).
91. N.Y.C., N.Y., Local Law 99 (2019).
92. Caroline Spivack, *NYC Passes Its Own "Green New Deal" in Landmark Vote*, Curbed (Apr. 22, 2019), https://ny.curbed.com/2019/4/18/18484996/nyc-council-passes-climate-mobilization-act-green-new-deal [https://perma.cc/6ZF6-7FZN] (quoting Councilmember Constantinides, primary sponsor of the Climate Mobilization Act).
93. Harrison Connery, *Has REBNY Stopped the Bleeding? Broker Bill Poses Test*, The Real Deal (Oct. 11, 2023), https://therealdeal.com/new-york/2023/10/11/city-councils-rental-broker-bill-tests-rebnys-power/ [https://perma.cc/URN6-H6UB] (listing Local Law 97 as one in "a string of painful defeats" for REBNY).
94. Liz Donovan, *Building Owners File Lawsuit to Block Key NYC Climate Law*, City Limits (May 23, 2022), https://citylimits.org/2022/05/23/building-owners-file-lawsuit-to-block-key-nyc-climate-law/ [https://perma.cc/2GPZ-7DJ5].
95. Darcey Gerstein, *The Year in Co-op, Condo, and HOA Law*, Cooperator News N.Y. (July 2022), https://cooperatornews.com/article/the-year-in-co-op-condo-hoa-law [https://perma.cc/TK9G-U8PY].
96. *See* Local Law 97 Article 321, NYC Accelerator, *available at* https://accelerator.nyc/sites/default/files/NYC_Accelerator_LL97_Prescriptive_Pathways_Handout.pdf [https://perma.cc/G3EG-YRYQ] (discussing how Local Law 97 provides different compliance pathways for affordable housing).
97. Karen Leow, *Real Estate's Attempt to Co-Opt the Affordable Housing Discussion*, Gotham Gazette (May 1, 2015), https://www.gothamgazette.com/130-opinion/5706-real-estates-attempt-to-co-opt-the-affordable-housing-discussion-rebny-loew [https://perma.cc/Q68Q-X5D7] (pointing out REBNY's track record of opposing affordable housing measures).
98. *See Glenn Oaks Village Owners, Inc. v. City of New York,* No. 154327/2022, 2023 WL 7130782 (N.Y. Sup. Ct., Oct. 27, 2023). The other plaintiffs in this case are Bay Terrace Cooperative, Robert Friedrich (President of Glenn Oaks), and Warren Schrieber (Present of Bay Terrace). Although the named plaintiffs in this lawsuit are middle-income co-ops and their respective presidents, they are represented by Randy Maistro, a well-connected, high-priced lawyer. Neither the co-ops nor the individual plaintiffs are paying their lawyer and they refuse to say who is footing the bill. Samantha Maldonado, *Judge Dismisses Lawsuit Challenging Imminent City Climate Law*, The City (Nov. 2, 2023), https://www.thecity.nyc/2023/11/02/judge-dismisses-lawsuit-local-law-97/ [https://perma.cc/9BJ3-5ZZP]. Many speculate that REBNY is paying the bill for the litigation. Ben Brachfeld

Glenn Oaks Village Owners, Inc. v. City of New York, alleged that Local Law 97 was preempted by the state's Climate Leadership and Community Protection Act,[99] and that it imposed excessive penalties, and that it unconstitutionally deprived building owners of due process by assessing retroactive civil penalties against preexisting buildings.[100]

Relying on a handful of federal cases that found penalties unconstitutional, the *Glenn Oaks* plaintiffs characterized Local Law 97 as imposing fines "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[101] Indeed, they argued to the court that the law's penalties were "so excessive that [they] would be grossly disproportionate to the purported offense and would shock one's sense of fairness."[102] The Supreme Court dismissed all these allegations for failure to state a claim under New York State law.

In particular, the court discussed in detail why there was no claim under New York law that Local Law 97 imposed either excessive or retroactive penalties.[103] First, when the *Glenn Oaks* court actually did the math, the penalty numbers that the plaintiffs potentially faced were nowhere near as daunting as the rhetoric suggested. Indeed, the court pointed out that the possible fines plaintiffs claimed they faced, when considered across the nearly 3,000 units in the Glenn Oaks apartment complex, were quite modest (ranging from $45.49 to $377.74 annually per unit.[104]

Second, the court noted that much higher penalty figures had previously been upheld in New York. Specifically, the court relied on *Oriental Boulevard v. Heller*,[105] a factually similar case. In *Heller*, a group of apartment building owners challenged Local Law 14, which imposed stringent measures aimed at reducing air pollution from incinerators and other oil-burning equipment.[106] The *Heller* plaintiffs alleged that the costs associated with complying with the law would be disproportionate, that the time frame for compliance was too short, and that the fines for noncompliance were confiscatory.[107] The *Heller* court rejected these claims, finding instead that even though the required expenditures were significant, "considering the serious health hazard represented by aerial pollution, there is no showing that the amounts are disproportionate to the capital investment or the benefits to be obtained."[108] The *Glenn Oaks* court similarly found neither the prospective penalties under Local Law 97, nor Plaintiffs' projections about their compliance costs, to be unreasonable.[109]

The *Glenn Oak*s decision "provide[d] clarity to the NYC Real Estate community that Local Law 97 is valid, enforceable, and constitutional."[110] The court's rejection of allegations that the costs associated with Local Law 97 are disproportionate has not stopped the law's opponents from continuing their claims that the law will be ruinous.[111] The main site of contestation, however, has shifted away from the courts.

B. Legislating to Undermine Local Law 97

The next front in the battle to undermine Local Law 97 was fought in the City Council. The Council's handful of Republican members partnered with two conservative Democrats to sponsor Intro. 913. This proposed legislation would have gutted Local Law 97 through delay.[112] Specifically, Intro. 913 proposed amending Local Law 97 by extending all the emissions reductions deadlines forward seven years, including moving the first compliance period deadline from 2024 to 2031. Under this bill, no buildings

& Christian Murray, *The Costs of Change: NYC Co-op and Condo Owners Join Forces With Big Real Estate to Soften Local Law 97*, The Villager (Aug. 16, 2023), https://www.amny.com/news/co-op-condo-owners-real-estate-local-law-97/ [https://perma.cc/LGN3-4VTV]. It is also worth noting that the lead individual plaintiffs Bob Friedrich and Warren Schrieber, have questioned whether climate change is even happening. *See* Steve Cuozzo, *Loony "Environmental" Mandates Will Kill NYC's Middle Class Housing*, N.Y. Post (Mar. 12, 2023), https://nypost.com/2023/03/12/nycs-local-law-97-is-a-threat-to-affordable-housing/amp/ [https://perma.cc/5QX3-RA8L] (quoting Schrieber); Stephanie G. Meditz, *Owners Near Boiling Point Over Enviro Law*, Queens Chron. (Aug. 3, 2023), https://www.qchron.com/editions/queenswide/owners-near-boiling-point-over-enviro-law/article_80faeeaf-d6c6-5ba4-9064-8eb3384d75ab.html [https://perma.cc/8N3Y-2PR6] (same); Bob Friedrich, *Climate Mobilization Act Is a Disaster for Owners of Affordable Cooperatives*, Crain's N.Y. Bus. (May 9, 2022), https://www.crainsnewyork.com/op-ed/op-ed-climate-mobilization-act-disaster-co-op-owners [https://perma.cc/PZ44-22T8].

99. Complaint at ¶ 6, *Glenn Oaks Village Owners, Inc., 2023 WL 7130782*. Citing to Metro. Funeral Directors Ass'n, Inc. v. City of New York, 702 N.Y.S.2d 526, 530 (Sup. Ct. 1999), the court in *Glenn Oaks* rejected this claim. *Glenn Oaks Village Owners, Inc.*, 2023 WL 7130782, at *10. The court noted that Art. IX, § 2(c) of the New York Constitution and § 10(1)(ii)(a)(12) of the Municipal Home Rule Law grant the city "broad powers with respect to the protection of the health and safety of those who reside within municipal boundaries." *Id.* Moreover, the court found that nothing in the Climate Leadership and Community Protection Act evinced a legislative intention to preempt city regulation in this context. *Id.* at *12–13.
100. Complaint, *supra* note 99, at ¶ 10. The lawsuit also raised other constitutional claims about excessive penalties, *id.* at ¶ 7, vague and ambiguous standards, *id.* at ¶ 13, and inappropriate use of taxing authority, *id.* at ¶ 15. The court roundly rejected these claims. *Glenn Oaks Village Owners, Inc.*, 2023 WL 7130782, at *17–24.
101. Complaint, *supra* note 99, at ¶ 207 (quoting Golan v FreeEats.com, Inc., 930 F.3d 950, 962 (8th Cir. 2019) and St. Louis, I.M. & S. Ry. Co. v Williams, 251 US 63, 67 (1919)).
102. *Id.*
103. *Glenn Oaks Village Owners, Inc.*, 2023 WL 7130782, at *19–21.
104. *Id.*
105. Oriental Blvd. Co. v. Heller, 265 N.E.2d 72 (N.Y. 1970).
106. For a discussion of Local Law 14, see *Smog-New York City*, Resources (Jan. 1, 1967), https://www.resources.org/archives/smognew-york-city/.
107. *Heller*, 265 N.E.2d at 73.
108. *Id.* at 220–21.
109. *Glenn Oaks Village Owners, Inc.*, 2023 WL 7130782, at *23.
110. Alexis Saba & Aaron Goldman, *New York Supreme Court Dismisses Challenge to Local Law 97*, Sive, Paget & Riesel (Oct. 31, 2023), https://sprlaw.com/new-york-supreme-court-dismisses-challenge-to-local-law-97/ [https://perma.cc/6HP2-4K7L].
111. Illan Ireland, *This Is Going to Be a BackBreaker: Landmark Climate Law Poses Test for NYC Co-Ops*, City Limits (Nov. 16, 2023), https://citylimits.org/2023/11/16/this-is-going-to-be-a-back-breaker-landmark-climate-law-poses-test-for-nycs-co-ops/ [https://perma.cc/6DFY-TNED].
112. N.Y.C. Council, Int. No. 913 (Feb. 2, 2023), *text available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=6013724&GUID=E923FF1B-E248-43E4-85E6-56E7F95A2046 [https://perma.cc/KK4V-NZQR]. Intro. 913's primary sponsor was Council Member Vicki Paladino, a Republican best known to New Yorkers for flouting public health mandates during the COVID-19 pandemic. Jacob Kaye, *Paladino Barred From Council Floor After Flouting Vax Rules*, Queens Eagle (Jan. 6, 2022), https://queenseagle.com/all/2022/1/6/paladino-barred-from-council-floor-after-flouting-vax-rules [https://perma.cc/YXT2-TNWB]; David Brand, *Queens Council Candidate Leads Maskless Conga Line at Republican Club Holiday Party*, Queens Daily Eagle (Dec. 21, 2020), https://queenseagle.com/all/queens-council-candidate-leads-maskless-conga-line-at-republican-club-holiday-party [https://perma.cc/B2WS-LF3H].

would have had to make any emissions reductions until 2031, and the goal of reducing overall emissions 40% would have been pushed back until 2037.[113]

Intro. 913 was heavily backed by REBNY through an astroturf proxy[114] called *Homeowners for a Stronger New York*.[115] Their campaign to amend Local Law 97 included slick mailers and TV ads.[116] [Fun fact: When I attended what was supposed to be an informational meeting about Local Law 97, I was handed a pre-printed postcard opposing the law and asked to sign and return the card to the meeting organizer. I asked who the organizer worked for. His response "REBNY . . . [pause] . . . I mean Homeowners for a Stronger New York."] However, despite the large effort to rally opponents of Local Law 97, Intro. 913 did not attract co-sponsors beyond City Council's most conservative lawmakers, failed to gain traction with the wider public, and did not become law. And yet, at the very start of the 2024 legislative session, three of Intro. 913's primary sponsors reintroduced their bill, this time as Intro. 58.[117] This fight continues.

Another City Council proposal, Intro. 1197, would have gutted Local Law 97 in a different manner. First, it would have recharacterized greenspaces owned by garden apartments and towers in the park=style developments as part of their square footage for calculating emissions limits.[118] This change alone would have eliminated the need for most covered co-operatives to do any retrofits. On top of this proposal, Intro. 1197 also tied fines for emissions violations to the assessed value of the residential units, entirely eliminating fines for units assessed below a certain threshold, regardless of their carbon footprint.[119] Finally, Intro. 1197 would have made past sustainability investments like installing energy-efficient lighting,[120] solar panels,[121] or submetering units[122] into grounds for relaxing a building's emission limit target.[123] This law attracted more co-sponsors than Intro. 913, but also did not get a hearing in committee. In April 2024, Intro. 1197, was reintroduced as Intro. 772.[124]

C. *Regulating to Undermine Local Law 97*

Attempts to dilute or overturn Local Law 97 suffered defeats in court and city council. The failure of these well-funded campaigns is a tribute to the skill with which Local Law 97 was written,[125] and to the vigor of environmental advocacy in its favor. However, there was still one more audience for anti-Local Law 97 arguments—New York City's Mayor Adams.[126] The Adams administration is responsible for implementing and enforcing Local Law 97. Unfortunately, the administration's interpretation of the law's penalty provisions has called the effectiveness of the entire system into question.

In commenting on the ambitious legislation he crafted, Local Law 97's chief legislative architect, Councilmember Costa Constantinides, frequently stated "we don't want your money, we want your carbon."[127] Yet, it was clear from the beginning that the lynchpin of Local Law 97 has always been its penalty provisions. Beginning in 2024, the law imposed a fine of significant penalties for any covered building that either failed to submit an emissions report[128]

113. Int. No. 913, *supra* note 112.
114. Astroturfing involves creating a "front group" that simulates the appearance of an independent association that is actually funded by an interested patron. Edward Walker & Andrew N. Le, *Poisoning the Well: Astroturfing Harms Advocacy Organizations,* 10 Social Currents 184 (2023) (describing how industry groups seek to capitalize on the legitimacy of seemingly independent associations as a source of additional power).
115. For reporting on the financial relationship between "Homeowners for a Stronger New York" and "Taxpayers for an Affordable New York" (a REBNY-operated PAC), see Brachfeld & Murray, *supra* note 98; *see also* Jeanmarie Evelly & Emma Whitford, *Data Drop: Which Council Campaigns Are Real Estate PACs Supporting This Election Cycle?*, City Limits (June 23, 2023), https://citylimits.org/2023/06/23/data-drop-which-council-campaigns-are-real-estate-pacs-supporting-this-election-cycle/ [https://perma.cc/CX6J-EZ27].
116. Many graphics on the Homeowners for a Stronger New York's website were the content of these mailers. *See* Homeowners for a Stronger N.Y., https://www.homeownersforastrongerny.com/ [https://perma.cc/8T7R-RSZ8].
117. N.Y.C. Council, Int. No. 58 (Feb. 8, 2024), *text available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=6509432&GUID=06F3BB53-2F7B-46AA-970C-DF4656C4FE81 [https://perma.cc/R9VH-EV7B].
118. N.Y.C. Council, Int. No. 1197 (Sept. 28, 2023), *text available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=6365362&GUID=FFEAF3A6-6F0D-470A-941F-BD9CC35217E9&Options=Advanced&Search=[https://perma.cc/J8YH-QK9C].
119. *Id.* at 2.
120. N.Y.C., N.Y., Local Law 88 (2009); N.Y.C., N.Y., Local Law 134 (2016). Many of these upgrades were already mandatory under existing local law. For example, Local Law 88 and Local Law 134 required all commercial and residential buildings larger than 50,000 square feet to upgrade lighting in common areas to meet energy conservation standards by 2025.
121. Local Laws 92 and 94, adopted in 2019 as part of the Climate Mobilization Act, require that both new and existing buildings undertaking major roof renovations install either solar or green roofs.
122. N.Y.C., N.Y., Local Law 132 (2016) (requiring that all covered buildings submeter their electricity by 2025).
123. N.Y.C., N.Y., Local Law 134 (2016).
124. N.Y.C. Council, Int. No. 882 (Apr. 11, 2024), *text available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=6632568&GUID=72D1068D-4BFD-4C20-9E82-C80DC1A11DE0 [https://perma.cc/388T-JR86].
125. Amy Turner, *New York State Court Upholds Local Law 97*, Colum. L. Sch. Sabin Ctr. Climate L. Blog (Nov. 6, 2023), https://blogs.law.columbia.edu/climatechange/2023/11/06/new-york-state-court-holds-upholds-local-law-97/ [https://perma.cc/96PJ-RM3P] (characterizing the case as "a master class in local authority to enact ambitious climate laws").
126. Mayor Adams received hundreds of thousands of dollars in campaign donations from the real estate industry. Emma G. Fitzsimmons & Nicholas Fandos, *Adam's Re-Election Bid Fueled by Real Estate Titans and Out-Of-Towners*, N.Y. Times (July 18, 2023), https://www.nytimes.com/2023/07/18/nyregion/adams-real-estate-donors.html [https://perma.cc/PJR8-7EQL]; Bernadette Hogan et al., *Mayor Adams Scores Big in Campaign Cash From NYC Real Estate Power Brokers*, N.Y. Post (July 18, 2023), https://nypost.com/2023/07/18/mayor-adams-scores-big-in-campaign-cash-from-nyc-real-estate-power-players/ [https://perma.cc/UK9M-C4AR]; Greg B. Smith & Yoav Gonen, *Eric Adams' Campaigns and Nonprofit Reaped Big Bucks From Lobbyists and Developers Seeking Help*, The City (Apr. 18, 2021), https://www.thecity.nyc/2021/04/18/eric-adams-campaign-contributions-lobbyists-developers/ [https://perma.cc/2H7V-BEFR].
127. *See, e.g.*, Reforestation Nation, *We Don't Want Your Money We Want Your Carbon*, YouTube (Jan. 24, 2020), https://www.youtube.com/watch?v=HsXaxx7DAvs (last visited Mar. 7, 2024).
128. N.Y.C., N.Y., Admin. Code § 28-320.6.2 (imposing a monthly penalty of $0.50 per square foot for failure to file a report).

or exceeded the building's annual emissions limit.[129] With each successive compliance period, the allowable emissions decreased, and the penalties escalated. Thus, there was a significant financial incentive (besides saving the planet) to comply with the law. And it seemed to be working. In 2019, nearly 20% of covered buildings were projected to be out of compliance with the 2024 emissions limits. By 2022, many of those buildings had already been brought into compliance two years ahead of the deadline.[130] In fact, the noncompliance rate was roughly half the city's internal projections.[131] However, that left roughly 1,500 buildings emitting soon-to-be unlawful amounts of carbon.[132] This is where the penalty provisions should have come into play.

But that was before the mayor's office weighed in.[133] On September 12, 2023, Mayor Adams released his plan for implementing Local Law 97 under the somewhat ironic title *Getting 97 Done*.[134] The irony stems from the fact that *Getting 97 Done* signaled the administration's intent to rip a gaping hole in the law. It did so by exploiting language in Local Law 97 that directed administrative tribunals to consider a building's good faith in assessing penalties for noncompliance.[135] Embracing what it called "a pathway for out-of-compliance buildings to avoid penalties,"[136] the city announced that Local Law 97 penalties would be waived for buildings that demonstrated a "good-faith effort" at compliance with the Local Law 97. The city then adopted a staggeringly broad definition of what constituted good faith.[137]

The city first waived penalties for buildings that were currently undertaking the work necessary for compliance but did not get it done in time.[138] This seems like a relatively reasonable interpretation of good faith. Indeed, Local Law 97 already gave the Department of Buildings authority to adjust the emissions limit applicable to a particular covered building when noncompliance was directly related to unexpected or unforeseen events outside the control of the building's owners.[139] This authority was clearly intended to be exercised on a case-by-case basis, and only when "the owner is complying with the requirements of this article to the maximum extent practicable."[140] The COVID-19 pandemic's impact on New York City[141] and the disruption of global supply chains since 2020[142] might arguably have justified the decision to offer a blanket extension to buildings that had decarbonization work underway but not yet complete by the statutory deadline.

However, the Department of Building's new rules went much further. The good-faith penalty waiver extended not only to buildings that failed to complete work by the statutory deadline, but also to buildings that failed to initiate work by that deadline. Indeed any building that submits a decarbonization plan by May 1, 2025[143] will be deemed to have exercised good faith so long as the decarbonization plan will bring the building into compliance with its 2024 limits no later than 2026.[144] There are no additional requirements.[145] Extending a "good-faith effort" penalty waiver to buildings that merely create a decarbonization *plan* nearly a year and a half after they were supposed to deliver substantive emissions reductions is, in the words of Local Law 97 Advisory Board Member Pete Sikora, "a disaster."[146]

129. *Id.* at § 28-320.6 (imposing an annual penalty of $268 per ton of excess carbon emitted).
130. Stephen Lee, *NYC Buildings Complying With Emissions Law Faster Than Expected*, Bloomberg L. (Aug. 16, 2023), https://perma.cc/FHH7-R6BK.
131. *Id.*
132. *Id.*; *see also* Samantha Maldonado, *City's 3 Year-Old Climate Protection Law Finally Gets Some Details Ahead of 2024 Deadline*, The City (Oct. 7, 2022), https://www.thecity.nyc/2022/10/07/nyc-climate-change-law-details-2024-deadline/ [https://perma.cc/93LG-MK4F]. The city also cited 1,500 buildings in Getting 97 Done, *supra* note 17, at 12.
133. The Adams Administration stands accused of giving large real estate developers unlawful special preference in other contexts. Tea Kvetenadze, *Preferred Developer List for FDNY Inspections Emerges Amid FBI Probe Into Mayor Adams Campaign*, N.Y. Daily News (Nov. 17, 2023), https://www.nydailynews.com/2023/11/17/preferred-developer-list-for-fdny-inspections-emerges-amid-fbi-probe-into-mayor-adams-campaign-source/ [https://perma.cc/K37Q-924Y]; Craig McCarthy & Allie Griffin, *Ex-FDNY Chief Accuses Mayor's Office of Helping Big Real Estate Cut Inspection Line: Lawsuit*, N.Y. Post (Nov. 16, 2023), https://nypost.com/2023/11/16/metro/ex-fdny-chief-accuses-mayors-office-of-helping-big-real-estate-cut-inspection-line-lawsuit/ [https://perma.cc/LHA4-T5B8].
134. Getting 97 Done, *supra* note 17.
135. N.Y.C., N.Y., Admin. Code § 28-320.6.1(1).
136. Getting 97 Done, *supra* note 17, at 4.
137. The final rule was published on December 14, 2023. *See* N.Y.C. Dep't of Bldgs., *Notice of Adoption of Rule*, https://www.nyc.gov/assets/buildings/pdf/LL88_LL97.pdf [https://perma.cc/3VN6-UPCS]. A coalition of environmental justice groups criticized this interpretation of "good-faith effort" as unreasonable and contrary to the actual meaning of "good faith." Letter from EarthJustice et al., Comments on Proposed Article 320, 7–10 (Oct. 24, 2023), https://earthjustice.org/wp-content/uploads/2023/10/earthjustice_-et_al_locallaw97comments_10.24.2023_final.pdf [https://perma.cc/724A-3RP2].
138. 1 R.C.N.Y. §§ 103-14(i)(2)(iv)(b)–(c) (2023).
139. N.Y.C., N.Y., Admin. Code § 28-320.6.1(4).
140. *Id.* at § 28-320.7. However, the language of this provision makes it clear that this is a building-by-building determination, not a wholesale adjustment to the statute.
141. On February 29, 2020, the first COVID-19 case was diagnosed in New York City. N.Y.C. Dep't of Health, *COVID-19: Data—Trends and Totals*, https://www.nyc.gov/site/doh/covid/covid-19-data-totals.page [https://perma.cc/3LX7-K79V]. The city rapidly became the epicenter of the COVID-19 pandemic in the United States. *See* Corrine N. Thompson et al., *Covid-19 Outbreak—New York City, February 29-June 1, 2020*, Morbidity & Mortality Wkly. Rep. (Nov. 20, 2020), *available at* https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6946a2-h.pdf [https://perma.cc/UP89-AZP6]. The economic impacts rivaled the health impacts. Off. of N.Y. State Comptroller, *New York's Economy and Finances in the COVID-19 Era*, State of N.Y. (Sept. 2, 2020), https://www.osc.ny.gov/reports/covid-19-september-2-2020 [https://perma.cc/W8MN-FLPC].
142. *See generally* Javid Moosavi et al., *Supply Chain Disruptions During the COVID-19 Pandemic: Recognizing Potential Disruption Management Strategies*, 75 Int'l J. Disaster Risk Reduction 102983 (2022) (providing a thorough review of research on this issue).
143. N.Y.C., N.Y., 1 R.C.N.Y. § 103-14(i)(2)(iv)(a).
144. Notice of Public Hearing and Opportunity to Comment on Proposed Rules, N.Y.C. Dep't of Bldgs. 5 (2023), https://www.nyc.gov/assets/buildings/local_laws/ll88_ll97_article.pdf?utm_medium=email&utm_name=&utm_source=govdelivery [https://perma.cc/SZR7-KU3E].
145. Though beyond the scope of this Article, the role of renewable energy credits as emissions offsets is an additional source of concern. Pete Sikora, *Big Buildings Get a Pass for Pollution if Eric Adams Doesn't Close His New Corporate Loophole*, N.Y. Focus (Dec. 23, 2022), https://nysfocus.com/2022/12/23/eric-adams-climate-real-estate-local-law-97 [https://perma.cc/6TEA-RQHS] (describing how unchecked use of renewable energy credits could allow buildings to avoid reducing carbon emissions). The Local Law 97 Advisory Board recommended limiting renewable energy credits to 30% of overages, and to emissions from electricity usage only. *See* N.Y.C. Dep't of Bldgs., Local Law 97 Advisory Board Report 19 (2023), https://www.nyc.gov/assets/sustainablebuildings/downloads/pdfs/ll97_ab_report.pdf [https://perma.cc/F755-F7SB].
146. Hilary Howard, *New York's Anti-Pollution Law Is Here. Even Supporters Don't Like It*, N.Y. Times (Sept. 15, 2023), https://www.nytimes.com/2023/09/15/nyregion/law-97-building-pollution-nyc.html [https://perma.cc/V4NR-9RC8].

Mayor Adams' version of *Getting 97 Done* involved waiving penalties not just for buildings that did not complete decarbonization work before the deadline, but also for buildings that neither commenced decarbonization work before the statutory deadline nor even produced a plan to do such work. These regulations undercut the penalty portion of Local Law 97 and have the potential to undermine the whole program.[147] They call into question the city's current commitment to actually "getting 97 done." While the motivations behind these regulatory adjustments remain subject to interpretation, they underscore the ongoing tension between environmental objectives and the interests of the real estate industry in New York City. As stakeholders continue to navigate this complex landscape, the dynamics of backlash and adaptation surrounding Local Law 97 shed light on the intricate interplay between policy implementation, legal challenges, and money politics in the realm of urban sustainability initiatives.

D. Where Does the Opposition Come From?

While a few of the anti-Local Law 97 leaders are on the record questioning climate change, many of Local Law 97's opponents try to separate themselves from climate deniers.[148] They instead position themselves as the voice of reason and to portray Local Law 97 as "not well thought through,"[149] or "too much too soon."[150] Indeed, sponsors of Intro. 913 explicitly adopted this narrative as the rationale for extending the deadlines seven years. And yet, the law was adopted in 2019, with the first, relatively low-ambition compliance period five years later and the rest phasing in over the following 25 years—hardly a rush to implementation.

Notably, the opposition to Local Law 97 has repeatedly sought to cloak itself in the language of social justice. Throughout the previously described litigation and lobbying to undermine the law, the face of the campaign has been owners of middle-income co-ops.[151] In order to understand why that matters, it is necessary to first understand what a co-op is. Co-ops (housing cooperatives) are a widespread form of apartment ownership in New York City, though rare elsewhere in the country.[152] What makes co-ops unique is their ownership structure. A housing cooperative is a corporation.[153] The corporation itself owns all the housing stock. To purchase a co-op residence, one purchases shares in the housing corporation rather than fee simple ownership of the residence. Owning shares in the corporation entitles the shareholder to a proprietary lease, granting that shareholder the right to live in a specific dwelling unit. Thus, the owner of a cooperative apartment is technically both a shareholder in the corporation and a tenant of the corporation rather than an owner of real estate.

There are advantages and disadvantages to this form of ownership. Cooperative residences tend to be more affordable than the more familiar condominiums.[154] And because the cooperative is a corporation, the co-op board can make decisions on behalf of the corporation—including decisions to impose special assessments, without shareholder approval, to make needed repairs and retrofits.[155] At least in theory, this gives co-ops the ability to avoid the kind of condominium management dilemmas that led to the Surfside condominium collapse in Florida.[156]

147. It is worth noting that the federal government seems to have abandoned penalties in its climate response. The Inflation Reduction Act (IRA), passed in 2022, relies exclusively on incentives rather than penalties to drive structural and behavioral change. This tactic was necessary because the law passed through the reconciliation process, which allowed U.S. Senate Democrats to avoid a Republican filibuster. Rebecca Goldman, *What Are the Inflation Reduction Act and Budget Reconciliations*, League of Women Voters (Sept. 1,, 2022), https://www.lwv.org/blog/what-are-inflation-reduction-act-and-budget-reconciliation [https://perma.cc/M3PU-AWXH]; Maxine Joselow, *Why the Inflation Reduction Act Passed the Senate but Cap and Trade Didn't*, Wash. Post (Aug. 10, 2022), https://www.washingtonpost.com/politics/2022/08/10/why-inflation-reduction-act-passed-senate-cap-and-trade-didnt [https://perma.cc/597D-7BJG]. Whether this "carrots only" approach can be effective, time will tell.

148. *See* Meditz, *supra* note 98 (contrasting the stances of *Glenn Oaks* petitioner Schrieber with that of Queensview co-op Treasurer Alicia Fernandez).

149. Haidee Chu, *Looming Climate Law Has Co-op and Condo Owners Fretting About Funds to Retrofit Buildings*, The City (July 5, 2023), https://www.thecity.nyc/2023/07/05/local-law-97-carbon-emissions-retrofit-buildings/ [https://perma.cc/9QXG-KMJU].

150. Vivian Tejanda, *Local Law 97: A Controversial Environmental Fix*, City Signal (Mar. 22, 2023), https://www.citysignal.com/local-law-97-efficacy-debate/ [https://perma.cc/U2QV-49TU].

151. *See, e.g.*, Carl Campanile, *NYC Co-Op Owners, Covering Over 800K Apartments, Rebel Against Massive Climate Law Costing Millions*, N.Y. Post (Apr. 30, 2023), https://nypost.com/2023/04/30/co-op-owners-rebel-against-massive-nyc-climate-law-costing-millions/ [https://perma.cc/AC W6-KSYF] (characterizing the Homeowners for a Stronger New York campaign as one of "middle-class co-op and condo building owners"). My own experience with a so-called Local Law 97 information session at which I, along with my neighbors at our middle-class co-op, found pre-made protest signs at our seats and pre-printed advocacy postcards that Homeowners for a Stronger New York collected to mail to elected officials.

152. A cooperative is not an architectural style, it is an ownership style. Any multiple unit dwelling can be a housing co-operative. Indeed, across New York City, there are towers in the park cooperatives, detached buildings, high-rise cooperatives, and garden-apartment cooperatives. *Housing Co-operative Overview*, Nat'l Ass'n Hous. Coops., https://resources.uwcc.wisc.edu/housing/Housing-Cooperative-Overview.pdf [https://perma.cc/VQD6-EQUZ].

153. *Id.*

154. Depending on your perspective, this is either an advantage or a disadvantage. For the disadvantage argument, see Michael Schill et al., *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. Legal Stud. 275, 280–82 (2007) (describing the differences and concluding that condominiums are more valuable and more desirable housing). This article was notably written before the 2008 financial crisis, which hit condominium owners much harder than cooperatives because of the stricter controls that co-op boards exercise on purchaser qualifications. Virginia K. Smith, *As Manhattan Market Slumps, Classic Co-ops Offer Safety and Stability*, Mansion Glob. (July 31, 2020), https://www.mansionglobal.com/articles/as-manhattan-market-slumps-classic-co-ops-offer-safety-and-stability-217978 [https://perma.cc/HQR7-C43Y] (noting that co-ops are priced lower than condos, have stronger financials, and were able to impose stronger COVID-19 restrictions); Teri Karush Rogers, *The Downside for Condos in a Downturn*, N.Y. Times (Feb. 6, 2009), https://www.nytimes.com/2009/02/08/realestate/08COV.html [https://perma.cc/JNF8-QGRL] (noting that co-ops did not suffer nearly as much as condos during the financial crisis).

155. Decisions of cooperative boards of directors are generally reviewed under the deferential business judgment rule. *See*, *e.g.*, 40 W. 67th St. Corp. v. Pullman, 790 N.E.2d 1174, 1178 (N.Y. 2003) (refusing to interrogate board decisions "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes") (citations omitted).

156. In 2021, a large section of the 12-story Champlain Towers collapsed a Surfside Condominiums in Surfside Florida, killing 98 people. Sara Blansky et al., *House of Cards: How Decades of Problems Converged the Night Champlain Towers Fell*, Miami Herald (Dec. 30, 2021), https://www.miamiherald.com/news/special-reports/surfside-investigation/article256633336.html

But, co-operative apartment owners are ultimately on the hook to pay for any capital improvements to their buildings. Given how much of New York City's housing stock is cooperatives,[157] and that many co-op owners are middle-income, the way that Local Law 97 impacts these buildings is an important part of the story. REBNY has been quick to recognize that a narrative about middle-class co-op owners claiming they face "exorbitant" costs from "misguided or unrealistic" regulation is far more compelling than a narrative about big real estate developers looking to protect their profit margins. As a result, co-op owners were the named plaintiffs in the litigation, and their testimony featured prominently in meetings with officials. Yet, these co-op owners were never the real principals in this fight. They were more like window dressing for a well-funded and sophisticated opposition campaign.[158] It is worth noting that REBNY president James Whelan[159] is also president of Taxpayers for an Affordable New York.[160] All of Taxpayers for an Affordable New York's other officers/directors are also high-ranking REBNY employees. The organization's secretary, Reggie Thomas, is REBNY Senior Vice President for governmental affairs, and its treasurer, Maureen Lauster is REBNY's Chief Financial Officer.[161] There are no other officers or directors, and the organization reports no employees. Indeed, the address listed for Taxpayers for an Affordable New York on its tax filings is c/o The Real Estate Board of New York.[162]

This matters because Taxpayers for an Affordable New York is the sole funder of the Homeowners for a Stronger New York, the main organization funding allegedly "grassroots" anti-Local Law 97 activities.[163] In short, despite portraying itself as a grassroots collective of middle income co-op and condo owners, the anti-Local Law 97 campaign is a REBNY proxy.[164]

To be clear, complying with this law will cost money. Upgrades and retrofits to meet Local Law 97 emission limits may be expensive, particularly for buildings that have delayed maintenance and capital upgrades.[165] The required investment in building infrastructure, and perhaps more importantly the fines for noncompliance, are significant.[166] In co-ops, these costs will have to be borne by shareholders.[167] REBNY's bankrolling of the opposition campaign, and the reality that big developers want to gut the law, does not negate the fact that middle-income co-op owners do have real concerns.

Additionally, the fact that rent-regulated buildings are treated differently under Local Law 97 gives their concerns some additional heft.[168] The rationale for treating rent-regulated buildings differently was to reduce the potential for Local Law 97 to displace rent-regulated tenants. Rent=regulated buildings have a different, more prescriptive list of relatively affordable mandatory modifications to reduce carbon emission.[169] Essentially, middle-income co-op owners are arguing that they too face displacement because of the costs associated with complying with the law.

Despite these concerns, Local Law 97 is already working better and faster than expected.[170] The overwhelming majority of covered buildings have brought their carbon emissions into compliance with Local Law 97's 2024 standards.[171] The more ambitious 2030 standards will be more difficult and more expensive to meet. Many covered buildings may need to invest in extensive retrofits, like install-

[https://perma.cc/TY5G-B6UX]. The condo board had been aware of the structural issues since 2018, but it was only in 2021, a few months before the collapse, that the condominium association approved a multi-million-dollar special assessment to pay for repairs. *Id.* Unlike a co-operative, where the corporate board has authority to spend and raise money under ordinary corporate law principles, a condominium can only obtain impose a special assessment through a super-majority vote of the membership. Casey Tolan et al., *A 2020 Report Found Surfside Condo Lacked Funds for Necessary Repairs. One Expert Called It a "Wake-Up Call,"* CNN (July 8, 2021), https://www.cnn.com/2021/07/08/us/surfside-collapse-condo-finances-invs/index.html [https://perma.cc/6KYS-WQNB]. For a description of these struggles, see Kevin McCoy, *Condo Wars: Surfside Association Fighting in Florida Was Extreme, But It's a Familiar Battle for HOAs*, USA Today (July 10, 2021), https://www.usatoday.com/story/news/2021/07/10/surfside-condo-building-collapse-associations-fights-plans/7840468002/ [https://perma.cc/K7HT-UWE6].

157. 2023 New York City Housing and Vacancy Initial Survey, *supra* note 10, at 6–7; Adam Tanaka, *Co-op City: How New York City Made Large-Scale Affordable Housing Work*, Bloomberg (Jan. 3, 2019), https://www.bloomberg.com/news/articles/2019-01-03/how-co-op-city-s-affordable-housing-in-nyc-has-survived [https://perma.cc/HR28-CNC6].
158. Brachfeld & Murray, *supra* note 98 (noting that Homeowners for a Stronger New York spent $300,000 on mailers and TV ads opposing Local Law 97).
159. *Staff*, REBNY, https://redesign-ui-qa.rebny.com/leadership/ [https://perma.cc/7QD8-593N].
160. *Taxpayers for an Affordable New York Inc. Form 990 (FYE Dec.* 2022*)*, ProPublica, (Dec. 2022), https://projects.propublica.org/nonprofits/organizations/133606190/202332979349302018/full [https://perma.cc/SK57-Q4Y4].
161. *Id.*
162. On the Schedule B (Form 990) (2022), the list of contributors has only one entry and it is marked "restricted." *Id.*
163. Brachfeld & Murray, *supra* note 98.
164. *Id.* Similarly, the Presidents' Council of Co-ops and Condos, which purports to speak for the city's middle-income co-ops, is deeply entwined with REBNY. For example, attorney Geoffrey Mazel is a member of REBNY. REBNY, *Members*, https://www.rebny.com/members/ [https://perma.cc/3FAL-QXZN]. He is also both a board member of Homeowners for a Stronger New York, and attorney for the Presidents' Council of Co-ops and Condos. *Id.* In addition, REBNY's Residential Management Council Chair Michael Wolfe serves on the Presidents' Council board. FirstService Residential, *Presidents Co-op and Condo Council (PCCC) Appoints Michael Wolfe as Executive Committee Advisory Member*, Cision PRWeb (July 8, 2021), https://www.prweb.com/releases/presidents-co-op-and-condo-council-pccc-appoints-michael-wolfe-as-executive-committee-advisory-member-843222410.html [https://perma.cc/HVC3-B6BZ]. In turn, the long-time co-presidents of the Presidents' Council were the named plaintiffs in the *Glenn Oaks* litigation. Complaint, *supra* note 99.
165. *See generally* Iain S. Walker et al., *The Costs of Home Decarbonization in the US*, Am. Council for an Energy Efficient Econ. (2022) (documenting the costs and the associated energy savings of building retrofits for electrification); Nish Amarnath, *Emissions Compliance Period Begins for NYC's Local Law 97*, FacilitiesDive (Jan. 3, 2024) (describing a range of compliance tactics ranging from virtually costless tweaks to major multi-million-dollar capital investments). *See also* Getting 97 Done, *supra* note 17, at 8 (noting that compliance will be easy for some building owners and difficult for others).
166. N.Y. Local Law 97 § 5 adds § 28-320.6 to the Administrative Code of New York. This section imposes a penalty of $268 for every metric ton of carbon dioxide equivalent that a covered building emits over its limit.
167. For a discussion of the financial structure of co-operatives, see *supra* text accompanying notes 149–51.
168. *See Local Law 97 Guidance for Affordable Housing*, NYC Dept. Hous. Pres. & Dev, https://www.nyc.gov/site/hpd/services-and-information/ll97-guidance-for-affordable-housing.page [https://perma.cc/7BEV-LH5U].
169. *See* NYC Accelerator, *supra* note 96.
170. Lee, *supra* note 130.
171. Jennifer Kingston, *New York Jump-Starts the "Building Decarbonization" Trend*, Axios (Jan. 9, 2024) (reporting that 91% of covered buildings comply with the 2024 standards).

ing heat pumps or rewiring their electricity.[172] Funding these next-round modifications is a legitimate concern for middle-income residential buildings with modest reserves. Even recognizing the legitimacy of these financial concerns, there is no logic in relaxing the 2024 goals because achieving the 2030 goals will be challenging.

Further, there are funding sources to make compliance with the 2030 goals easier. First, Local Law 96, passed alongside Local Law 97 in the Climate Mobilization Act PACE financing.[173] The PACE program offers loans to fund renewable energy or energy efficiency upgrades.[174] Buildings can fund 100% of the cost of Local Law 97 sustainability improvements with long-term, non-recourse loans.[175] These loans can be paid back over 30 years. At the state level, New York's new Cap and Invest program is expected to generate large sums to support decarbonization.[176]

New York City provides other support as well. For example, the NYC Accelerator Program offers access to free, personalized guidance from licensed consultants to help buildings develop compliance strategies.[177] Federal tax subsidies are potentially available under the Inflation Reduction Act, and the New York Legislature has approved a tax abatement that could help low- and moderate-income co-ops, condos, and rental buildings make needed retrofits.[178] Homeowners for a Stronger New York is currently lobbying the New York Legislature to enact The Growing Resilient & Energy Efficient NY ("GREEN") Buildings Act.[179] If enacted, this law will provide significant long-term tax abatements for buildings making energy efficiency retrofits or other modifications that reduce carbon emissions.[180]

Of course, investments in building retrofits to comply with Local Law 97 will also provide building owners with long-term financial dividends through reduced operating costs,[181] as well as human health and environmental dividends from cleaner air and fewer carbon emissions. Moreover, if the price of carbon emission retrofits is more than a particular building can bear, Local Law 97 already has a provision to address this concern. For those genuinely struggling to comply, the city had authority, in the law itself, to make building-by-building adjustments.

The Mayor's Office has cited social justice concerns as part of its rationale for an expansive good-faith interpretation of Local Law 97.[182] They claim that buildings in disadvantaged communities are lagging in compliance. Yet, given the clear relationship between reducing carbon emissions and reducing pollutants that cause asthma and cardiovascular disease, concerns for social justice should drive more rapid implementation of emissions reduction, not more lax penalties for failure to reduce those dangerous emissions. Moreover, that claim about where compliance is lagging should beg the question of who owns those buildings.[183] In many cases, it is the same REBNY members bankrolling the astroturf campaign against the law. Furthermore, many Local Law 97 laggards are the same buildings that frequently lag in basic repairs and safe housing.[184] The fact that neglectful landlords are yet again refusing to invest in their buildings in overburdened communities seems like a reason for the city to act forcefully, rather than to relax requirements.

Activists opposed to Local Law 97 have picked up these themes as well and express concern about the law driving gentrification.[185] Given that Local Law 97 opponents are making social justice claims about the law's purported impact on overburdened communities of color, it is worth noting that none of the city's social or environmental justice advocacy groups have joined them in their critique of Local Law 97. Instead, these groups are among Local Law 97's strongest supporters.[186]

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172. Getting 97 Done, *supra* note 17, at 12–14.
173. N.Y.C., N.Y., Local Law 96 (2019).
174. *See generally Your Guide to PACE in NYC*, NYC PACE Program, https://www.nycpace.info/ [https://perma.cc/7WB5-TMTM].
175. *Id.*
176. Press Release, NYSERDA, Cap-and-Invest Outline and Affordability Study Released (Dec. 20, 2023), https://www.nyserda.ny.gov/About/Newsroom/2023-Announcements/2023-12-20-DEC-and-NYSERDA-Release-Cap-and-Invest-Preproposal-Outline-and-Climate-Affordability [https://perma.cc/F6KG-PGVJ].
177. NYC Accelerator, https://accelerator.nyc/ [https://perma.cc/Q8SA-BFQV] [https://perma.cc/9MPU-FE29].
178. Emily Myers, *New Tax Break for Major Building Upgrades*, Habitat Mag. (Oct. 2023), https://www.habitatmag.com/Publication-Content/Bricks-Bucks/2023/2023-October/New-Tax-Break-for-Major-Building-Upgrades [https://perma.cc/AN4K-CRAB].
179. Growing Resilient & Energy Efficient NY (GREEN) Buildings Act, N.Y. Legis. S. A-943, Reg. Sess. 2023-24 Leg. (2023), https://www.nysenate.gov/legislation/bills/2023/S943/amendment/A [https://perma.cc/8G9G-85LS].
180. *Id.* at § 2 (adding § 488-b(5) providing tax abatements to the real property tax law).
181. One of the reasons that buildings are complying faster than expected is that "a lot of these things pay for themselves." Lee, *supra* note 130 (quoting Rohit Aggarwala, Commissioner of the New York City Department of Environmental Protection).
182. *Id.* (indicating Aggarwala expressed "dismay" that many noncomplying buildings are in disadvantaged communities).
183. Lee, *supra* note 130.
184. For instance, the property at 84-53 Dana Court in Middle Village, Queens, is scheduled to receive fines in the 2024-2029 compliance period. Owned by a landlord whom Public Advocate Jumanee Williams named the worst in New York City, this building had 89 open Class, or immediately hazardous, housing violations as of January 2023. Steven Wishnia, *No Heat, Bathroom Mushrooms, Bees in the Wall: Life Under One of NYC's Most "Egregiously Negligent" Landlords*, Hellgate (Jan. 13, 2023), https://hellgatenyc.com/life-under-nyc-bad-landlord [https://perma.cc/VHJ2-MEKR]. The Local Law 97 status of this building can be found through the NYC Accelerator website. NYC Accelerator, https://accelerator.nyc/building-energy-snapshot [https://perma.cc/9MPU-FE29].
185. Cuozzo, *supra* note 98 (quoting *Glenn Oaks* plaintiffs Schreiber and Friedrich).
186. *See, e.g.*, Eliza Klein, *New York City Must Invest in Implementing Local Law 97*, City Limits (Feb. 12, 2024), https://citylimits.org/2024/02/12/opinion-new-york-city-must-invest-in-implementing-local-law-97/ [https://perma.cc/D7QS-M46D]; EarthJustice et al., su*pra* note 137; *Comments Submitted by WE ACT for Environmental Justice to the New York City Department of Buildings*, WEACT (Oct. 24, 2023) (decrying the proposed "good-faith" regulations as fostering delay, and calling for strict guardrails and enforcement strategies to ensure that emissions reductions are timely); *New York City Environmental Justice Alliance Testimony on LL97 to NYC Council Committee on Environmental Protection and Committee on Housing and Buildings*, NYC-EJA (Apr. 13, 2022), https://nyc-eja.org/wp-content/uploads/2022/04/NYC-EJA-Testimony-LL97-oversight-hearing-April-2022.pdf [https://perma.cc/VS29-H6P7]; *Max Politics Podcast: New York City's "Green New Deal" Comes Into Focus With Pete Sikora*, Gotham Gazette (May 23, 2023) (describing the coalition behind Local Law 97 and explaining New York Communities for Change support for Local Law 97) (downloaded using SoundCloud). More broadly, the "Climate Works for All" coalition supporting Local Law 97 is composed of labor, community, faith, environmental, and other social justice organizations. Press Release, ALIGN, Climate Advocates to Mayor: No Urgency or Transparency on Local Law 97 (Sept. 12, 2023), https://alignny.org/press/climate-advocates-

IV. Conclusion: Lessons Learned

The Climate Mobilization Act sits at the intersection of environmental imperatives and urban realities. New York City, like many global cities, finds itself on the front lines of climate change. These urban centers will play a critical role in the transition to a low-carbon future. As New York City has demonstrated, retrofitting existing buildings will be essential if we are to meet the Paris Agreement climate goals of keeping warming below 1.5 or 2°C. The Climate Mobilization Act embraces this reality, particularly through Local Law 97, which has been called "the most consequential municipal climate and jobs legislation in the world."[187]

This description of Local Law 97 is not just hype. By 2030, Local Law 97 is expected to reduce citywide greenhouse gas emission from buildings by 40% and reduce carbon emissions by six million tons of carbon dioxide. These emissions changes are expected to avoid 150 hospitalizations per year and prevent between 50 and 130 deaths per year.[188] At the same time, the law is projected to create between 26,700 and 141,000 green jobs.[189]

Yet, the nitty-gritty details of translating this ambitious climate legislation into real-world change is still being hammered out.[190] Indeed, Local Law 97 is a test case for the practical, political, and economic feasibility of requiring building retrofits to reduce carbon emissions. If it succeeds, that success will reverberate far beyond the city's five boroughs. If it fails, those lessons will spread far and wide as well. And 2024 is a critical year—the first mandatory emissions reduction deadline.

So far, the verdict is mixed. Compliance with the 2024 emissions reductions have been more rapid and more widespread than predicted. The law withstood legal challenges, as well as efforts to repeal or amend its key provisions. That is all very encouraging. It shows that laws like this can be enacted, and that existing buildings can be retrofitted to reduce their carbon emissions.

Yet, the devil is in the implementation details. For Local Law 97 to be truly transformative, the city must commit to rigorous enforcement alongside significant support, education, funding, and capacity-building. It is not clear whether that will happen. The current mayor's decision to waive the 2024 penalties is not a good sign and could indicate that he is not committed to the city's ambitious 2030 climate goals. Thus, the next New York City mayoral election, in fall 2025, will be a critical test for climate progress.

The stakes could not be higher. If New York strikes the right implementation balance, Local Law 97 could mark a giant step forward for "delivering on our climate goals and transitioning to a greener future."[191] It might become a blueprint for climate action in municipalities across the country and around the world. As the city navigates the complexities of implementing this legislation, decision-makers should remember that the world is watching. The IPCC reports document, in increasingly urgent terms, the need for rapid, significant climate action. In New York, that might be happening—one building at a time.

to-mayor-adams-no-urgency-or-transparency-on-local-law-97/ [https://perma.cc/HRR9-E7NZ].

187. Rachel Rivera & Norman Frazier, *Mayor Adams, Don't Weaken Local Law 97*, City Limits (Sept. 25, 2023), https://citylimits.org/2023/09/25/opinion-mayor-adams-dont-weaken-local-law-97/ [https://perma.cc/6N25-875B].

188. N.Y.C. Mayor's Off. of Climate & Env't Just. et al., Presentation at Contractor Action Summit, Slides 8, 17 (Nov. 8, 2023), *available at* https://www.nyc.gov/assets/hpd/downloads/pdfs/services/ll97-contract-summit.pdf [https://perma.cc/JA99-DE4S].

189. *Id.* at Slide 8.

190. Press Release, NYC Buildings, DOB Finalizes Second Major Rule Package to Implement City's Groundbreaking Building Emissions Law and Advances Key "Getting 97 Done" Initiatives (Dec. 18, 2023) (quoting Marc Zuluaga, co-founder of Cadence OneFive, and member of Local Law 97 Climate Working Group).

191. *DOB Announces Proposed Rules to Implement Building Emissions Law*, N.Y.C. Dep't Bldgs. (Oct. 6, 2022), https://www.nyc.gov/site/buildings/dob/pr-prop-rule-emissions.page [https://perma.cc/9G8Y-TA97] (Commissioner Aggarwala).

SWIMMING TO THE SHORELINE: ADOPTING THE FEDERAL INDIAN TRUST DOCTRINE FOR PROTECTION OF MUMBAI'S KOLI FISHING COMMUNITY

Prakriti Shah*

ABSTRACT

Traditional fishing communities have relied on coastal ecosystems for several generations. Their connection with the sea, which is an integral part of their livelihood, culture, and identity, is now threatened by the destruction of these ecosystems. The Koli fisherfolk of Mumbai are one such community that lack the legal tools and protection to safeguard their right to fish and to carry on their livelihood. In the United States, native tribes such as the Yakama Tribe may utilize the federal trust doctrine to hold the federal government accountable for the protection of natural resources that they rely on. This Article suggests that the adoption of a hybrid trust responsibility doctrine in Indian jurisprudence, which amalgamates the Public Trust Doctrine prevalent in India and the United States Federal Trust Doctrine, could lead to stronger safeguards for the Koli community. This Article proposes that the hybrid doctrine could evolve by first enacting a special statute for the Koli community, similar to the Forest Rights Act, and subsequent judicial decisions interpreting the scope of that special statute along with an expansion of the Public Trust Doctrine.

The Koli fishing community, an Indigenous group inhabiting Mumbai in coastal Maharashtra, relies on traditional forms of fishing for its sustenance. Their traditional way of life simultaneously promotes the sustainability of the sea and survival of fish species. The community has traditionally fished in the Arabian Sea, with which they have a deep cultural and spiritual connection.[1] This connection is now under threat as the rapid urbanization of Mumbai has led to loss of access and resources for Koli fisherfolk.[2] In addition, other factors such as commercial fishing and inadequate environmental laws make the ecosystems that the Koli fisherfolk rely on even more vulnerable.[3]

The Koli fishing community has been categorized as a "Scheduled Tribe" in the state of Maharashtra, which is a special status granted under the Constitution of India for the social empowerment of certain groups, though they have not been recognized as "Indigenous."[4] As it stands, the Koli community's status as a special class for whom fishing is the main source of livelihood is widely accepted by custom and has been cited by Indian courts, but does not formally appear in legislation.[5] The only group of people relying on traditional livelihoods for whom specific legislation has been enacted in India are forest dwellers. Forest dwellers are considered among the earliest inhabitants of

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1. *See generally* Shuddhwati Peke, Women Fish Vendors in Mumbai: A Study Report, Int'l Collective Support of Fishworkers (2013), *available at* https://demo.icsf.net/wp-content/uploads/2021/04/132_Monograph_WFV_Mumbai_26april2013_Final_w_Cover.pdf [https://perma.cc/5DXV-Y4CN].
2. *See id.* at 9.
3. *See* Venkatesh Salagrama, Climate Change and Fisheries: Perspectives From Small-Scale Fishing Communities in India on Measures to Protect Life and Livelihood 4, Int'l Collective Support of Fishworkers (2012), https://www.icsf.net/wp-content/uploads/2012/09/930.ICSF135.pdf [https://perma.cc/Y4MX-Y8P3].
4. *See generally* India Const. arts. 330–342A.
5. *See generally* Ramdas Janardan Koli v. Secretary, Ministry of Environment and Forests, 2015 SCC OnLine NGT 4.

the Indian subcontinent and rely on forests for food, water, habitat, and their livelihood.[6]

The coastal ecosystems that provide the Koli community with sustenance are also under threat as land has been reclaimed and coastal waters continue to be polluted.[7] The legal framework safeguarding these coastal ecosystems, consisting of laws and regulations that demarcate protected areas and regulate activities along the coastline, is inadequate.[8] One such set of regulations are the Coastal Regulation Zone Notifications ("CRZ Notifications") issued under the Environmental Protection Act of 1986.[9] These ecosystems are also entitled to protection under the public trust doctrine, as established in the jurisprudence of the Indian courts.[10]

A similarly situated fishing community in the Pacific Northwest of the United States is the federally recognized Yakama Tribe. This tribe is also heavily reliant on fish, not only for the sustenance, but also for their spiritual and cultural value. The federal trust doctrine, which imposes a fiduciary duty on the United States federal government to protect natural resources for the Yakama Tribe, could provide grounds for the tribe to assert its access to natural resources, as it would allow them to bring breach-of-trust actions against the federal government. The federal trust doctrine is unlike the public trust doctrine as understood by Indian courts because it includes a fiduciary responsibility toward federally recognized tribes. The integration of this fiduciary aspect into India's existing public trust doctrine could empower the Koli fishing community to assert their rights to fish, access to fishing commons, and other related entitlements.

Part I of this Article provides an overview of the Koli fishing community and its intrinsic connection to the sea, which informs and underlies the community's identity, livelihood, and culture. Part I also examines the threats to this connection with the sea, focusing on modern infrastructure projects like sea bridges, ostensibly constructed in the name of development. Part II reviews the current legal framework pertaining to the Koli community in India, which includes special status under the Constitution of India, the role of the CRZ Notifications in protecting their fishing commons, and public trust doctrine case law in India and its relevance to the Kolis. Part III first introduces the Yakama community of the Pacific Northwest, a Native American tribe of the United States, that relies on fishing as part of their livelihood and traditional cultural practices. It then examines the federal trust doctrine, its evolution, and how it relates to the right to fish.

Part IV proposes a hybrid doctrine for the protection of Kolis, combining the public trust doctrine as understood in India and the United States' federal trust doctrine. It first proposes a new statute with provisions that recognize and protect the Koli community's right to fish along with stewardship responsibilities placed on the community for protection of the habitats they rely on, similar to the history of forest-dwelling Indigenous communities in India. It then proposes that once such statute is enacted, Indian courts could read its provisions along with the existing public trust doctrine to develop jurisprudence analogous to the United States' federal Indian trust doctrine.

I. The Connection Between Mumbai's Koli Community and the Sea

The Koli community is a traditional fishing community native to the city of Mumbai, well known for its Indigenous status[11] and considered to be the original inhabitants of the city.[12] This part describes the importance of the Koli community's livelihood as fisherfolk to their identity, as acknowledged by scholars and court decisions. The major threats the Koli community face are then addressed to demonstrate the immediate need for stronger protection of the community's traditional livelihood.

A. Foundations of the Koli Community in India

The Koli fishing community is one of the oldest communities in the coastal city of Mumbai and is widely regarded as an Indigenous community.[13] Even before it was a city, "Bombay" as it was then known was comprised of seven islands surrounding the Arabian Sea, which were the fishing grounds for the Koli community.[14] The Koli people and their history are closely linked with the formation of the city of Mumbai.[15] The community has customarily been dependent on fishing as a form of livelihood.[16] Much like Indigenous communities around the world, they place high value on the social, cultural, and customary aspect of holding land or sea that transcends mere property rights.[17] Their traditional methods of fishing, which include the use of small boats and other customary practices have been historically sustainable for marine ecosystems.[18] One such practice is refraining from fishing in the monsoon

6. *Overview—India*, Tenure Facility, https://thetenurefacility.org/timeline/india/ [https://perma.cc/EX6F-VKRB].
7. *See generally* Peke, *supra* note 1.
8. Lawyers Initiative for Forests & Env't, Legal Framework for Conservation of Coastal and Marine Environment of India: A Desk Review 1 (2013), *available at* https://snrd-asia.org/wp-content/uploads/2018/04/CMPA-Technical-Report-Series-No.-02.-Legal-Framework-for-Conservation-of-Coastal-and-Marine-Environment-of-India-A-Review.pdf [https://perma.cc/7APZ-R4ME].
9. *Id.* at 20.
10. Ramdas Janardan Koli v. Secretary, Ministry of Environment and Forests, 2015 SCC OnLine NGT 4.
11. Sally Warhaft, *No Parking at the Bunder: Fisher People and Survival in Capitalist Mumbai*, 24 S. Asia: J. S. Asian Stud. 213, 216 (2001).
12. *See* Peke, *supra* note 1.
13. Hemantkumar A. Chouhan et al., *Coastal Ecology and Fishing Community in Mumbai: CRZ Policy, Sustainability and Livelihoods*, 51 Econ. & Pol. Wkly. 48, 52 (2016) [hereinafter *Coastal Ecology*].
14. Pranita A. Harad & Pramod P. Joglekar, *A Study of Fish Symbolism in the Life of the Son Koli Community of Mumbai*, 77 Bull. Deccan Coll. Post-Grad. & Rsch. Inst. 121, 121 (2017).
15. *See* Lalitha Kamath & Gopal Dubey, *Commoning the Established Order of Property: Reclaiming Fishing Commons in Mumbai*, 5 Urbanisation 85 (2020).
16. *See* Ramdas Janardan Koli v. Secretary, Ministry of Environment and Forests, 2015 SCC OnLine NGT 4.
17. Kamath & Dubey, *supra* note 15 at 87.
18. Hemantkumar A. Chouhan et al., *Urban Development, Environmental Vulnerability and CRZ Violations in India: Impacts on Fishing Communities and*

months, which is typically the spawning season for many fish species.[19]

During the British Raj, the Koli fisherfolk first began being taxed for their fishing activities and being displaced from their traditional fishing grounds.[20] Subsequently, urban development has continued to displace the Koli fishing community, further exacerbating the community's impoverishment.[21] In the current legal framework, although no statute expressly protecting the Koli fishing community exists, their traditional and customary rights have been acknowledged by Indian courts and in scholarly writings.[22]

The Kolis are identified as a distinct community on the basis of caste,[23] and the community incudes various sub-castes and tribal groups,[24] such as the Son Kolis and Mahadev Kolis,[25] which are divided on the basis of their source of livelihood, language, and other cultural markers.[26] Not all persons of the Koli caste are fisherfolk, however; traditional fisherfolk in Mumbai are generally referred to as "Kolis."[27] The unique spiritual and religious beliefs of Kolis include rituals surrounding goddess worship, distinctive dress codes, dances, and other cultural practices.[28] Koli men and women have traditionally occupied distinctive roles within the supply chain of fishing.[29] While Koli men went to fish at sea, the women played the integral function of drying, curing, and selling the fish catch.[30] Thus, Koli livelihood, tradition, and culture have been marked by the community's relationship with the coastal ecosystems.

B. *Threats to the Koli Community's Traditional Fishing Practices*

Coastal ecosystems provide some of the most diverse habitats but are increasingly becoming vulnerable to a host of factors.[31] Preserving the traditional livelihoods of the Koli fishing community is essential to the sustainability of the coastal ecosystems in the city of Mumbai. While the Koli community faces several threats such as climate change, commercial fishing, and modern infrastructure,[32] the focus of this section is the rapid urbanization in the city of Mumbai, especially the major coastal infrastructure projects that have impeded the Koli community's access to fish and coastal ecosystems.

Traditional fishing communities around the world have been impacted by development projects and the Koli community is no exception. In recent years, the infrastructure of Mumbai has undergone massive changes with the introduction of a sea-link bridge that damaged the coastal ecosystem.[33] The Bandra-Worli sea link was completed in 2010 after 10 years of construction to provide better accessibility between Greater Mumbai and its suburbs.[34] The 3.5-mile sea link project displaced the Koli fisherfolk that fished in a 70-acre estuary area, which was reclaimed for the project. It also severely damaged the surrounding coastal ecosystem, affecting fish catch.[35] Concrete pillars erected in the middle of the sea where the Koli community fished changed fishing patterns that the community had relied on and prevented access to navigation routes for the fishermen.[36] The change in the tidal pattern particularly affected the poorest sections of the Koli fishing community, who rely on high tides to bring in fish near the shore where they fish, as they do not own their own boats for fishing.[37]

In 2015, the Municipal Corporation for Greater Mumbai issued a proposal for the construction of an even bigger sea bridge known as the Coastal Road Project, and invited input from the public.[38] The 18.1-mile project aims to provide even greater accessibility between different parts of the city and its suburbs to ease traffic.[39] The project was permitted to proceed despite several objections.[40] A group serving the interests of the Koli fishing community petitioned the Municipal Corporation to conduct necessary environmental impact assessments, a public hearing, and restrain construction in certain fishing zones.[41]

The courts ultimately permitted the construction of the project to proceed,[42] the first phase of which is expected to be operative in May 2024.[43] The construction of the project involves reclamation of several acres of mangroves which

Sustainability Implications in Mumbai Coast, 19 Env't, Dev. & Sustainability 971, 982 (2017) [hereinafter *Urban Development*].

19. *Id.*
20. *See* Peter Reeves et al., *The Koli and the British at Bombay: The Structure of their Relations to the Mid-Nineteenth Century*, 19 S. Asia: J. S. Asian Stud. 97, 103–04 (2007).
21. Warhaft, *supra* note 11, at 214.
22. Kamath & Dubey, *supra* note 15, at 86.
23. Gayatri Nair, *Beyond Morality: The Moral Economy Framework and the Fisheries in Mumbai*, 17 J. S. Asian Stud. 210, 211 (2022).
24. Devanathan Parthasarathy, *Hunters, Gatherers and Foragers in a Metropolis: Commonising the Private and Public in Mumbai*, 46 Econ. & Pol. Wkly. 54, 62 (2011).
25. Sandeep Hegde, *Son Kolis—The Aboriginal Inhabitants of Bombay (Now Mumbai) in Transition*, 62 Int'l Letters Soc. & Humanistic Sci. 140, 141 (2015).
26. Peke, *supra* note 1, at 8.
27. *See generally* Sheetal Chhabria, *The Aboriginal Alibi: Governing Dispossession in Colonial Bombay*, 60 Compar. Stud. Soc'y & Hist. 1096 (2018).
28. Peke, *supra* note 1, at 8.
29. *See id.*
30. *See id.*
31. *See* N.N.V. Sudha Rani et al., *Coastal Vulnerability Assessment Studies Over India: A Review*, 77 Nat. Hazards 405, 409 (2015).
32. *See* Vinita Govindrajan, *Fishing in Troubled Waters: In India Fishermen Are Using Customary Laws to Tackle Declining Catches*, Scroll.in (Nov. 20, 2017), https://scroll.in/article/857742/fishing-in-troubled-waters-in-india-fishermen-are-using-customary-laws-to-tackle-declining-catch [https://perma.cc/VK2J-RLDF]; *see also* Aarefa Johari, *"The Sea Is Changing So Much": Climate Change and Lives of Mumbai's Fishermen*, Quartz (July 7, 2021), https://qz.com/india/2030290/mumbais-koli-fishermen-cope-with-climate-change-and-cyclones [https://perma.cc/3V6F-ZXJ3].
33. *Urban Development*, *supra* note 18, at 975–76.
34. *Bandra Worli Sea Link—Project Features*, Maharashtra State Rd. Dev. Corp. Ltd., https://perma.cc/5TN3-CSSW.
35. *Urban Development*, *supra* note 18, at 975–76.
36. Nikhil S. Dixit, *After Coastal Project Antagonised Mumbai's Oldest Residents, Courts Offer Relief*, The Wire (Aug. 13, 2019), https://thewire.in/environment/after-coastal-project-antagonised-mumbais-oldest-residents-courts-offer-relief [https://perma.cc/G757-JWAX].
37. *See id.*
38. Worli Koliwada Nakhwa v. Municipal Corporation of Greater Mumbai, 2019 SCC Online 1272.
39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.*
43. *Costal Road Project in Mumbai Resumes Work and Will Be Operational in May 2024*, Times Prop. (Mar. 22, 2023), https://timesproperty.com/news/post/

will destroy the breeding grounds for certain fish species affecting the Koli fisherfolk's catch and potentially impacting 35,000 fisherfolk across 23 villages.[44] The increasing inability of the Koli community to continue their traditional form of livelihood, coupled with the continued degradation of the coastal ecosystems on which they rely, pose a risk to the Koli community's identity itself.[45]

II. Current Legal Framework With Respect to the Koli Community

This part provides an overview of the legal framework surrounding the rights of the Koli fishing community. This part first explores the meaning of the special status of Scheduled Tribe conferred on the Koli fisherfolk. The inadequacies surrounding the CRZ Notifications are then examined as they relate to the Koli fishing community. The origin and evolution of the public trust doctrine in Indian jurisprudence is then addressed in detail, and public trust doctrine case law involving traditional fishing communities' rights is also discussed.

A. Special Status as Scheduled Tribe

The traditional practice of fishing was considered a caste-based livelihood of the Koli fisherfolk.[46] Under colonial rule in India, the practice was eventually commercialized in an effort to boost revenue and was opened up to other castes.[47] The caste system in India is pervasive to a community's identity. In the system of caste hierarchy, the Kolis have historically been discriminated against on the basis of caste because of their "low-ranking" status.[48] With respect to the Koli community's caste status, the Supreme Court of India remarked:

> [d]espite the cultural advancement, the genetic traits pass on from generation to generation and no one could escape or forget or get over them. The tribal customs are peculiar to each tribe or tribal communities and are still being maintained and preserved. Their cultural advancement to some extent may have modernized and progressed but they would not be able to establish their affinity to the membership of a particular tribe.[49]

The Koli community has been designated as a Scheduled Tribe in the state of Maharashtra, by virtue of their avocation as "fishermen".[50] Such status is conferred on communities facing extreme socioeconomic hardships under Article 342 of the Constitution of India, which empowers the President to classify certain groups as a Scheduled Tribe."[51] Although no specific criteria exists for such classification, the intent behind this constitutional provision is to alleviate the quality of life for communities that possess a distinctive culture and carry on traditional ways of life.[52] The Supreme Court of India has described Scheduled Tribes as those who "[have] traditional moorings and customary beliefs and practices."[53] Such tribes are largely governed by their own customary code of conduct, with their own rich cultural heritage, mode of worship, and cultural ethos.[54]

The Constitution of India confers special provisions on communities designated as Scheduled Tribes, such as reservations in government offices, educational institutions, and representation in legislative assemblies.[55] Such affirmative action policies are an attempt to safeguard these communities' interests as well as accelerate their socioeconomic development through various schemes.[56] Therefore, although their low caste status has led to the marginalization of the Koli fisherfolk, it is on the basis of their customary, collective caste-based identity that they have also been able to historically assert their right to live by the sea and fish.[57]

B. CRZ Notifications

Among the existing laws that have express provisions pertaining to the Koli community are the CRZ Notifications issued by the Central Government of India.[58] The Ministry of Environment, Forest, and Climate Change ("MOEFCC") issues these Notifications in the exercise of its powers under the umbrella environmental legislation, the Environment (Protection) Act, 1986.[59] These Notifications were enacted to implement India's commitments at the United Nations Stockholm Conference in 1972 for the protection of the human environment.[60]

The CRZ Notifications entitle Koli fisherfolk to claims to coastal commons, also known as *Koliwadas*.[61] The first CRZ Notification was issued in 1991 for the regulation of activities that have the potential to harm ecosystems in coastal areas on the basis of Coastal Regulation Zone.[62] These Zones are categorized as CRZ-I, CRZ-II, CRZ-III and CRZ-IV, with CRZ-I being the most ecologically sensitive and highly regulated zone.[63] The 1991 CRZ Notification delegated the authority to create and identify Coastal Zone Management Plans ("CZMPs") to coastal states,

coastal-road-to-be-operational-from-may-2024-blid4155 [https://perma.cc/5PYF-3824].

44. Dilnaz Boga, *Will a New Mumbai Road Destroy Fishermen's Livelihoods?*, Al Jazeera (Nov. 23, 2016), https://www.aljazeera.com/features/2016/11/23/will-a-new-mumbai-road-destroy-fishermens-livelihoods [https://perma.cc/G2W3-Y9FC].
45. *See id.*
46. Nair, *supra* note 23, at 216.
47. *Id.*
48. *See id.* at 211.
49. Kumari Madhuri Patil v. Addl. Commissioner (1994), 6 SCC 241.
50. *Id.*
51. *Frequently Asked Questions*, Nat'l Comm'n Scheduled Tribes, https://ncst.nic.in/content/frequently-asked-questions [https://perma.cc/NH5P-M2LF].
52. *Id.*
53. Kumari Madhuri Patil v. Addl. Commissioner (1994), 6 SCC 241.
54. *See id.*
55. *See* India Const. arts. 330–342A.
56. *See* Nat'l Comm'n Scheduled Tribes, *supra* note 51.
57. *See* Chhabria, *supra* note 27.
58. *Urban Development*, *supra* note 18, at 974.
59. *Id.* at 973.
60. MOEFCC, Coastal Regulation Zone Notification, S.O. 19(E) (Jan. 6, 2011) (notifications have the binding force of law in India and are analogous to agency-made rules in the United States).
61. *Id.*
62. MOEFCC, Notification, S.O. 114(E) (Feb. 19, 1991).
63. *Id.* at 7.

under which Zones were to be classified with reference to development plans and survey maps.[64] As far as the Koli community was concerned, repairs of their existing structures were permitted and traditional homes protected.[65] The construction of their dwelling units was also permitted, so long as they were within the ambit of traditional and customary uses such as existing fishing villages.[66] Violations of the CRZ Notifications, however, have been rampant since the 1990s rendering them arguably ineffective, with encroachments on the community's fishing commons used to satisfy commercial greed.[67] Poor implementation and inadequacy of the 1991 Notification eventually led to the issuance of another CRZ Notification in 2011.[68]

The 2011 Notification sought to address several deficiencies found in the 1991 Notification such as the lack of participation by affected parties.[69] It marked the first time that the Koli community was invited to participate.[70] The preamble of the 2011 Notification states that it is issued "with a view to ensure livelihood security to the fisher communities and other local communities."[71] The 2011 Notification retains the provisions for classification of Coastal Regulation Zones and identification of CZMPs, among various other features.[72] It delegates the identification of the Kolis' fishing commons known as *Koliwadas* and other areas for drying or curing fish, to the government of the state of Maharashtra.[73] The 2011 Notification distinguished the coastal areas of Mumbai as those "requiring special consideration for the purpose of protecting the critical coastal environment and difficulties faced by local communities," citing environmental issues and the need for decent housing for the poor in the interconnected islands of Greater Mumbai.[74] Activities in these areas under special consideration are subject to stricter regulations.[75]

In January 2019, the MOEFCC issued the draft of a new CRZ Notification, which diluted several of the protections afforded to coastal, ecologically sensitive lands and to the fishing community.[76] Activities that were previously prohibited in CRZ-I areas would be permitted under the new CRZ Notification, such as eco-tourism, land reclamation, and oil and gas exploration.[77] The provisions protecting *Koliwadas* in the 2011 Notification and the special consideration provisions are not mentioned in the 2019 Notification.[78] The 2019 Notification provides that until the CZMPs are approved, the CZMPs under the 2011 Notification as well as other provisions of the earlier Notification shall remain in force.[79] Official executive correspondence states that the CZMPs will be deemed to be in effect upon being made available on the website of Maharashtra Coastal Zone Management Authority ("MCZMA").[80] In September 2021, the CZMPs for Mumbai were uploaded to the website of the MCZMA, thereby bringing them into force.[81]

Aggrieved by the draft provisions of the CRZ 2019 Notification, a group of Koli fisherfolk challenged the 2019 Notification in a proceeding before the National Green Tribunal of India,[82] a special tribunal created in 2010 for the adjudication of environmental issues.[83] The application filed before the Tribunal alleged that the CZMPs failed to properly demarcate *Koliwadas* and that no public hearing was conducted before the fishing areas were mapped.[84] The Koli fisherfolk group's application was ultimately rejected for procedural defects.[85] Another challenge to the validity of the 2019 Notification filed by a nonprofit environmental organization,[86] however, was admitted before the National Green Tribunal in December 2022 and is pending as of this writing.[87] While this challenge is pending before the National Green Tribunal, the 2019 Notification is the regulation that is currently in effect.

C. *The Relevance of India's Public Trust Doctrine to the Koli Community*

The public trust doctrine originated in Roman law and was then adopted into English common law, eventually finding its way into the common-law jurisdictions of India and the United States.[88] The public trust doctrine provides that certain resources are the common and shared property of all citizens, which are to be stewarded in perpetuity by the government.[89] In India, the public trust doctrine is founded

64. *Id.* at 6.
65. *Id.* at 9.
66. *Id.*
67. *See id.*
68. *Urban Development*, *supra* note 18, at 973.
69. Ramasamy R. Krishnamurthy et al., *Managing the Indian Coast in the Face of Disasters & Climate Change: A Review and Analysis of India's Coastal Zone Management Policies*, 18 J. Coast. Conservation. 657, 658 (2014).
70. MOEFCC, Coastal Regulation Zone Notification, S.O. 19(E) (Jan. 6, 2011).
71. *Id.* at 1.
72. *See id.* at 8.
73. *Id.* at 15.
74. *Id.* at 9.
75. *Id.*
76. Meenakshi Kapoor, *India Diluted the Law That Protects Its Coastal Areas Once the Public Could No Longer Give Inputs*, Scroll.in (Aug. 11, 2020), https://scroll.in/article/969922/india-diluted-the-law-that-protects-its-coastal-areas-once-the-public-could-no-longer-give-inputs [https://perma.cc/CM9R-JU7F].
77. MOEFCC, Notification, G.S.R. 37(E) (Jan. 18, 2019).
78. *Id.*; *but see* MOEFCC, *supra* note 70, at 11.
79. MOEFCC, *supra* note 77, at 6.
80. *Id.* at 50; Letter from H. Kharkwal, Additional Dir. & Member Sec. (CRZ), to the Member Secretary, Maharashtra Coastal Zone Mgmt. Auth. (Sept. 29, 2021) (outlining certain conditions that must be fulfilled prior to the approval of CZMPs, as provided by the National Coastal Zone Management Authority. According to clause 3(iii) of the letter, one of these conditions is that the CZMPs are made available on the website of the MCZMA).
81. Maharashtra Coastal Zone Management Authority, https://mczma.gov.in/content/approved-czmp-mumbai-city-suburban-districts-2019 [https://perma.cc/W7TP-E9WY] (showing that the CZMP approval letter has been uploaded); MOEFCC, Notification, G.S.R. 37(E) (Jan. 18, 2019); *see also generally* Letter from H. Kharkwal, *supra* note 80.
82. Unreported Judgments, Colaba Koliwada v. Maharashtra Coastal Zone Mgmt. Auth./App. No. 32 of 2022, decided on Jan. 18, 2023 (NGT), at *8 (India).
83. The National Green Tribunal Act, 2010, § 3 (June 2, 2010).
84. Unreported Judgments, Colaba Koliwada v. Maharashtra Coastal Zone Mgmt. Auth./App. No. 32 of 2022, decided on Jan. 18, 2023 (NGT), at *8.
85. *Id.*
86. Unreported Judgments, Vanashakti & Ors. v. Union of India/App. No. 106 Of 2022, decided on Dec. 1, 2022 (NGT), at *8.
87. *Id.*
88. David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Env't L.J. 711, 713–15 (2008).
89. *See id.* at 713.

on the idea that natural resources such as rivers, shores, forests, and air are held in trusteeship by the government for the enjoyment of the public.[90] This imposes a fiduciary duty on the government, which acts as trustee to manage natural resources for the sole benefit of the beneficiaries, the general public.[91] The doctrine enables the beneficiaries to hold the government accountable for the management of these resources.[92] Another essential aspect of the doctrine is that the government is obligated to ensure that its trust responsibility toward the public is not subjugated to private interests.[93]

Indian courts have recognized and interpreted the public trust doctrine,[94] which is now on par with "the law of the land."[95] The public trust doctrine in Indian jurisprudence is established by Articles 21, 48A, and 51 of the Constitution of India.[96] Article 21 provides the right to life, i.e., that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."[97] Article 48A places an obligation on States to protect and improve the environment and safeguard forests and wildlife,[98] while Article 51 provides that citizens have a duty to protect and improve the natural environment.[99]

The Supreme Court of India first addressed the public trust doctrine in *M.C. Mehta v. Kamal Nath*.[100] The case was raised in response to the construction of a club on the banks of the Beas river, which was part of a protected forest.[101] The construction under challenge had diverted the flow of the river in order to protect the club from future floods.[102] The club was constructed on forest land that had subsequently been removed from its classification as a protected area and leased to a private corporation, in which all shares were owned by the family of the former Minister of Environment and Forests, Kamal Nath.[103] Relying on judgments of the courts in the United States, including the U. S. Supreme Court decision *Illinois Central Railroad Co. v. Illinois*, as well as the scholarship of Joseph Sax, the Supreme Court of India held that the public trust doctrine requires the government to protect natural resources like air, sea, waters, and forests for the enjoyment of the general public rather than to permit its use for private ownership or commercial purposes.[104] The Court observed that the state government of Himachal Pradesh, where the river is located, had "committed [a] patent breach of public trust by leasing the ecologically sensitive land to the corporation."[105] Finally, the Court directed that the leases granted be cancelled, and found the private corporation liable for restitution and restoration of the environment of that area.[106]

In the case of *Ramdas Janardan Koli v. Secretary, Ministry of Environment and Forests*, the public trust doctrine was applied in a manner that directly benefitted the Koli fishing community.[107] In 2013, the Koli community, affected by the port infrastructure activities of three government-owned and -controlled companies, filed an application before the National Green Tribunal.[108] The fishing community sought compensation for the loss of their livelihood, as well as rehabilitation for the 1,630 Koli families that were under threat of displacement due to reclamation activities by government-controlled companies.[109] The Koli community alleged that the companies' infrastructure activities impaired tidal water exchanges and the ingress and egress of fishing boats to the sea area, narrowed the Kolis' navigational routes, and substantially impaired the breeding of fish.[110] The Koli fishermen argued that they have a traditional right to fish and were entitled "to earn [a] livelihood by carrying [on their] traditional business as per the recognized custom which has become a source of law."[111]

In its judgment, the National Green Tribunal held that the Koli community's fishing practices have existed since time immemorial, which gave them customary rights to fish and were in alignment with the right to life and liberty under the Constitution of India.[112] The Tribunal further recognized that the economy of the Koli fishing community has a nexus with their right to enter seawater, collect fish, and carry on their business, in order to earn a livelihood.[113] Notably, the Tribunal observed that one of the three companies carried on with its development activities without regard for environmental degradation, which is "indicative of [its] disregard to [the] mandate of [the] 'Public Trust Doctrine.'"[114] Finally, the Tribunal directed the three entities to pay compensation to the affected Koli fisherfolk, although no decision on the rehabilitation of the fisherfolk was made in the Tribunal's judgment.[115] In reaching its decision in this case, the Tribunal cited various declarations and conventions of international law that India had signed or ratified, also holding that when governments

90. M.C. Mehta v. Kamal Nath (1997), 1 SCC 388 (1996).
91. *See id.*
92. Michael C. Blumm & Mary Christina Wood, The Public Trust Doctrine in Environmental and Natural Resources xxxix (2d ed. 2015).
93. Takacs, *supra* note 88, at 715.
94. *See* M.C. Mehta v. Kamal Nath (1997), 1 SCC 388 (1996); *see also* M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu (1999), 6 SCC 464; *see also* Centre for Public Interest Litigation v. Union of India (2012), 3 SCC 1.
95. State (NCT of Delhi) v. Sanjay (2014), 9 SCC 772 (the term "law of the land" indicates that the doctrine is now a settled principle of law).
96. *See* India Const., *infra* notes 97–98.
97. India Const. art. 21.
98. India Const. art. 48A.
99. Shyam Divan & Armin Rosencranz, Environmental Law and Policy in India: Cases and Materials 46 (3d ed. 2022).
100. M.C. Mehta v. Kamal Nath (1997), 1 SCC 388 (1996).
101. *Id.* at 413.
102. *Id.* at 397.
103. *Id.* at 391–92.
104. *Id.*; M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu (1999), 6 SCC 464 (public trust doctrine applied to construction of shopping complex in place of a park) *and* Fomento Resorts & Hotels Ltd. v. Minguel Martins (2009), 3 SCC 571 (held that making common properties subject of private ownership would be wholly unjustified).
105. M.C. Mehta v. Kamal Nath (1997), 1 SCC 388 (1996).
106. *Id.* at 407.
107. *See generally* Ramdas Janardan Koli v. Secretary, Ministry of Environment and Forests, 2015 SCC OnLine NGT 4.
108. *See id.*
109. *Id.* at 2.
110. *Id.* at 2-3.
111. *Id.* at 4.
112. *See id.* at 21.
113. *See id.* at 21.
114. *See id.* at 21.
115. *See id.* at 25–28.

fail to protect human rights from harm by non-state actors, it amounts to a violation of international law.[116]

Even before the public trust doctrine was first interpreted in the case of *M.C. Mehta v. Kamal Nath*, the Supreme Court of India, in 1994, observed that the State has a duty to protect fishermen as enshrined in Article 46 of the Constitution of India.[117] In *State of Kerala v. Joseph Antony,* a dispute arose between traditional fishermen in the southern Indian state of Kerala and enterprisers who used mechanized vessels and fishing methods.[118] The state of Kerala and an organization representing traditional fisherfolk's interests challenged the decision of the High Court of Kerala holding that the issuance of notifications prohibiting the use of purse seines beyond a certain zone was beyond the valid exercise of the state government's powers granted under the Kerala Marine Fishing Regulation Act, 1980.[119] The notifications at issue sought to prohibit the use of mechanized vessels including purse seine nets employed by the enterprisers, which reportedly depleted existing fish stocks and forced hordes of fishermen in Kerala out of their traditional livelihood.[120]

Under that Act, the executive branch of the state of Kerala was empowered to prohibit or restrict certain fishing matters.[121] The Court held that the notifications were valid and operative, noting that by using indiscriminate fishing methods, the enterprisers had created an imminent threat to the traditional fishermen's livelihoods, thereby denying them of their right to live.[122] The Court also observed that the fishermen were traditionally dependent on fishing to earn their livelihood unlike the enterprisers who engaged in mechanized fishing as a means to make profit.[123] The Court concluded that it was necessary to prohibit the use of mechanized boats, which had the effect of destroying the fishermen's livelihood, "for protecting the source of livelihood of the already impoverished mass of fishermen in the State and also to save the pelagic wealth."[124] In its concluding remarks, the Court acknowledged that "the protection of the interests of the weaker sections of the society is warranted as enjoined upon by Article 46 of the Constitution and the protection is also in the interest of the general public."[125] Thus, Indian jurisprudence has not only recognized that a function of the public trust doctrine is the protection of coastal ecosystems on which the Koli community relies, but has also acknowledged the need for the community's protection.

116. *See id.* 23–25.
117. State of Kerala v. Joseph Antony (1994), 1 SCC 301.
118. *Id.* at 304.
119. *See id.* at 311–12.
120. *Id.*
121. Kerala Marine Fishing Regulation Act, 1980, § 4.
122. State of Kerala v. Joseph Antony (1994), 1 SCC 301.
123. *See id.*
124. *See id.*
125. *Id*. at 318.

III. Understanding the United States' Federal Trust Doctrine

Emerging from treaty rights, jurisprudence, and federal statutes, the federal trust doctrine creates a fiduciary duty owed by the United States federal government to Indigenous peoples.[126] The Yakama Tribe is an Indian tribe native to the United States, and much like Mumbai's Koli fishing community, the tribe traditionally depends on fishing as the primary means of its livelihood.[127] Fish, especially salmon, are an extremely valuable resource for the Yakama people as they are linked to Yakama culture, health, and well-being.[128] This part draws lessons from the federal trust doctrine's role in protecting the Yakama people to assert rights of the Koli fishing community and to enhance their protection.

A. *An Overview of the Yakama Fishing Tribe*

The Yakama Tribe is a federally recognized tribe under the Yakama Nation Treaty of 1855.[129] The Yakama Tribe is a community of Indigenous people who have ancestrally inhabited certain parts of the land along the Columbia Basin.[130] These lands are primarily located in what is now the state of Washington, in the area demarcated as the Yakama Indian Reservation encompassing 1.13 million acres in Southwestern Washington.[131] The Yakama Tribe has depended on and continues to depend on fishing, especially on salmon, as well as hunting, gathering, and trading as a means of their livelihood since time immemorial.[132] Of all the traditional activities the Yakama people practice, the importance of salmon to their way of life seems most ubiquitous, and preceded white settlers by thousands of years.[133] Fish have been and remain vital to the way of life for several Indian tribes including the Yakama, and "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[134] Indigenous communities like the Yakama Tribe have a spiritual connection with fish resources and ecosystems, and have been stewards for ensuring their sustainability while maximizing yield and benefit.[135]

126. Rebecca Tsosie, *Conflict Between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians*, 39 Tulsa L. Rev. 271, 274–75 (2003).
127. Phil Ferolito, *Tribal Fishing a Vital Tradition on Valley Rivers*, Yakima Herald-Republic (July 29, 2018), https://www.yakimaherald.com/news/local/tribal-fishing-a-vital-tradition-on-valley-rivers/article_302bcf12-93a9-11e8-9010-af806d656420.html [https://perma.cc/7PQ4-VZHH].
128. Jessica M. Montag et al., *Climate Change and Yakama Nation Tribal Well-Being*, 124 Climatic Change 385, 386 (2014).
129. Mainon A. Schwartz, Cong. Rsch. Serv., R47414, The 574 Federally Recognized Indian Tribes in the United States 4 (2024).
130. Montag et al., *supra* note 128, at 386.
131. *See id.*
132. Fronda Woods, *Who's in Charge of Fishing*, 106 Or. Hist. Q. 412, 412 (2005).
133. Michael C. Blumm, Pacific Salmon Law and the Environment xiii (2022).
134. United States v. Winans, 198 U.S. 371, 381 (1905).
135. Ian W. Record, *We Are the Stewards: Indigenous-Led Fisheries Innovation in North America*, Native Nations Inst. & Harv. Proj. Am. Ind. Econ. Dev. 1 (2008).

The Yakama community's traditional rights are expressly recognized in the Stevens Treaties, which are eight treaties that were executed during 1854-1856 between Indigenous people and the United States federal government.[136] Under these Treaties, Indigenous tribes ceded the title to millions of acres of their ancestral land whilst preserving their "right of taking fish at all usual and accustomed places, in common with [settlers], and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands."[137] The Yakama Nation Treaty of 1855 was executed between the Yakama Tribe and the federal government, under which the Yakama people relinquished title to the land they occupied.[138] This Treaty provided the Yakama Tribe with the exclusive right of taking fish, hunting, gathering, and pasturing their cattle.[139]

An attempt to obstruct the Yakama people's access to the Tumwater fishery led to the Supreme Court decision in *United States v. Winans*,[140] where the Court reaffirmed the canon that treaties should be construed in favor of Indigenous people without regard for procedural rules.[141] In the *Winans* case, the Supreme Court held that treaty rights were not "a grant of right to the Indians but a reservation by the Indians of rights already possessed and not granted away by them."[142] The Court also concluded that "the right was intended to be continuing against the United States and its grantees as well as the State and its grantees."[143]

The *Winans* case is considered to have cemented the principles of interpretation of the Stevens Treaties, that they must be construed keeping in mind what the Indians desired and understood.[144] Although the *Winans* case does not mention the federal trust doctrine, it cemented one of the most important principles of interpretation of treaty rights, which is the source from which the principles of trust and protection emerged.[145]

Much like the Koli fishing community, the Yakama Tribe also faces many threats to their way of life. The presence of industrial and agricultural pollution in the water bodies where they fish leads to toxic fish catch.[146] The construction of dams in the Columbia Basin, which leads to decreased salmon stock and a diminution in the community's catch,[147] also threatens the Yakama Tribe's ability to continue their livelihood. Another one of the biggest threats is rising water temperatures, which cause salmon populations to change their migratory routes.[148]

B. *The United States' Federal Trust Doctrine and Its Application to Fishing*

The federal trust doctrine is an important tool that the Yakama Tribe may use to constrain government action that affects Indian or Indigenous property.[149] The federal trust doctrine was originally premised on the need to protect Indigenous peoples' land from white settlers,[150] but it developed more of a resource-protection focus over time.[151] One view of the federal trust doctrine suggests that it may be understood as a federal responsibility to protect or enhance tribal assets.[152] The federal trust doctrine has been interpreted to serve as a means for the government to carry out its treaty obligations to ensure adequate harvests for tribal populations.[153]

The federal trust doctrine places an obligation on the federal government to protect Indigenous communities while simultaneously ensuring their sovereignty to manage their own affairs.[154] In other words, the doctrine imposes a duty upon the federal government to protect native lands along with a guarantee to tribes that they will be able to continue their ways of life.[155] The federal trust doctrine involves the federal duty to protect Indigenous populations from state governments and other nonfederal authorities as well as a duty to act only in the best interests of the tribes.[156] One decision of the Supreme Court notes that the fiduciary relationship of the federal trust doctrine arises when the executive branch assumes control over the harvests and property belonging to Indians.[157]

The legal foundations of the principle are thought to have been first established in 1831 by Chief Justice John Marshall in *Cherokee Nation v. Georgia*,[158] in which the Cherokee Nation, a sovereign tribal government, challenged the enactment and enforcement of laws that effectively deprived the Cherokees of their sovereign rights and seized their reservation lands, contrary to the Treaty

136. Wash. Dep't Fish & Wildlife, *Treaty History With the Northwest Tribes*, https://wdfw.wa.gov/hunting/management/tribal/history [https://perma.cc/U29Y-D7ZT].
137. *See id.*; *see also* Michael C. Blumm & Cari Baermann, *The Belloni Decision and Its Legacy:* United States v. Oregon *and Its Far-Reaching Effects After a Half-Century*, 50 Env't L. 347, 350 (2020).
138. June 9, 1855, Treaty With the Yakama, 12 Stat. 951.
139. *See generally id.*
140. *See* 198 U.S. 371, 371 (1905).
141. Blumm, *supra* note 133, at 37.
142. *See Winans*, 198 U.S. at 371.
143. *See id.* at 381–82.
144. Blumm & Baermann, *supra* note 137, at 354–55.
145. Tsosie, *supra* note 126.
146. Tony Shick, *The U.S. Promised Tribes They Would Always Have Fish, But the Fish They Have Pose Toxic Risks*, ProPublica (Nov. 22, 2022), https://www.propublica.org/article/how-the-us-broke-promise-to-protect-fish-for-tribes [https://perma.cc/R44E-6MMX].
147. Mary C. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1492–93 (1995).
148. Courtney Flatt, *Northwest Tribes Call for Removal of Lower Columbia River Dams*, Or. Pub. Broad. (Oct. 14, 2019), https://www.opb.org/news/article/pacific-northwest-tribes-remove-columbia-river-dams/ [https://perma.cc/5TR5-CRPH].
149. Wood, *supra* note 147, at 1505.
150. In one of the first Supreme Court decisions dealing with the federal trust doctrine, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), the Court took the view that the Cherokee Nation is in a "state of pupilage" under the guardianship of the United States federal government. *Id.*
151. Wood, *supra* note 147, at 1505.
152. David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law 65 (2001).
153. Wood, *supra* note 147, at 1505.
154. Randall S. Abate, *Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognized Tribes Imperiled by Climate Change*, 25 Fordham Env't L. Rev. 10, 41 (2013).
155. Stephen L. Pevar, The Rights of Indians and Tribes 33 (3d ed. 2002).
156. Justin B. Richland & Sarah Deer, Introduction to Tribal Legal Studies 63 (2d ed. 2010).
157. United States v. Mitchel, 463 U.S. 206, 225 (1983) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)); Wood, *supra* note 147, at 1519.
158. Wilkins & Lomawaima, *supra* note 152, at 68.

of Holston, which they signed.[159] Although the Supreme Court ultimately held that it did not have the jurisdiction to make a judgment in the case, it observed that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[160] Specifically, the court held that "[the tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[161] Justice Marshall further elaborated that the guiding principles of the United States' federal Indian law derived from the relationship of trust arising out of the treaties that the tribes entered into with the United States.[162]

In a subsequent and definitive case, *Worcester v. Georgia*,[163] Justice Marshall expanded on the federal trust relationship between the tribes and the United States federal government, holding that it "was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[164] Justice Marshall's analysis implied that the federal government had a duty to protect Cherokee rights from incursions by states and private citizens.[165]

Another landmark case that established the federal trust doctrine is that of *Seminole Nation v. United States*,[166] which arose out of petitions filed before the Court of Claims by the Seminole Nation. The Seminole people contended that the United States had not satisfied treaty requirements of allocating trust fund amounts to individual members of the tribe.[167] The federal government argued that the payments had been made to the tribal treasurer and creditors, but had been misappropriated and not distributed to the tribal members.[168] The Supreme Court observed that due to the existence of a fiduciary duty, the federal government had not satisfied its obligations to make payments to individual members of the Seminole Nation, given that it had knowledge of the misappropriation of such funds.[169] The Court held that

> it is a well-established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary.[170]

The Court noted that the federal government "has charged itself with the moral obligations of the highest responsibility and trust,"[171] and observed that "[i]ts conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."[172]

In *United States v. White Mountain Apache Tribe*, the White Mountain Apache Tribe sued the United States for failure to carry out its fiduciary duty to manage land and improvements held in trust for the tribe.[173] The Court held the federal government liable in damages for the breach of such a fiduciary duty to preserve the trust corpus,[174] while observing that "elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch."[175]

In the case of *Parravano v. Babbitt*, commercial fishermen challenged an emergency regulation that curtailed non-tribal fishing in the Hoopa Valley in order to protect chinook salmon populations.[176] The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's order upholding the emergency regulation in question and observed that "the federal government is the trustee of the Indian tribes' rights, including fishing rights."[177] The federal trust doctrine is now a well-established legal obligation, consisting of the highest standards that the federal government must meet in order to ensure that Indigenous people and their resources are protected[178] with fishing rights included within the ambit of its interpretation.[179]

By creating an obligation of responsibility, the federal trust doctrine gives rise to a cause of action to Indigenous people against the federal government for failing to protect their property or the corpus of their trust, which could include land, fish populations,[180] or any other asset.[181] The evolution of the federal trust doctrine has led to the proliferation of several federal agencies that are entrusted with duties relating to Indian affairs.[182] These agencies and their officials are required to comply with the trust relationship, as executive officials are bound "by every moral and equitable consideration to discharge [the federal] trust [doctrine] with good faith and fairness."[183] Failure of executive

159. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
160. *Id.* at 16.
161. *Id.* at 11.
162. *Id.*; Tsosie, *supra* note 126, at 273.
163. Worcester v. Georgia, 31 U.S. 515 (1832), *recognized as abrogated in* Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).
164. *Id.* at 555.
165. Tsosie, *supra* note 126, at 273.
166. Seminole Nation v. United States, 316 U.S. 286 (1942).
167. *Id.* at 287–88.
168. *Id.* at 295.
169. *Id.* at 295–96.
170. *Id.* at 296.
171. *Id.* at 297.
172. *Id.*
173. United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003).
174. *See id.*
175. *Id.*
176. Parravano v. Babbitt, 70 F.3d 539, 541 (9th Cir. 1995).
177. *Id.* at 546.
178. U.S. Dep't of the Interior, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries, Order No. 3335 (Aug. 20, 2014).
179. *See* Parravano v. Babbitt, 70 F.3d 539 (9th Cir.1995); *but see* Arizona v. Navajo Nation, 599 U.S. 555 (2023).
180. Abate, *supra* note 154, at 74.
181. Randall S. Abate, *Ocean Iron Fertilization and Indigenous Peoples' Right to Food: Leveraging International and Domestic Law Protections to Enhance Access to Salmon in the Pacific Northwest*, 20 UCLA J. Int'l L. & Foreign Aff. 45, 74 (2016).
182. *See* Indian Law Research Guide: Federal Agencies, The University of New Mexico, https://libguides.law.unm.edu/c.php?g=260744&p=1961629 [https://perma.cc/7VKV-CRCV] (listing several United States federal agencies, including the Bureau of Indian Affairs (BIA), Indian Health Service (HIS), and the Interior Board of Indian Appeals Decisions, among others, that handle Indian affairs).
183. Abate, *supra* note 181, at 72 (quoting Kelly Nokes, *An Opportunity to Protect—Analyzing Fish Consumption, Environmental Justice, and Water Quality Standards Rulemaking in Washington State*, 16 Vt. J. Env't L. 323, 351 (2014)).

officials to uphold the federal trust relationship could then entitle the Yakama Tribe and its members to sue the United States for damages,[184] and may also seek injunctive relief.[185]

IV. Proposal for Adoption of the United States' Federal Trust Doctrine to Mumbai's Koli Community

The Koli community has faced several challenges to access their right to fish, fishing commons, and the conservation of their cultural and traditional rights, which pose serious risks not only to their ability to earn a livelihood, but also to the health of Mumbai's coastal ecology.[186] This part proposes the adoption of the federal trust responsibility doctrine in India, which could be employed by the Koli community to more effectively safeguard their rights to carry on their traditional livelihoods and to preserve the coasts they rely on. The proposal contemplates the enactment of a statute akin to the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ("Forest Rights Act"), with protective provisions as well as responsibilities placed on the Koli fisherfolk for preservation of coastal ecosystems. Leveraging such a statute, along with the public trust doctrine in India, this part argues for the evolution of an analogous federal trust doctrine in India, which would place a fiduciary responsibility upon state governments.

A. Enactment of Statute to Protect the Koli Fishing Community

The only Indigenous community in India that enjoys special statutory provisions are forest dwellers. The Forest Rights Act traces its origins to movements by activists, human rights advocates, and nonprofit organizations dedicated to tribal interests.[187] Persons categorized as forest dwellers in India mostly belong to Scheduled Tribe communities, ranking low in the caste system,[188] much like Koli fisherfolk. Forest dwellers are considered traditional communities, as they are dependent on forest resources for their subsistence, by way of cultivation, hunting, or gathering.[189]

The history of forest dwellers also resembles the Koli fishing community's experience in Mumbai, as they were displaced during colonial rule in India and after independence, continuing well into the late 1990s.[190] The eviction of forest dwellers and their lack of access to forest resources affected the livelihood of millions of them that were living on, or cultivating forests.[191] In 2002, in an effort toward purported environmental conservation, the central government's Ministry of Environment and Forests ordered the removal of all forest dwellers that were considered encroachers on forest lands, within six months.[192] The Ministry's order led to a huge outcry from human rights defenders and grassroots organizations, eventually resulting in the formation of a parliamentary committee to examine the possibility of a law preserving forest dwellers' rights.[193] In 2006, the Forest Rights Act was passed,[194] representing a strong example of a political, demand-based effort for democratic forest governance for marginalized forest-dependent persons.[195]

The preamble of the Forest Rights Act, which informs the reading of the statute,[196] acknowledges that the long-standing rights of generations of forest dwellers were not codified, leading them to suffer historical injustices.[197] It further acknowledges the need to address "the long standing insecurity of tenurial and access rights" of forest dwellers, "including those who were forced to relocate their dwelling due to State development interventions."[198] These injustices are addressed through various provisions in the law that include forest dwellers' entitlement to "hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members."[199] Other such guaranteed rights include traditional community rights, rights of use or entitlement to fish, water bodies and other resources, and rights of access to biodiversity and traditional knowledge.[200]

The Forest Rights Act empowers forest dwellers with the ability to protect or regenerate community forest resources for sustainable use.[201] Forest dwellers are also conferred with the right to ensure that forest land, wildlife, biodiversity, and water resources are "preserved from any form of destructive practices affecting their cultural and natural

184. While the Yakama Nation and individual tribal members may theoretically bring a claim against the federal government for damages in lieu of a failure to meet its fiduciary responsibilities, the historical problem of land rights violations persists in many Native American communities. Minority Rts. Grp., *Native Americans in the United States of America*, https://minorityrights.org/communities/native-americans/ [https://perma.cc/S86N-VYM2]. Moreover, such breach of trust claims may not result in a favorable outcome for the tribe in light of a recent decision Supreme Court opinion *reversing* a Ninth Circuit decision holding that the "United States has a duty under the 1868 treaty to take affirmative steps to secure water for the Navajos," which in the Navajos' view was a failure to "satisfy the trust obligations of the United States." Arizona v. Navajo Nation, 599 U.S. 555, 555 (2023).

185. Brief of Amici Curiae Historians at 29–32, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (No. 21-1484), 2023 WL 1972703.

186. *See generally Urban Development*, *supra* note 18.

187. Indranil Bose, How Did the Indian Forests Rights Act, 2006 Emerge?, Rsch. Programme, Inst. & Pro-Poor Growth 21 (2010), *available at* http://www.indiaenvironmentportal.org.in/files/forest%20rights%20act%202006-emerge.pdf [https://perma.cc/2RV8-ATXT].

188. Kundan Kumar & John M. Kerr, *Democratic Assertions: The Making of India's Recognition of Forest Rights Act*, 43 Dev. & Change 751, 754 (2012).

189. *Id.* at 754.

190. *See id.* at 755.

191. *Id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *Id.* at 767.

196. *See* Global Energy Ltd. v. Central Electricity Regulatory Commission, 2009 SCC Online SC 1112 (holding that the object of legislation should be read in the context of the preamble); Maharashtra Land Development Corporation v. State of Maharashtra, 2010 SCC Online SC 1270 (holding that the preamble of the Act is a guiding light to its interpretation).

197. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

198. *See generally id.*

199. *Id.* at § 3.

200. *Id.*

201. *See id.*

heritage."[202] Although they are framed as "rights," the language of these provisions indicate stewardship-like duties for forest dwellers. The beneficiaries or forest dwellers can thus take steps to conserve their way of life, along with the integrity of forest lands.

As a community that is considered to have inhabited the coastal areas of Mumbai since time immemorial,[203] the Koli fisherfolk are similarly situated to the forest dwellers of India. The Koli fisherfolk are widely accepted as the original inhabitants of the city of Mumbai. The Kolis have already been granted the special status of Scheduled Tribe under the Constitution of India, which demonstrates their marginalized status and the need to protect the community. The combination of these factors would justify the importance of enacting legislation to recognize rights to coastal land, fishing commons, and other such entitlements, as well as to the necessity to vest those rights with the Koli fisherfolk itself. A similar preamble to the Forest Dwellers Act, acknowledging the historical injustice borne by the Koli community, would be a helpful means of interpreting this proposed statue.

A proposed statute for protecting the Koli fishing community would contain stewardship-like provisions of protection as well as responsibility as seen in the Forest Dwellers Act. Given that traditional forms of fishing encourage the sustenance of coastal ecosystems,[204] the enactment of a statute similar to the Forest Rights Act to serve the interests of the Koli fishing community would enable them to take appropriate steps using traditional community knowledge to fortify coastal ecosystems. The concept of such stewardship rights for fisherfolk was touched upon in the Supreme Court of India's decision in *State of Kerala v. Joseph Antony*,[205] where the Court found it necessary to prohibit mechanized boats as they not only affected the fishermen's livelihood, but also adversely impacted the pelagic wealth, thereby suggesting that not only are the two essential, but also connected.

Despite the robust language of the provisions of the Forest Rights Act, its implementation has been lacking and has come under criticism from forest rights experts.[206] Under the Forest Rights Act, individuals, groups, or families wishing to secure their forest rights are required to submit a claim for recognition and vesting of these rights.[207] In practice, a large number of these claims are consistently rejected, thwarting attempts of forest dwellers to reap its benefits.[208] The lack of implementation is largely seen as a result of the unwillingness of central forest authorities to cede control over forest lands as well as the prioritization of commercial interests in forest lands.[209] However, despite the difficulties with implementation of the Forest Rights Act, it is largely hailed as instrumental in changing the discourse around forest rights and improving access to justice for forest dwellers.[210]

In the case of the Koli fisherfolk, a statute providing them with stewardship rights may not meet the same obstacles as the Forest Rights Act given that the mapping of *Koliwadas* has already been delegated to the state government authorities. Thus, the demarcations for customarily enjoyed land such as coastal commons for Koli fisherfolk already exist as they are being mapped with reference to the city's development plan.[211] This may help expedite the process of vesting rights to commonly held property for the Koli fisherfolk. A specialized statute for the Koli fishing community could also encourage state government authorities to honor the *Koliwada* demarcations envisaged under the CRZ Notifications that are under threat of being ignored.[212] Furthermore, the passing of a statute conferring special status on the Koli fishing community could be instrumental in changing discourse around their rights and lifestyles, leading to greater access to justice like the forest dwellers have had in India.

India's responsibilities under international law could also prove influential in the enactment of such a statute for Koli fisherfolk. India is obligated to protect Indigenous people under two major international laws. The first comprehensive international law protecting Indigenous people, to which India is a signatory, is the International Labour Organization Indigenous and Tribal Populations Convention, 1957 (ILO No. 107). In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous People ("UNDRIP"),[213] which India subsequently voted to ratify.[214] Indian courts acknowledge UNDRIP's principles as persuasive law.[215]

UNDRIP reflects over 25 years of negotiations between actor states and provides an important parameter of reference for interpreting Indigenous rights.[216] Article 8 of the UNDRIP requires States to provide effective mechanisms

202. *See id.*
203. The Supreme Court has used the phrase "time immemorial" to recognize the long-standing governance rights of Indigenous peoples. *See* Worcester v. Georgia, 31 U.S. 515, 559 (1832). Meanwhile, the Supreme Court of India has generally recognized the phrase "time immemorial" as associated with activity or practice whose time of origin is not within the memory of man or the date of its commencement is shrouded in the mists of antiquity. *See, e.g.*, Patneedi Rudrayya v. Velugubantla Venkayya, AIR 1961 SC 1821.
204. *Coastal Ecology*, *supra* note 13, at 54.
205. State of Kerala v. Joseph Antony (1994), 1 SCC 301.
206. Mayank Aggarwal, *Forest Rights Act: A Decade Old But Implementation Remains Incomplete*, Mongabay (Dec. 13, 2018), https://india.mongabay.com/2018/12/forest-rights-act-a-decade-old-but-implementation-remains-incomplete/ [https://perma.cc/S94S-J7WD].
207. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.
208. *See Four Reasons Why the Forest Rights Act Fails to Empower Forest-Dwelling Communities*, Oxfam India (July 27, 2018), https://www.oxfamindia.org/blog/forest-rights-act [https://perma.cc/9E7C-CHSV].
209. *See id.*
210. *See id.*
211. Maharashtra Coastal Zone Management Authority, *supra* note 81.
212. The petition challenging the CRZ 2019 Notification alleges that the state government is proceeding without proper mapping of certain areas as *Koliwadas*. Unreported Judgments, Vanashakti & Ors. v. Union of India/App. No. 106 Of 2022, decided on Dec. 1, 2022 (NGT).
213. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007).
214. *Voting Data—U.N. Declaration on the Rights of Indigenous Peoples: Resolution*, U.N. Digit. Libr., https://digitallibrary.un.org/record/609197?ln=en [https://perma.cc/7G6E-HBQ4].
215. Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests (2013), 6 SCC 476. While India has ratified the UNDRIP, it has not been codified into domestic law in India. Therefore, courts will likely limit its value to persuasive.
216. Felipe Gómez Isa, *The UNDRIP: An Increasingly Robust Legal Parameter*, 23 Int'l J. Hum. Rts. 7, 7 (2019).

to ensure the integrity of Indigenous peoples' identity and to prevent dispossession from their lands.[217] The special legislation intended for the Koli community would be in furtherance of India's obligation under the UNDRIP as it is essential to the preservation of the community's identity by safeguarding their traditional livelihood of fishing. Under Article 12 of the UNDRIP, Indigenous people have the right to practice their religious traditions and customs,[218] while Article 26 provides them with the right to own the lands that they have traditionally inhabited or used.[219] The proposed statute would effectively implement India's obligations under these Articles of the UNDRIP as well, given that it would strengthen the Koli community's rights to customarily occupied areas including places to fish and fishing commons. Article 38 of the UNDRIP obligates States to take legislative measures in consultation and cooperation with Indigenous communities to achieve the goals of the UNDRIP.[220] A special law for the sustainability of the Koli fishing community will therefore be consistent and harmonious with India's international legal obligations.[221]

B. *An Analogous Federal Trust Doctrine in Indian Case Law*

Public trust doctrines around the world took decades of environmental and Indigenous activism to become a widely accepted principle.[222] Once a special statute with stewardship provisions codifying the Koli community's rights is enacted, establishing an analogous federal trust responsibility doctrine with a fiduciary duty toward the Koli community could evolve. This is because Indian courts could read the statute provisions along with the public trust doctrine to conclude the existence of such a doctrine. A trust responsibility doctrine in India akin to the United States federal trust doctrine could evolve from jurisprudence in India just as the jurisprudence of the Supreme Court was vital in the evolution of the federal trust relationship.[223]

Courts in India have established that state governments hold natural resources in trust for the public and are responsible for prioritizing these public rights over private interests by way of its numerous public trust doctrine precedents.[224] However, Indian jurisprudence has limited the public trust doctrine to the protection of natural resources, which are meant for the use and enjoyment of the general public. The purpose of such public trust responsibility is limited by Indian precedent to the extent of "[t]he aesthetic use and pristine glory of the natural resources, the environment and the ecosystems."[225]

Courts have not ventured beyond this understanding of the public trust doctrine to hold states responsible for preserving these resources for Indigenous communities in particular, in a trustee-beneficiary capacity or otherwise. In the *Ramdas Janardan Koli* case, the National Green Tribunal applied the public trust doctrine in its reasoning, which led to the Koli fisherfolk obtaining a favorable decision. However, the violation of the public trust doctrine was observed due to the government-controlled entity's disregard for environmental degradation. Thus, the victory of compensation that the Koli fisherfolk were awarded in that case arose from a protective duty of the natural environment for the public, which comprises all members of society including the Kolis, rather than a specific duty toward the fishing community per se.

In India, the development of a federal trust responsibility doctrine like the United States' federal trust doctrine, where the government would hold natural resources in trust for the benefit of the Koli fishing community, in a trustee-beneficiary relationship, would help ensure Koli fisherfolk are adequately protected and can continue to pursue their traditional, culturally rooted form of livelihood. This hybrid doctrine would place a duty of trusteeship on the state government of Maharashtra rather than the central government as the federal trust doctrine does. The individuals of the Koli community would then be the beneficiaries. The fiduciary duty in this proposed Indigenous trust doctrine would be on the state government rather than the central government in India, unlike the federal trust doctrine in the United States, which squarely places such responsibility on the federal government. This is because state governments are already entrusted with identifying *Koliwadas* under the CRZ Notifications, and therefore will likely be more attuned to the needs and problems of the Koli community as a whole.

Additionally, Article 46 of the Constitution of India requires state governments to "promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes."[226] State governments are also tasked with protecting such people from social injustice and all forms of exploitation.[227] The imposition of an analogous federal trust responsibility on the state governments in India would be in alignment with its constitutional responsibilities envisioned under Article 46, as the Koli community's ability to earn their livelihood is undeniably in the community's "economic interests."

Adopting the federal trust responsibility doctrine in India would cast a fiduciary duty upon the state government to protect the Koli community and safeguard the trust corpus for the community's benefit. The trust cor-

217. G.A. Res. 61/295, *supra* note 213, at art. 8.
218. *Id.* at art. 12.
219. *Id.* at art. 26.
220. *Id.* at art. 38.
221. The United States has not codified the UNDRIP and as such, the United States' and India's obligations in international law differ insofar as the rights of traditional or Indigenous communities are concerned.
222. Joseph Orangias, *Towards Global Public Trust Doctrines: An Analysis of the Transnationalisation of State Stewardship Duties*, 12 Transnat'l Legal Theory 550, 561 (2021).
223. 1 Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 5.04[1]–[2][a] (2012 ed.).
224. *See* M.C. Mehta v. Kamal Nath (1997), 1 SCC 388 (1996); M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu; Fomento Resorts & Hotels Ltd. v. Minguel Martins (2009), 3 SCC 571.
225. *See* Fomento Resorts & Hotels Ltd. v. Minguel Martins (2009), 3 SCC 571.
226. India Const. art. 46.
227. *Id.*

pus would include the coastal ecosystems themselves, fish stocks, and fishing commons or *Koliwadas*, as well as other areas used for related activities such as curing or drying of fish and fish markets. To establish such a trust responsibility doctrine, Indian courts would first need to appreciate that the traditional fishing activities of the Koli community protect coastal ecology, ensuring its sustenance. The Koli community is a careful steward of the environment, particularly the coastal ecosystems. This understanding also aligns with and builds on the public trust doctrine in India, which aims to preserve the corpus of natural resources for the public, as is established in Indian case law. Moreover, the existence of a statute similar to the Forest Dwellers Act for the Koli fisherfolk could aid in reaching the understanding of Kolis as stewards of natural resources, as its provisions would recognize them as such.

A strong precedent for the origin of a trust responsibility doctrine for the Koli community may be derived from the Supreme Court of India's reasoning and rationale in *State of Kerala v. Joseph Antony*. In that case, the Court held that Article 46 applies to the welfare of the traditional fisherfolk population and recognized their marginalized status.[228] Although that decision was made with relation to the traditional fishing community in the state of Kerala, the Scheduled Tribe status of Koli fisherfolk in Mumbai, Maharashtra, would entitle them to similar if not the same constitutional protection.

In that decision, although the Court accepted the state of Kerala's responsibility toward the fisherfolk population, its reasoning lacked the recognition of a fiduciary responsibility for the state government. The Supreme Court of India has observed that a fiduciary relationship is where one person has a duty to act for the benefit of the other, requiring the highest duty of care.[229] A fiduciary duty therefore suggests a greater degree of state responsibility than what was envisaged in the *State of Kerala v. Joseph Antony* decision.

A fiduciary duty would mean that the interests of the Koli community to preserve their traditional livelihoods and to ensure the integrity of coastal ecosystems and fish stock take precedence over the state government's consideration of private interests. In *State of Kerala v. Joseph Antony*, the Supreme Court took note of the fact that the traditional fisherfolk's right to live was threatened by commercial interests that were not dependent on fishing for their livelihood.[230] The Court then held that it was necessary to prohibit their use of mechanized boats.[231] This conclusion suggests that the right of traditional fisherfolk to their livelihood supersedes the rights of the commercial entities to fish in the same waters.

The proposed fiduciary duty in the hybrid trust doctrine would allow for the Koli community's interests to take precedence over that of the general public. This would protect the Koli's coastal ecosystems rather than prioritizing the general public's purported interests that permit infrastructure projects and urban development. In the synthesis of the federal trust doctrine, courts in the United States relied on private trust law when it came to the entitlement of money damages to tribes. Similarly, Indian courts could rely on established trust law jurisprudence to solidify the trustee-beneficiary relationship of the trust responsibility doctrine, especially where the public trust doctrine does not provide interpretive guidance.

In interpreting the cases mentioned above, Indian courts found case law from the United States as persuasive in reaching their decisions. The seminal case of *M.C. Mehta v. Kamal Nath* referred to the landmark decision in *Illinois Central Railroad Co. v. Illinois*, where the public trust doctrine was interpreted.[232] In *M.I. Builders v. Radhey Shyam Sahu,* the Supreme Court discussed the American treatise, "Environmental Law and Policy: Nature, Law, and Society," by Plater, Abrams, and Goldfarb in a study of the origins and underlying notions of the public trust doctrine.[233] Similarly, Supreme Court decisions on the federal trust doctrine could provide a framework for Indian courts in formulating a trust responsibility doctrine. The federal trust doctrine cases discussed in Part III above could even persuade courts in India to hold that a breach of trust would entitle the Koli fisherfolk to sue for monetary damages. Such liability on the state government would enhance the legitimacy of the proposed trust responsibility doctrine for the Koli community.

V. Conclusion

The Koli community is an integral part of Mumbai's identity as the original inhabitants and stewards of its coastal areas. Modern urban development and inadequate or unenforced legal protections that serve to further commercial greed completely abrogate the traditional fishermen's interests, claims, and entitlements. The threat of climate change and its potential to drastically change the biodiversity and welfare of coastal ecology is already underway with Indigenous peoples facing the worst consequences, including loss of land and resources, political and economic marginalization, and human rights violations.[234] Moreover, in the dense city of Mumbai, land is the scarcest resource subject to competing power grabs. The Koli fisherfolk are relegated to the corners of such competition as they do not have any recourse to enforce their customary rights to fishing commons or coastal areas.

Despite its history of trying to civilize or rehabilitate its Indigenous tribes, the United States has, in modern times, broadened its view to a more benevolent approach in the development of Indigenous law and policy.[235] The federal trust relationship between the United States and federally recognized tribes has advanced over time and now seems to

228. State of Kerala v. Joseph Antony (1994), 1 SCC 301 (1993).
229. Sri Marcel Martins v. M Printer, AIR 2012 SC 1987.
230. State of Kerala v. Joseph Antony (1994), 1 SCC 301 (1993).
231. *Id.*
232. M.C. Mehta v. Kamal Nath (1997), 1 SCC 388 (1996).
233. M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu (1999), 6 SCC 464.
234. Dep't Econ. & Soc. Aff., *Climate Change*, U.N., https://www.un.org/development/desa/indigenouspeoples/climate-change.html [https://perma.cc/ZB8C-QCXG].
235. Wilkins & Lomawaima, *supra* note 152, at 62.

be a permanent principle in the adjudication of the matters related to tribal affairs. The fiduciary nature of the responsibility in such a doctrine is a powerful tool for a traditional fishing community like the Yakama people to depend on, to ensure they can continue to fish for generations to come.

A special statute for Mumbai's Koli fishing community where the state government is held to a fiduciary responsibility can create a standard analogous to the federal trust doctrine, ensuring the longevity of the Koli community. Drawing from Indian jurisprudence on the public trust doctrine and similar case law, along with examples from American and international law, Indian courts could place a fiduciary duty on the state government, which would give rise to a similar federal trust doctrine for the Koli fisherfolk. The formation of this hybrid doctrine would then provide the Koli community with the right to bring causes of action for the destruction of the corpus of the trust, or coastal commons and ecosystems.

MOVING TOWARD SUSTAINABLE ENVIRONMENTAL PROTECTION AND JUSTICE: LESSONS FROM SOCIAL DOMINANCE THEORY

Carlton Waterhouse*

ABSTRACT

The movement for environmental justice has made considerable progress since its birth four decades ago. Despite notable progress, many government decisionmakers, legal practitioners, environmental advocates, and business leaders often lack clarity on how to implement environmental justice, in practice. To improve environmental decisionmaking that promotes environmental justice, this Article promotes a new framework for fostering environmental justice and sustainability more broadly. Drawing on the often neglected yet foundational relationship of social equity to the concept of sustainable development, the Article advises environmental decisionmakers to deepen their understanding of social inequity to effectively promote justice in the environmental context. To that end, the Article investigates Social Dominance Theory and its insights as a beneficial resource for governments, businesses, and nonprofit organizations interested in promoting sustainability and environmental justice.

I. Introduction

Thanks to the foundational scholarship of Robert Bullard, Paul Mohai, Bunyan Bryant, Richard Lazarus, Michael Gerrard, Sheila Foster, Luke Cole, and many others, environmental justice has developed into a vibrant field of academic engagement.[1] Moreover, these early scholars' work drew deeply from the experiences of marginalized communities and their members who struggled against pollution and its health and environmental effects.[2] Racial discrimination in housing and across governmental decisionmaking often set the stage for the multitudinous environmental hardships that affected communities encounter.[3] In other cases, Indigenous, working class, and other communities bear the burdens of mining, fossil fuel exploration and

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1. *See generally* Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (1st ed. 1990) (identifying the racial and socioeconomic disparity in environmental quality and protection facing African Americans in the southern United States); Bunyan Bryant & Paul Mohai, Race and the Incidence of Environmental Hazards: A Time for Discourse (1st ed. 1992) (chronicling environmental threats faced by communities of color and the grassroots mobilization used to challenge them); Richard Lazarus, *Pursuing Environment Justice: The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787 (1993) (exploring the distributional effects of environmental protection laws and policy); Richard Lazarus, *Distribution in Environmental Justice: Is There a Middle Ground?*, 9 St. John's J. Legal Comment 481 (1994) (arguing that race and class mutually influence distributional environmental effects); Confronting Environmental Racism: Voices From the Grassroots (Robert D. Bullard ed. 1993) (providing activists and academic perspectives on the range of environmental injustices facing Black, Indigenous, and People of Color communities across the United States); Robert D. Bullard, Unequal Protection: Environmental Justice and Communities of Color (1994) (detailing the efforts of grassroots organizations in communities of color to fight environmental injustice); James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 Stan. Env't L.J. 125 (1994) (examining the use of Title VI of the Civil Rights Act of 1964 as a means to promote environmental justice); Richard Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 Md. J. Contemp. Legal Issues 1 (1994) (defining environmental justice and proposing ways to promote it); Michael Gerrard, The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks (1st ed. 1999) (surveying legal mechanisms available to challenge environmental injustice); Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement (2000) (using case studies of communities challenging environmental injustices to show the legal, political, and economic dimensions of environmental racism).
2. *See generally* Confronting Environmental Racism: Voices From the Grassroots, *supra* note 1; Unequal Protection: Environmental Justice and Communities of Color, *supra* note 1; Bryant & Mohai, *supra* note 1; Cole &. Foster, *supra* note 1.
3. *See generally* Richard Rothstein, The Color of Law (2018) (discussing intentional federal governmental discrimination in housing and its consequences); James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism (explaining the prevalence of private discrimination in housing at the county, municipal, and neighborhood levels).

extraction, nuclear testing, polluting industries, and climate risks.[4]

Over the last three decades, environmental justice has become a critical line of inquiry to understand the world in which we live. The inequality experienced in pollution exposure and climate change vulnerability represents an important area of research and policy development across academic disciplines and governments worldwide.[5]

While environmental justice, as a framing issue, has heightened awareness of environmental inequities broadly, it must represent more than a box to check off or community engagement strategy to deploy.[6] Otherwise, the decades of domestic and global inequality that environmental injustice has wrought will never be reversed. Fortunately, environmental laws and regulations at the state and federal level increasingly address environmental justice in meaningful and substantive ways.[7] President Joseph Biden has elevated the importance of the issue through multiple executive orders and guidance to federal agencies to address environmental justice and equity in conducting their missions.[8] Along with President Biden, the United States Congress has recently established significant funding for communities straining under the burden of pollution and climate-based risks, vulnerabilities, and harms.[9]

Despite the encouraging and important advancements noted above, some government policymakers, environmental law practitioners, and business leaders may still struggle with how "to do" environmental justice.[10] Even when agreeing that adverse environmental outcomes in overburdened communities should be avoided, decisionmakers may be unsure of how best to address the adversities that exist and to prevent new adverse outcomes from occurring. This Article seeks to provide an additional framework for understanding and achieving environmental justice and equity. Moreover, it counsels policy and decisionmakers to direct more time and attention toward understanding social inequity, in addition to why and how it persists, to effectively promote justice in the environmental context. The failure to make this shift will continue what this Article identifies as "porous environmental protection" which reflects the lawful, yet unaddressed concentration of permitted pollution sources in working class white and Black, Indigenous, and People of Color communities. This practice creates gaps in the environmental protection offered to these communities that bear the burden of cumulative pollution exposures and their adverse consequences as a result.

This Article turns to Social Dominance Theory as a valuable tool to understand social inequality broadly and environmental inequality in particular. Using the theory, social psychologists and other scholars explain the social and psychological characteristics that sustain group-based inequality across very different societies.[11] To that end, this Article examines Social Dominance Theory and its insights as a potential resource for governments, businesses, and nonprofit organizations interested in environmental justice. In addition to explaining the theory, this Article also examines how it can deepen understanding of the social

4. *See generally* Judy Pasternak, Yellow Dirt: A Poisoned Land and the Betrayal of the Navajos (2011) (describing the environmental and health consequences of uranium mining on the Navajo Nation); Indigenous Environmental Justice (Karen Jarratt-Snider & Marianne O. Nielsen eds., 2020) (exploring environmental injustices in Indian Country); Andrew Hurley, Environmental Inequalities: Class, Race, and Industrial Pollution in Gary, Indiana, 1945-1980 (1995) (examining how race, class, and political economy shaped environmental inequality in Gary, Indiana); Dorceta E. Taylor, *Race, Class, Gender, and American Environmentalism*, U.S. Dep't of Agric., Gen. Tech. Rep. PNW-GTR-534 (2002), https://www.fs.usda.gov/pnw/pubs/pnw_gtr534.pdf [https://perma.cc/GY8C-ZKQ3] (providing a history of environmental organizing and activism in the United States across race, class, and gender identities); Gordon Walker, Environmental Justice Concepts, Evidence and Politics (2011) (constructing a conceptual framework for environmental justice globally); Ruchi Anand, International Environmental Justice: A North-South Dimension (2004) (investigating the global dimensions of disparate environmental risk).

5. *See* Reg'l Off. for Eur., *Environmental Health Inequalities*, World Health Org. (WHO), https://www.who.int/europe/news-room/fact-sheets/item/environmental-health-inequalities [https://perma.cc/2BV4-ST-FH]; *Environmental Justice*, U.N. Developmental Programme (UNDP), https://www.undp.org/rolhr/justice/environmental-justice [https://perma.cc/FP9R-3DYQ].

6. "'Environmental justice is not a footnote anymore; it's a headline,' [Prof. Robert] Bullard said. 'Over the last four decades working on this, I realized while we've been able to make a lot of changes over the years, there's still a lot of work that still needs to happen—and it needs to happen in warp speed, because we don't have a lot of time since climate change is with us right now.'" Rachel Ramirez, *There's a Clear Fix to Helping Black Communities Fight Pollution*, VOX (Feb. 26, 2021), https://www.vox.com/22299782/black-americans-environmental-justice-pollution [https://perma.cc/F7YX-T6PF].

7. *See generally* Env't Just. Clinic, *Environmental Justice Law and Policy Database*, Vt. L. Sch., https://ejstatebystate.org/law-policy-database?_law_type=law [https://perma.cc/6G8T-E6PR] (compilation of state environmental justice laws); Off. of Gen. Couns., EPA Legal Tools to Advance Environmental Justice, U.S. Env't Prot. Agency (May 2022), *available at* https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf [https://perma.cc/2T2C-CEEC].

8. Press Release, The White House, Fact Sheet: President Biden Signs Executive Order to Revitalize Our Nation's Commitment to Environmental Justice for All (Apr. 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/21/fact-sheet-president-biden-signs-executive-order-to-revitalize-our-nations-commitment-to-environmental-justice-for-all/ [https://perma.cc/27P6-CBFC].

9. Press Release, The White House, The Bipartisan Infrastructure Law Advances Environmental Justice (Nov. 16, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/16/the-bipartisan-infrastructure-law-advances-environmental-justice/ [https://perma.cc/2CDY-PEY3]; Press Release, The White House, Fact Sheet: Inflation Reduction Act Advances Environmental Justice (Aug. 17, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/17/fact-sheet-inflation-reduction-act-advances-environmental-justice/ [https://perma.cc/FD76-XLAT].

10. While these substantial investments passed under the Biden Administration fund new and innovative ways for communities and local governments to "do" environmental justice, in the past, many businesses and governmental entities struggled to figure out how to advance environmental equality. *See generally* Jonathan K. London et al., *Problems, Promise, Progress, and Perils: Critical Reflections on Environmental Justice Policy Implementation in California*, 26 UCLA J. Env't L. & Pol'y 255 (2008); Jennifer R. Wolch et al., *Urban Green Space, Public Health, and Environmental Justice: The Challenge of Making Cities "Just Green Enough,"* 125 Landscape & Urb. Plan. 234 (2014). For a discussion of new approaches some cities have taken to address the issue, see also Clayton Aldern, *Seattle's New Environmental Justice Agenda Was Built by the People It Affects the Most*, Grist (Apr. 22, 2016), https://grist.org/justice/seattles-new-environmental-justice-agenda-was-built-by-the-people-it-affects-the-most/ [https://perma.cc/6CJV-6W5G]; Nicole Javorsky, *Which Cities Have Concrete Strategies for Environmental Justice?*, Bloomberg (May 7, 2019), https://www.bloomberg.com/news/articles/2019-05-07/mapping-policies-for-environmental-justice [https://perma.cc/4TTW-LKUH].

11. Jim Sidanius & Felicia Pratto, Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression 31 (2001) (developing a theory to explain persistent group-based inequality across societies).

forces that create and maintain group-based hierarchy in the environmental context.[12] Finally, to promote sustainable environmental practices and policies for all communities, the Article proposes criteria for organizations, businesses, and governments to use when evaluating the sustainability of environmental policies and protections.[13]

Environmental justice literature identifies three critical frames for examining and achieving environmental justice[14]: justice in the distribution of environmental burdens and benefits, justice in the processes of environmental decisionmaking, and justice in the recognition and regard given to the communities harmed or put at risk by environmental decisions.[15] These frames provide critical insights into how we see where injustice exists. They reveal the unequal pollution burdens and health risks relative to wealth, profits, employment, and income; the unequal access that burdened community members have to government decisionmakers compared to corporate and private investors; and the unequal recognition granted to tribes, communities of color, and working-class white communities.[16] These frames help to identify macro- and even micro-level occurrences of environmental injustice. Advocates and scholars also note ways that enhanced community involvement and engagement will provide just processes and respect for community knowledge and cultural practices in environmental decisionmaking.[17] While these are necessary for the development of an environmentally just future, sustainable environmental practices also require that existing disparate exposures and vulnerabilities suffered by communities be addressed.[18]

New Jersey has shown remarkable leadership in developing environmental justice legislation that goes to the heart of these problems.[19] Through their legislative process, the state passed a groundbreaking law and implemented regulations to reverse the environmental injustice norm.[20] The New Jersey Environmental Justice Law "requires DEP [Department of Environmental Protection] to evaluate environmental and public health impacts of certain facilities on overburdened communities (OBCs) when reviewing certain applications."[21] Under the law, the New Jersey DEP will deny permit applications for new facilities that do not serve a compelling public interest when those proposed facilities will have disproportionate impacts on overburdened communities.[22] This Article argues that the New Jersey Environmental Justice Law provides a compelling statutory model for promoting environmental justice at the state level. Adoption of similar legislation across the states or at the federal level would substantially challenge the current norm of sacrificing overburdened communities access to clean air, water, and green space for the financial benefits and tax revenues that polluting industries provide.[23] Until that time, outside of New Jersey, environmental actors and policymakers will make innumerable decisions that could either exacerbate past injustices or minimize them. Social Dominance Theory, explained below, offers decisionmakers a tool to examine how proposed and future environmental policies and decisions increase or diminish existing environmental inequities.[24]

Part II of the Article explores the roots of sustainable development to elevate the, often neglected yet, essential role of social equity to the pursuit of sustainability. In Part III, the Article examines social psychology's Social Dominance Theory as a conceptual mechanism for supporting sustainable project development and establishing environmental protection for all. Within this part, the Article proposes the application of Social Dominance Theory in environmental decisionmaking over the current intentional discrimination model that masks the racial and gender inequalities that reflect significant gaps in the levels of environmental quality and protection experienced by different communities. Part IV draws insights from Social Dominance Theory to help guide institutional practices and the development and application of environmental laws and policies to address the pollution exposure gaps created by "porous environmental protection" and suffered by vulnerable and overburdened communities. In this part, the Article contends that sustainable environmental protection requires that environmental policies protect vulnerable and overburdened communities from the harmful effects of climate change and cumulative pollution exposures to establish environmental protection for all.

II. Sustainable Development

In 1987, the World Commission of Environment and Development published a groundbreaking report entitled *Our Common Future* (also known as the Brundtland Report).[25] It established a foundation for sustainable development and the subsequent environmental discourse.[26] One of the many fruits of this earlier work is the 2030 Agenda for Sustainable Development and its Sustainable Develop-

12. See discussion *infra* Part II.
13. *Id.*
14. *See generally* Walker, *supra* note 4, at 1–14.
15. *See generally id.* at 39–75.
16. *See generally id.* at 16–37.
17. *See generally id.* at 64–75.
18. *See generally id.* at 53–64.
19. N.J. Stat. Ann. §§ 13:1D–157 to 13:1D–161 (West 2020).
20. N.J. Stat. Ann. § 13:1D–157.
21. Dep't of Env't Prot., *Environmental Justice Law*, State of New Jersey, https://dep.nj.gov/ej/law/ [https://perma.cc/Z8TY-H4RD].
22. *Id.*
23. Louisiana's long-standing tax relief law continues to attract polluting industries to the state. *See* Dylan Baddour, *Gulf Coast Petrochemical Growth Draws Billions in Tax Breaks Despite Pollution Violations*, The Texas Tribune (Mar. 15, 2024), https://www.texastribune.org/2024/03/15/texas-petrochemical-plants-gulf-coast-tax-breaks-pollution/ [https://perma.cc/CSV3-SF8B]. In response to a 2022 investigation of racial disparities in its environmental permitting program, Louisiana sued EPA to rebuff its efforts to have the state address ongoing environmental inequality. Jennifer Hijazi & Stephen Lee, *Louisiana Civil Rights Case Threatens EPA's Enforcement Plans*, Bloomberg L. (Jan 24, 2024), https://news.bloomberglaw.com/environment-and-energy/louisiana-civil-rights-case-threatens-epas-enforcement-plans [https://perma.cc/795C-C2PL].
24. See discussion *infra* Part II.
25. Word Comm'n on Env't & Dev., Our Common Future (1987), *available at* http://www.un-documents.net/our-common-future.pdf [https://perma.cc/249J-4WXE] [hereinafter Brundtland Report].
26. Michelle E. Jarvie, *Brundtland Report*, Encyc. Britannica, https://www.britannica.com/topic/Brundtland-Report [https://perma.cc/2E7L-QFTD].

ment Goals ("SDGs").[27] The Agenda and its goals reflect international cooperation and agreements around how to meet the needs of the present without compromising the ability of future generations to meet their own needs.[28] The Brundtland Report and the 2030 Agenda for Sustainable Development share a core principle of sustainability: social equity.[29] The Brundtland Report authors wrote:

> The search for common interest would be less difficult if all development and environment problems had solutions that would leave everyone better off. This is seldom the case, and there are usually winners and losers . . . "Losers" in environment/development conflicts include those who suffer more than their fair share of the health, property, and ecosystem damage costs of pollution. As a system approaches ecological limits, inequalities sharpen. Thus when a watershed deteriorates, poor farmers suffer more because they cannot afford the same anti-erosion measures as richer farmers. When urban air quality deteriorates, the poor, in their more vulnerable areas, suffer more health damage than the rich, who usually live in more pristine neighbourhoods . . . Hence, our inability to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations.[30]

Thirty years later, Corporate Knights' 2017 report on the 100 most sustainable companies around the globe, published in *Forbes* magazine, includes gender diversity, CEO pay equity, pension fund status, employee turnover, and percentage of taxes paid as core elements of their evaluation along with water, waste, energy, and carbon ratings.[31] The Corporate Knights' approach reflects the fundamental principle that environmental action without equity is not sustainable. Further, *Our Common Future* made clear why equity was and still is essential for sustainability when the Commission stated, "[a] world in which poverty and inequity are endemic will always be prone to ecological and other crises."[32] Sustainable development requires social equity just as much as ecological and climate conscious project design and construction. To promote social equity, a deeper understanding of social inequity and inequality is needed to break patterns of environmental neglect and disregard that reflect the historic experience of many communities. The next part considers the insightful work of social psychologists whose work focuses on the mechanisms that sustain and perpetuate social inequality across a range of different societies.

III. Social Dominance in Theory and Practice

Social Dominance Theory is a valuable resource for promoting sustainability because of its insights into the social inequity that *Our Common Future* identified as a critical barrier to achieving it. As a theory of relations between and among groups, Social Dominance Theory combines social analysis with examinations of human psychology.[33] It stands out among theories examining social inequality because it explains the processes that produce and maintain prejudice and discrimination at multiple levels.[34] Looking across cultures and across time, the theory ties dominance to all human societies "producing . . . stable economic surplus."[35] As a phenomenon, social dominance is observable across societies irrespective of governmental structure, economic and social complexity, or belief system even though "the degree, severity, and definitional bases of group-based hierarchical organization vary across societies and within the same society over time."[36] From the British feudal system, to the Indian caste system, and the French aristocracy, history is replete with examples of social hierarchies with explicit winners and losers.[37] When considered in its totality, the theory powerfully addresses ideologies, policies, institutional practices, and individual attitudes and relations.[38] Accordingly, it provides a helpful lens for thinking about the prevalence and persistence of environmental and climate injustices in the United States and across the globe.[39]

In explaining its functional aspects, Social Dominance Theorists posit that dominant group members claim and enjoy a disparate share of the society's positive social value.[40] Positive social value consists of important resources like wealth, education, quality housing and healthcare, abundant and high-quality food, political power, leisure, and education.[41] These are social goods or benefits that society produces and distributes to its members.[42] Moving beyond an individual perspective, the theory attends to the systematic nature of human relations within societies.[43] Although individuals exercise human agency in their experience within society, from the time of their birth, individuals engage a web of organizations, activities, and

27. Brundtland Report, *supra* note 25, at Part I, ch. 2; Transforming Our World: The 2030 Agenda for Sustainable Development, United Nations (UN), *available at* https://sustainabledevelopment.un.org/content/documents/21252030 Agenda for Sustainable Development web.pdf?ref=truth11.com [https://perma.cc/SXD2-3DBV].
28. Brundtland Report, *supra* note 25, Part I., ch. 2, ¶ 1.
29. *Id.* at Part I, ch. 2, ¶ 3 ("Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation.").
30. Brundtland Report, *supra* note 25, at Part I, ch. 2, ¶¶ 24–26.
31. Jeff Kauflin, *The World's Most Sustainable Companies 2017*, Forbes (Jan. 17, 2017), https://www.forbes.com/sites/jeffkauflin/2017/01/17/the-worlds-most-sustainable-companies-2017/?sh=32587a954e9d [https://perma.cc/M998-2ZP9].
32. Brundtland Report, *supra* note 25, at Part I, ch. 2, ¶ 4.
33. Sidanius & Pratto, *supra* note 11, at 31.
34. *Id.*
35. *Id.* at 35–37.
36. Felicia Pratto et al., *Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward*, 17 Eur. Rev. Soc. Psych. 271, 272 (2006).
37. Sidanius & Pratto, *supra* note 11, at 35–37.
38. Pratto et al., *supra* note 36, at 272–75. At its core, the theory explores the explains how group-based social hierarchies reflect the disparate social power that groups utilize to collectively enjoy the society's benefits. Sidanius & Pratto, *supra* note 11, at 32–33.
39. Sidanius & Pratto, *supra* note 11, at 32–33.
40. *Id.* at 31–32.
41. *Id.*
42. *Id.* at 32.
43. *Id.* at 33.

relationships that shape the benefits and opportunities they will enjoy within the society.[44] Families, governments, educational institutions, religious organizations, commercial businesses, and financial institutions frame the opportunities that individuals experience or lack.[45] From birth, experiences substantially differ for peasants and lords, high born and low castes, enslaved and free, females and males. Positive social value represents the outsized benefits the society bestows on dominant group members.[46]

In the environmental context today, greater access to green spaces, waste facility-free communities, clean air to breathe, clean drinking water, and higher resilience to natural disasters are typically described as environmental benefits.[47] Using the language of Social Dominance Theory, these would reflect positive social value.[48] Correspondingly, subordinate group members bear a disparate share of negative social value.[49] Negative social value is represented by inadequate housing, lack of employment, less and lower-quality education, both high-risk and undesirable labor, high rates of punishment, and higher rates of disease and morbidity.[50] Negative social value reflects the distribution of public bads and societal burdens to members.[51] Subordinate group members experience more than their "fair share" of these bads and burdens.[52] To this list, I have added higher risks and lower resilience to natural disasters, greater exposure to pollution and environmental contaminants, along with higher rates of the sickness, disease, and premature death that they cause.

According to Social Dominance Theory, all societies with stable economic surplus include three distinct systems of group-based hierarchy: an age system, a gender system, and an arbitrary-set system.[53] This Article focuses on the consequences and operations of the gender and arbitrary-set systems within the environmental context. The gender system reflects a historic and ongoing disproportionate distribution of political, military, commercial, and economic power to men over women.[54] Under the arbitrary-set system, groups are defined by identity characteristics other than age or gender. Groups experience the positive and negative social value that society distributes at distinctly different levels. The arbitrary-set system varies significantly across society and across time.[55] It most closely reflects the distinctive historical and demographic makeup of a society.[56]

Arbitrary-set groups are distinguished by characteristics like religion, clan, tribe, nationality, indigeneity, class, ethnicity, and race.[57] In one country, the arbitrary set may be based on one characteristic while in another some other aspect of identity may be more salient.[58] Examples can be found across history. In the United States, racial identity has played a significant role in group status beginning with the Indigenous American Indian tribes followed by the enslaved Africans.[59] In early modern Japan, social hierarchy was based on a system akin to occupational standing from greatest to least in status and power, "the Shi (samurai), Nou (farmers), Kou (industrial professionals, craftsman), Shou (merchants, retailers), and Burakumin (or nonhumans; i.e., Eta and Hinin)."[60] Moreover, at the intersection of some identities, social standing can be lowered or elevated in the social hierarchy.[61] In the environmental context, when compared with all other Americans, wealthy whites enjoy the greatest access to green spaces and the lowest levels of exposure to waste facilities and some of the most harmful air pollutants.[62] Applying Social Dominance Theory to the United States, this Article contends that the disproportionate placement of pollution burdens on communities of color, and the distribution of the economic benefits of that pollution to wealthier white communities reflects American social dominance in its environmental context.[63]

In considering group-based dominance, social dominance scholars make a vital point. Group-based social hierarchy results from discrimination across multiple levels: institutions, individuals, and collaborative intergroup processes.[64] Applying this insight to the United States is revealing. The 20th-century model of discrimination grounded in individual intent fails to address group-based inequities adequately.[65]

44. *Id.* at 32–33.
45. *Id.*
46. *Id.* at 31–32.
47. Walker, *supra* note 4, at 2–3.
48. Sidanius & Pratto, *supra* note 11, at 31.
49. *Id.*
50. *Id.* at 32.
51. *Id.*
52. *Id.*
53. *Id.* at 33–37.
54. Pratto et al., *supra* note 36, at 273.
55. Sidanius & Pratto, *supra* note 11, at 33–34.
56. *Id.* at 33–34.
57. *Id.* at 33.
58. Consider the historic caste system in India and the Japanese feudal system. *See* Pratto et al., *supra* note 36, at 273 (discussing the variance in arbitrary set definitions and boundaries "across societies and historical periods").
59. Sidanius & Pratto, *supra* note 11, at 37. *See generally* Aloysius L. Higginbotham, In the Matter of Color: Race and the American Legal Process 7–13 (Oxford Univ. Press, 4th ed. 1980); Ibram X. Kendi, Stamped From the Beginning: The Definitive History of Racist Ideas in America 17 (1st ed. 2017).
60. Sidanius & Pratto, *supra* note 11, at 35.
61. *See* Pratto et al., *supra* note 36, at 296.
62. *See* Jenny Rowland-Shea et al., *The Nature Gap: Confronting Racial and Economic Disparities in the Destruction and Protection of Nature in America*, Ctr. for Am. Progress (July 21, 2020), https://www.americanprogress.org/article/the-nature-gap/ [https://perma.cc/2RMG-2N5V] (finding that "the United States has fewer forests, streams, wetlands, and other natural places near where Black, Latino, and Asian American people live," that "[i]n 22 states, Native American communities are in places with the most or second-most energy development out of all racial and ethnic groups," and that "in almost two-thirds of states, low-income residents were most likely to live in nature-deprived areas"); Michael Mascarenhas et al., *Toxic Waste and Race in Twenty-First Century America Neighborhood Poverty and Racial Composition in the Siting of Hazardous Waste Facilities*, 12 Env't & Soc'y 109, 116 (2021); Press Release, Harv. T.H. Chan Sch. Pub. Health, Racial, Ethnic Minorities and Low-Income Groups in U.S. Exposed to Higher Levels of Air Pollution (Jan. 12, 2022), https://www.hsph.harvard.edu/news/press-releases/racial-ethnic-minorities-low-income-groups-u-s-air-pollution/ [https://perma.cc/45UP-KCUM].
63. *See generally* Iris T. Stewart et al., *The Uneven Distribution of Environmental Burdens and Benefits in Silicon Valley's Backyard*, 55 Applied Geography 266 (2014) (providing a cumulative environmental impact analysis for Santa Clara County, California).
64. Pratto et al., *supra* note 36, at 275.
65. Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1053–57 (1978).

Accordingly, it is vital that we move beyond the intent-based model of discrimination that dominates discussions of race and gender inequality in the environmental contexts. Based on the very constrained approach to governmental and private discrimination taken by the U.S. Supreme Court, the concept of animus directed toward a particular group has been used to legitimate countless other less explicit discriminatory actions with significant group-based consequences.[66] This current motivation-based model fails to account for the social realities of group-based hierarchy that manifest in ostensible identity-neutral practices and policies that consistently replicate and reinforce existing social hierarchy. This can be seen in everything from the historic lack of racial diversity in environmental nonprofit organizations to the perennial over-representation of African Americans among children with elevated blood lead levels for the better part of the last century.[67]

As currently applied, the intent-based model of discrimination routinely legitimates group-based injustice by assuaging the consciences of those who benefit from their group identities without accounting for their role in reproducing group-based inequality and the enjoyment of its benefits.[68] This can lead dominant group members to believe that they not only "deserve the privileges they enjoy," but also that they have acted fairly toward subordinate groups by not "intentionally" harming them.[69] Of course, the effects of drinking lead-poisoned water and breathing consistently polluted air are no less permanent or harmful according to the "intent" of private or governmental actors, so a narrow focus on intent misses the point. Dominant groups intentionally use their power and resources in society to secure and protect greater benefits for themselves and whether through ignorance, negligence, or disregard, they relegate subordinate groups to suffer the environmental consequences.

Furthermore, this individual-centered motivational model of discrimination directs attention away from ostensibly "neutral" standards and norms that protect the disproportionate resources, benefits, and opportunities they provide to dominant group members.[70] Consequently, the model masks and legitimates these norms and practices that replicate and reinforce group hierarchy and inequality.[71] Accordingly, under this legal standard, absent sufficient proof showing intent, causation, and fault, the processes and outcomes of decisions are deemed "free of discrimination" irrespective of the group-based hierarchy that they reflect and enhance.[72] In the environmental context, "neutral" legal standards continue to sustain and protect the racially discriminatory effects of environmental decisions that sustain and maintain the racial hierarchy observed in America's environmental protection and quality.[73]

In contrast, Social Dominance Theory explains group-based discrimination at the institutional, individual, and intergroup level that favors dominant groups over subordinate groups.[74] This Article contends that environmental injustices in America are the manifestation of past and ongoing institutional practices that favor white, non-Hispanic, upper middle class and upper-class, non-Indigenous, and other identities.[75] The institutional structures involved in environmental decisionmaking reflected the historic racial and socioeconomic discrimination that largely defined United States housing preceding the passage of the Fair Housing Act in the 20th century.[76] Before elaborating on this central concern, however, a few more aspects of Social Dominance Theory require attention.

A. Hierarchy-Related Myths and Ideologies

Social Dominance Theorists maintain that social dominance is maintained through three distinct mechanisms: legitimating myths and ideologies, institutions, and individual personality.[77] Each aspect plays a foundational role in sustaining social hierarchies. The use of legitimizing myths and shared social ideologies at the institutional, individual, and group levels reinforces existing hierarchies and justifies their continuance.[78] In other words, beliefs that are held within society about groups, their characteristics, and their social standing guide institutional practices and influence group and individual behavior.[79] This point is intuitive. Commonly held ideas in a society about the worth or characteristics of certain societal members will guide and influence the social interactions experienced by those members.[80] These include preconceived competences and deficits based on identity, like the historic claim that "woman are good at cooking" or "girls are bad at math" or that "blacks are natural athletes but are not hard workers." The list of historic and contemporary examples is nearly inexhaustible across the United States alone, much less the

66. *Id.* at 1057–1118.
67. *See* Dorceta E. Taylor, The State of Diversity in Environmental Organizations: Mainstream NGOs, Foundations & Government Agencies 3-7 (July 2014), *available at* https://orgs.law.harvard.edu/els/files/2014/02/FullReport_Green2.0_FINALReducedSize.pdf [https://perma.cc/7TS9-5K62] (discussing race, gender, and other forms of diversity in environmental organizations); *see* 1 U.S. Env't Prot. Agency, Environmental Equity: Reducing Risk for All Communities 9 (1992) (noting the persistence of racial disparities in childhood blood lead levels across socioeconomic indicators).
68. Freeman, *supra* note 65, at 1054–55.
69. *Id.* at 1052–57.
70. Sidanius & Pratto, *supra* note 11, at 27–29.
71. *Id.*
72. The Supreme Court's narrow definition of racial discrimination following the Civil Rights Movement restricted the government's ability to redress the discrimination unveiled in the previous era and began the Court's continuing retreat from *Brown v. Bd. of Educ.*, 357 U.S. 483 (1954), and its progeny. *See* Freeman, *supra* note 68, at 1057. Similarly, the Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) continues the approach identified by Alan Freeman.
73. *See* Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 Fordham Env't L. Rev. 51, 62–76 (2009).
74. Pratto et al., *supra* note 36, at 272.
75. *See* Charles Lee, *Confronting Disproportionate Impacts and Systemic Racism in Environmental Policy*, 51 ELR 10207, 10218–22 (Mar. 2021); *see also* Mascarenhas et al., *supra* note 62 (discussing distinct racial and income disparities in hazardous waste facility siting).
76. *See generally* Rothstein, *supra* note 3, at vii; Loewen, *supra* note 3, at 4–5.
77. Pratto et al., *supra* note 36, at 275.
78. *Id.*
79. Sidanius & Pratto, *supra* note 11, at 46–48.
80. *Id.*

world. These socially widespread beliefs or ideas influence and guide the behaviors of individuals, and the gamut of social institutions.[81] Social ideas and beliefs that are most widely held are readily affirmed, reaffirmed, and accepted as truth across social groups.[82] Teachers reinforce them in schools, advertisers use them to sell products, and political leaders appeal to them as traditional values.

Social Dominance Theorists identify two types of beliefs tied directly to social dominance. The first type, hierarchy-enhancing myths and ideologies legitimize social inequities by justifying social inequality and group-based domination through intellectual and moral justifications.[83] Consider the long-held American belief that slavery was acceptable because African people were cursed in the Bible, or that women make great nurses but could not be physicians, or that people are rich because they are hardworking and poor because they are lazy. These, and other myths and ideas, ultimately, justify group-based inequality as a natural phenomenon rather than the consequence of social practices and behaviors. Through these ideas, societies explain why one group prospers and another group suffers.[84]

For example, African Americans, woman, and poor people were expected and directed, historically, to subordinate roles and positions in the United States.[85] This meant that white woman and all African Americans were relegated to subordinated status as workers.[86] The Antebellum system of opportunity in the United States openly relegated different groups to subordinate status and experiences relative to their place in the societies social hierarchy.[87] The Civil Rights Movements rejected many of the social ideas and the explicit and implicit inferiority associated with them, as did the Women's Right Movements.[88] Because dominant social ideas and beliefs are like water to fish or air to mammals, they can be hard to recognize as they reflect what may be considered "common sense" until successfully challenged and socially rejected.

In environmental discussions, this can be seen in a range of ideas or explanations for environmental injustices. One far too common environmental experience of African Americans and Latinos is the proximity of waste facilities to their homes.[89] Although published research establishing this phenomenon dates back four decades,[90] early detractors rejected claims of racial disparity by alleging they were based in flawed research methodologies.[91] Others maintained that facility siting might simply reflect the real estate market and the "natural" way that land use decisions were made in accordance with property values and prices.[92] Based on this idea, People of Color likely moved to neighborhoods with waste facilities because of the lower costs of housing they afforded them.[93] The tenor of these arguments was to encourage governmental decisionmakers and others to ignore racial inequalities in the environmental sphere as a natural consequence of market forces that needed less rather than more intervention.[94] These market forces arguments normalized the racial subordination that People of Color experienced irrespective of their income levels and reduced their racialized group-based exposure to waste facilities and their risks to a series of individual choices as actors in a market.[95] Louisiana has made related claims in a suit against the United States Environmental Protection Agency ("EPA") for investigating complaints of racially discriminatory effects resulting from pollution permits issued by the Louisiana Department of Environmental Protection.[96] The market forces rationale, of course, ignored a century of lawful racial segregation in housing, mortgage financing, and access to capital in addition to historic discrimination in zoning, land use, and planning.[97] In doing so, it also ignored the historic and ongoing racial subordination experienced by communities of color at sites for waste disposal and proffered an idea that reinforced

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *See generally* Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law From 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. Third World L.J. 207, 226–46 (2006) (discussing restricted opportunities that free and enslaved African Americans were provided in Antebellum America); Carole Pateman, The Sexual Contract: 30th Anniversary Edition 116–54 (Stan. Univ. Press, 2018) (examining the subordination of woman in economic opportunities); David R. Roediger et al., The Wages of Whiteness: Race and the Making of the American Working Class 13–14 (4th ed. 2022) (illustrating white workers' understanding of their freedom and opportunity primarily in relation to the enslavement and subordination of African Americans).
86. *See generally* Pateman, *supra* note 85, at 116–54; Roediger et al., *supra* note 85, at 19–47.
87. In Louisiana, for example, free Blacks could be jailed for "regarding themselves" as the equal of whites. *See* Waterhouse, *supra* note 85, at 242–43.
88. *See* Carlton Waterhouse, *Dr. King's Speech: Surveying the Landscape of Law and Justice in the Speeches, Sermons, and Writings of Dr. Martin Luther King, Jr.*, 30 L. & Inequal. 91, 108–09 (2012); Ellen C. DuBois, Woman Suffrage and Women's Rights 33–35 (1998).
89. Mascarenhas et al., *supra* note 62, at 116.
90. *Id.* at 109.
91. "Census tract-level results in SMSAs [Standard Metropolitan Statistical Areas] do not appear to substantially support earlier research suggesting appreciable inequity in TSDF [treatment, storage, and disposal facilities] locations; in fact, they contradict that research." Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 Demography 229, 244 (1994) [hereinafter Demographics of Dumping].
92. *See* Vicki Bean, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 Yale L.J. 1383, 1385 (1994); Kent Jeffreys, *Environmental Racism: A Skeptic's View*, 9 J. Civ. Rts. & Econ. Dev. 677, 682 (1994).
93. Bean, *supra* note 92, at 1388–90. Prof. Vicki Bean raises the possibility without making a final determination, claiming that the widespread effects that had been documented previously require more exacting proof to show racial discrimination.
94. Jeffreys, *supra* note 92, at 689–91.
95. Bean, *supra* note 92, at 1388–90.
96. In *Louisiana v. U.S. Env't Prot. Agency*, No 2:23-cv-00692-JDC-KK (W.D. La. May 24, 2023), Louisiana alleged that EPA's investigation attempted to force them to engage in racial discrimination by addressing racial disparities in pollution exposure in the heavily polluted region of the state popularly known as Cancer Alley. On January 23, 2024, a federal district judge granted Louisiana's request to prohibit EPA from moving forward with further investigation. *See* Hijazi & Lee, *supra* note 23.
97. Bean, *supra* note 92, at 1388–90. Although Professor Bean provides an understated acknowledgement that Market Dynamics may include racial discrimination, environmental justice detractors largely disregarded that acknowledgement and referenced her work as a refutation of prior research and claims of environmental racism and environmental injustice more broadly. *See* John M. Oakes et al., *A Longitudinal Analysis of Environmental Equity in Communities With Hazardous Waste Facilities*, 25 Soc. Sci. Rsch. 125 (1996) (contending that People of Color suffered no disparate exposures to waste facilities but that general population trends best explained residential exposure to facilities). *But see generally* Rothstein *supra* note 3, at xii (examining multiple mechanisms of racial discrimination built into the United States housing market).

the existing social hierarchy as a race-neutral phenomenon free of discrimination.[98] Later research, not only confirmed that race was the most significant variable in determining where waste facilities were located, conclusively refuting the claims about methodological error, but that the disparities were worse than originally shown. Consider the excerpt below:

> [U]sing distance-based measures Mohai and Saha (2007) found that, although non-Whites comprised about 25% of the US population, the percentage of non-Whites living within one mile of a hazardous facility was 40% in 1990. Moreover, the difference between the proportion of non-Whites in host and non-host areas was over 20 percentage points when the distance-based method was applied, compared to the modest 1 to 3 percentage-point differences found when the unit-hazard-coincidence method was applied. This more accurate method effectively indicated that racial disparities around hazardous waste sites were even greater than previously reported in the 1983 GAO and 1987 UCC studies. And it intimated the degree to which a lack of understanding regarding the unequal distribution of environmental burdens by academic researchers and government agencies alike had prejudiced the first two decades of the environmental justice movement in the United States.[99]

Later studies, also refuted claims that disproportionate exposure results from community members moving to contaminated areas and that environmental inequality in the United States resulted from neutral market forces and the choices made by minorities and working class whites.[100]

> In addition to the race versus class debate, the question of who came first, poor communities and communities of color or toxic industry, has been the cause of much misunderstanding in environmental justice communities surrounding the root causes of the issue. In 2015, Mohai and Saha put this debate to rest. Using a national database of commercial hazardous waste facilities sited from 1966 to 1996, they conducted a longitudinal analysis using the distance-based method and concluded that "neighborhood transition serves to attract noxious facilities rather than the facilities themselves attracting people of color and low income populations" . . . In other words, industry has targeted poor communities and communities of color when choosing where to locate its toxic waste sites. (citations omitted)[101]

This Article maintains the assumption that race-neutral market forces determine pollution placement represents a hierarchy-enhancing idea that legitimates the racialized distribution of environmental burdens and benefits.[102]

A set of more explicitly racist ideologies can also be found in the historic development of environmentalism in the United States. Explicit beliefs in white supremacy and economic elitism, discussed in Part IV, influenced early leaders in the environmental movement and their approaches.[103]

The second type of ideology, identified by the Social Dominance Theorists, is hierarchy-attenuating.[104] This describes counter ideologies and social myths that undermine social hierarchy.[105] These ideas help to bolster the demands of subordinate group members for greater social equality.[106] Human rights, egalitarian religious themes, group identity pride, socialism, and feminism each represent hierarchy-attenuating ideologies.[107] These hierarchy-attenuating ideologies, when sustained over time, can disrupt the paradigms of embedded group-based dominance and replace them with notions of group equality. Success is certainly not guaranteed and societal ideologies are prone to contestation and even reversals. This Article argues that the environmental justice frame as applied by scholars and activists, since its inception, represents a vital hierarchy-attenuating idea. By framing environmental inequality grounded in social group identity as environmental racism or environmental injustice, activists and scholars claim that communities of color deserved better treatment from commercial entities, environmental groups, and governmental decisionmakers.[108]

Individuals' discriminatory beliefs and practices work in conjunction with hierarchy-enhancing myths and ideologies to further social dominance.[109] When individual decisions are repeated across a large scale that reflect hierarchy-enhancing beliefs in employment, education, criminality, etc., they cement group-based inequality.[110] The very structure of society supports discrimination against subordinate group members both by dominant group members and by members of the same and other subordinate groups.[111] In contrast, discrimination against dominant group members is difficult to carry out by anyone other than other members of the dominant group. It is like swimming upstream while discrimination against subordinate group members is swimming downstream. Since dominant social norms disfavor subordinate group members, discrimination against them is easily carried out and common. A classic example of how common discrimination can be against subordinate group members is readily found in the context of housing in the United States. Racial discrimination against African Americans in home and real estate financing was routine before its legal prohibition by the Fair Housing Act in 1968. However, despite

98. *See generally* Oakes et al., *supra* note 97.
99. Mascarenhas et al., *supra* note 62, at 114.
100. *Id.* at 115.
101. *Id.*
102. Economic decisions in the United States have reflected race-conscious behavior historically. When economic actors prefer discrimination, the market often accommodates rather than rejects those discriminatory preferences. Consider the discussion of the persistence of racial discrimination in the housing market, *infra* notes 112–14; *see also* Robert Bartlett et al., Consumer-Lending Discrimination in the FinTech Era 21 (Feb. 2019) (unpublished research paper), *available at* https://www.fdic.gov/bank/analytical/fintech/papers/stanton-paper.pdf [https://perma.cc/L7ER-JW68].
103. *See generally infra* note 186.
104. Sidanius & Pratto, *supra* note 11, at 46.
105. *Id.*
106. *Id.*
107. Pratto et al., *supra* note 36, at 275–76.
108. Walker, *supra* note 4, at 66.
109. Pratto et al., *supra* note 36, at 280–82.
110. *Id.* 281–82.
111. *Id.*

its legal prohibition and enforcement, racial discrimination against African Americans has continued to burden African Americans with inequitable lending rates and terms relative to similarly situated and even less-qualified white applicants since its passage.[112] This reflects both institutional bias in the financing system against African Americans and likely individual bias by the actors within the system against African American applicants.[113] Within the logic of the social system, the inequality between dominant and subordinate groups "makes sense." It is routine—"the way things are." Changing that logic in housing has proven quite difficult.[114]

When dominant group members believe themselves the victims of discrimination, it is a rare oddity. Allegations alone garner significant societal attention, discourse, and rhetoric. The debate about affirmative action in the United States and in other countries historically illustrates this. Dominant group members use the considerable resources at their disposal to challenge, undermine, and delegitimatize policies that diminish their dominance. The 20th-century discriminatory immigration laws and racial restrictions on land ownership targeting Asian immigrants who sought to purchase their own farms rather than work for white agriculturalists provides a meaningful historic example.[115] This can also be seen in the pollution-placement theory that polluting facilities are placed along "the path of least resistance."[116] Based on this model of distribution, Black, Indigenous, and People of Color communities along with white working-class communities represent more viable locations (i.e., easier targets) for the placement of locally unwanted land uses.[117] This Article maintains that the relative powerless of communities targeted for the placement and expansion of polluting facilities corresponds to their social subordination within America's social hierarchy.

B. Hierarchy-Related Individual Psychology

Social dominance also functions through individual psychology. At the personal level, Social Dominance Theorists have shown that individual orientation toward hierarchy can be measured by testing a person's Social Dominance Orientation ("SDO").[118] This orientation shows an individual's preference for group-based hierarchy.[119] Empirical research has shown that SDO correlates to individual support for group-based dominance and the governmental and private policies and practices that support it.[120] Persons with high SDOs adhere to hierarchy-enhancing ideologies and believe that group-based dominance is natural and proper based on perceived group-based characteristics.[121] Individuals showing low SDOs, in contrast, adopt hierarchy-attenuating ideologies, hold to more egalitarian beliefs, and challenge the legitimacy of existing hierarchy.[122] These preferences have been found empirically to hold true across the world today.[123]

Over the last two decades, social dominance researchers have connected SDO with numerous ideas and practices of group-based dominance across the world.[124] These studies illustrate the way that individual psychology across group identities connects individuals' beliefs with broader social ideas about group dominance.[125] As a personality trait, SDO identifies how people relate to and support or reject hierarchy-enhancing ideas about groups in their society.[126] A curious aspect of this trait is that it is found among both dominant and subordinate group members.[127] Consequently, subordinate groups will have their share of high SDO members who affirm and support hierarchy-enhancing ideologies.[128] Consider the women who expressed their opposition to women's suffrage on the grounds that women were of inadequate capacity or understanding.[129] High SDO individuals affirm hierarchy and their group's status within it as a natural and proper phenomenon when at the top or at the bottom of the social ladder.[130] These high SDO individuals are most prevalent among dominant groups and low SDO individuals are most common among subordinate groups.[131] The trait is correlated to an individual's group-based identity and personality, but also results from "socialization into specific doctrines, exposure to traumatic life experiences, multicultural experiences, observing the competence of members of denigrated groups, and education."[132] Most recently, scholars have linked SDO levels with environmentalism across a range of beliefs and behaviors.[133] Persons with higher SDOs across

112. *See* William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, *in* The Geography of Opportunity: Race and Housing Choice in Metropolitan America 101–03 (Xavier de Souza Briggs ed., 2005); Pratto et al., *supra* note 36, at 134–39; *see also* Austin P. Steil et al., *The Social Structure of Mortgage Discrimination*, 33 Hous. Stud. 759 (2018).

113. *See* Apgar & Calder, *supra* note 112; *see also* Steil et al., *supra* note 112; Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Mortgage-Approval Algorithms*, The Markup (Aug. 25, 2021), https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms [https://perma.cc/7GYB-S6VP].

114. *See generally* Martinez & Kirchner, *supra* note 113. Importantly, a recent study revealed widespread discrimination in housing appraisals—a previously unrecognized means of racial discrimination against African American and Hispanic home sellers. Jonathan Rothwell & Andre M. Perry, *Biased Appraisals and the Devaluation of Housing in Black Neighborhoods*, Brookings Inst. (Nov. 17, 2021), https://www.brookings.edu/articles/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/ [https://perma.cc/M4M5-7GY3].

115. *See generally* Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B.C. Third World L.J. 37 (1998).

116. Robin Saha & Paul Mohai, *Historical Context and Hazardous Waste Facility Siting: Understanding Temporal Patterns in Michigan*, 52 Soc. Probs. 618, 619 (2005) (internal quotations omitted).

117. *Id.*

118. Pratto et al., *supra* note 36, at 281–87.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Sidanius & Pratto, *supra* note 11, at 52.

128. *Id.*

129. *See* Livia Gershon, *Women Against Women's Suffrage*, JSTOR Daily (July 6, 2023), https://daily.jstor.org/women-against-womens-suffrage/ [https://perma.cc/6F7H-7N27].

130. Pratto et al., *supra* note 36, at 281.

131. *Id.* at 288.

132. *Id.* at 287–95.

133. *See* Fatih Uenal et al., *Social and Ecological Dominance Orientations: Two Sides of the Same Coin? Social and Ecological Dominance Orientations Predict Decreased Support for Climate Change Policies*, 25 Grp. Processes &

different countries show less support for environmental protection efforts and organizations.[134] This correlates with beliefs about human dominance over other forms of life and the rest of nature.[135]

C. *Hierarchy-Related Institutional Practices*

Beyond the myths and ideologies rationalizing social hierarchy and individual beliefs, Social Dominance Theory also points out institutional practices and behaviors that reproduce and maintain hierarchy.[136] By deploying myths and ideologies, institutions themselves function as either hierarchy-enhancing or hierarchy-attenuating forces.[137] Hierarchy-enhancing institutions reproduce and maintain social hierarchy through their allocation of more positive social value to dominant groups and more negative social value to subordinated groups.[138] Financial institutions, corporations, police, and criminal justice systems are classic examples worldwide.[139] In particular,"[c]riminal justice systems are viewed as important mechanisms of group dominance and control because, compared to dominants, subordinates are overrepresented in prison cells, torture chambers, and execution chambers across many different societies, even after accounting for differential rates of criminality between groups."[140] Hierarchy-enhancing institutions thus do the "heavy lifting" in the day-to-day production and reproduction of dominance.[141] These institutions distribute positive and negative social value across societies.[142] While both dominant and subordinate group members can interact with these institutions, the institutions routinely produce disparate amounts of positive or negative social value to dominant and subordinate groups.[143]

Accordingly, hierarchy-enhancing institutions use hierarchy-enhancing ideologies to explain and justify their disproportionate distribution of positive social value and benefits to dominant group members. Consider the notion of credit worthiness and the prior example of racial discrimination against African Americans in securing mortgage loans. Since the Fair Housing Act of 1968, financial institutions have been legally required to lend money in a racially non-discriminatory way based on the credit worthiness of applicants.[144] Banks and mortgage companies, ostensibly, make decisions based on "credit worthiness." However, investigations and civil rights cases across 60 years repeatedly reveal that white lenders with the same and even lower financial profiles obtain lower rates than their African American counterparts based on their "credit worthiness."[145] This reflects the way that financial institutions use a hierarchy-enhancing ideology to produce hierarchy-enhancing outcomes for dominant and subordinate group members. Without fanfare or vitriol, hierarchy-enhancing institutions routinely and regularly replicate social hierarchy though what are pronounced as "fair" and "objective" criteria.[146] In the United States, communities facing environmental injustices, likewise, bear the burdens of societal pollution through siting and permitting criteria used by permit applicants, EPA and their state counterparts, and local governments actors. Although the disproportionate location of polluting facilities in Black, Indigenous, and People of Color communities seemingly results from a host of "race-neutral" decisions, these organizations individually and collectively act as hierarchy-enhancing institutions by creating and maintaining the disproportionate pollution exposure faced by Black, Indigenous, and People of Color and white working-class communities.[147]

In contrast, hierarchy-attenuating institutions provide disproportionate positive social value to members of subordinate groups.[148] Religious organizations aiding the poor, civil and human rights organizations, and welfare organizations are all hierarchy-attenuating institutions.[149] Grassroots and other organizations addressing environmental injustices fall squarely within these ranks. This Article maintains that environmental organizations that ignore social inequality may further status quo injustices through their neglect or ignorance of the ways that social inequality is created and reproduced. In the same way that animals

Intergroup Rels. 1555 (2021); Taciano L. Milfont et al., *On the Relation Between Social Dominance Orientation and Environmentalism: A 25-Nation Study*, 9 Soc. Psych. & Personality Sci. 802 (2018).

134. *See generally* Milfont et al., *supra* note 133.
135. *Id.* at 810–11.
136. Pratto et al., *supra* note 36, at 276–78.
137. *Id.*
138. *Id.*
139. *Id.* at 276; *see* also Sidanius & Pratto, *supra* note 11, at 129.
140. Pratto et al., *supra* note 36, at 276 (citation omitted).
141. *Id.* at 276–78.
142. *Id.*
143. *See id.* at 277–78; *see also* Apgar & Calder, *supra* note, at 112 (the historic and ongoing racial discrimination in the U.S. housing market provides a telling example, as discussed above, in addition to the historic case of discrimination against African American farmers by the U.S. Department of Agriculture ("USDA") in seeking loans).
144. *See* Apgar & Calder, *supra* note 112, at 101–03; *see also* Steil et al., *supra* note 112, at 3–4.
145. *See* Apgar & Calder, *supra* note 112, at 101–03; *see also* Steil et al., *supra* note 112, at 3–4.
146. Sidanius & Pratto, *supra* note 11, at 128.

> Covert institutional discrimination is the discriminatory method of choice within societies with democratic and egalitarian pretensions for at least two reasons. First, this technique generates differential allocations to dominants and subordinates while still maintaining the fiction of evenhandedness and fairness. Second, because the discriminatory nature of these covert processes is often very subtle and difficult to prove, both dominants and subordinates are often not even aware that discrimination has actually taken place. As a result, it is difficult for subordinates to employ collective action to bring this discrimination to an end.

Id.

147. Eduardo Bonilla Silva explains similar phenomena as expressions of colorblind racism. "Much as Jim Crow racism served as the glue for defending a brutal and overt system of racial oppression in the pre-Civil Rights era, colorblind racism serves today as the ideological armor for a covert and institutionalized system in the post-Civil Rights era." Edward Bonilla-Silva, Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States 3 (2010). *See also* Yvette Cabrera et al., *EPA Promised to Address Environmental Racism. Then States Pushed Back.*, Ctr. for Pub. Integrity (Oct. 25, 2023), https://publicintegrity.org/environment/pollution/environmental-justice-denied/environmental-justice-epa-civil-rights-story/ [https://perma.cc/S5MX-UM5H] (discussing state resistance to EPA efforts to address racial disparities in pollution exposure under Title VI of the Civil Rights Act of 1964); *see also* Waterhouse, *supra* note 73, at 81–82 (discussing courts' rejection of race-based environmental discrimination claims using narrow perspectives of what constituted racial discrimination).
148. Pratto et al., *supra* note 36, at 276.
149. *Id.* at 277.

experience distinct impacts upon them from human activity based on their location and ecosystems, human communities experience the impacts of pollution differently based on their locations and social ecosystems, as well.[150] For example, emissions trading systems that lower overall pollution may prolong or exacerbate adverse pollution impacts in communities where older facilities continue to operate with less-stringent technological requirements through purchasing emissions allowances on the market.[151]

When institutions follow ostensibly neutral practices that reinforce social hierarchy, they further social inequality. In the environmental context, "porous environmental protection" results from the neutral implementation of environmental laws that ignore cumulative impacts and the concentration of risks borne by overburdened and vulnerable communities.[152] Neglecting the inequities experienced by communities carrying disproportionate environmental burdens in pursuit of a greater good is a recipe for continued environmental injustice. Accordingly, this Article recognizes that a shift to environmental protection grounded in social equity could be difficult for many environmental organizations who have not historically focused on integrating social equity into their environmental advocacy. However, the last half-century has revealed that neutral universal environmental protection efforts have failed to protect all communities equally and adequately. By connecting the sustainability insights provided by *Our Common Future* with the analysis developed by Social Dominance Theory, it becomes apparent that appreciating both the destruction and protection of nature are social enterprises that reflect the hierarchy maintained between humans within a given society and the hierarchy maintained between humans and the rest of nature. Ignoring the social dominance within human society and its consequences misses the commonality shared between the human communities and the rest of the natural world threatened and harmed by unsustainable development and destructive ecological practices.

Moreover, it forfeits the opportunity to build and enlist allies and additional protectors of natural spaces who can personally relate to the destructive practices and the harm they cause. To produce environmental justice, businesses, governmental offices, and nonprofit organizations must cease functioning as hierarchy-enhancing institutions that provide disproportionate positive social value and benefits to dominant groups. Instead, they need to become hierarchy-attenuating organizations and institutions that provide greater environmental protection and benefits to the communities most threatened, at risk, and harmed by climate change, industrial operations, and pollution.

Social dominance functions at the ideological, institutional, and individual levels.[153] Across these levels, the prevailing systems of belief and reasoning of society itself perpetuate dominance.[154] The consequence is that institutions and individuals readily replicate dominance without thinking, while challenging dominance requires social participants to make waves and buck systems that usually come at some cost.[155] This asymmetrical relationship grounds and cements hierarchy.[156] Institutions committed to traditions and policies that are "hierarchy-neutral" routinely maintain and perpetuate hierarchy as a direct result. Based on the preceding text, this Article contends that Social Dominance Theory has significant ramifications for the development and implementation of environmental law and policy. Both profit-driven and nonprofit organizations committed to sustainability can gain valuable insight into the creation and development of sustainable projects and policies by examining how they perpetuate or alleviate existing disparities in environmental quality. Government actors can also assess how their policies further or limit disparate environmental burdens faced by the communities they are charged to protect. The state of New Jersey's Environmental Justice Law mentioned above represents an important legislative effort in this regard.[157] In order to better protect overburdened communities, the law directs the state's environmental protection agency to consider disproportionate pollution exposures when granting pollution permits. This statute, discussed further below, rejects the environmental decisionmaking approach that has created overburdened communities to provide better environmental protection for the state's residents.[158]

Historically, law has supported and reinforced racial, gender, national origin, and sexual identity-based discrimination through explicit legislative enactments in some cases and despite constitutional and statutory prohibitions to the contrary in others.[159] Ironically, throughout United States history, lawyers have also played significant roles in challenging doctrines, policies, and practices of neglect, exclusion, and devaluation based on those same identity constructs.[160] Environmental law practitioners and policymakers today can fit within either historic paradigm. Through their personal actions and the actions of their institutions, they can approach their practice in a way

150. *See, e.g.*, Marcus Strom, *Human Activity Forces Animals to Move 70 Percent Further to Survive*, Uni. of Sydney (Feb. 2, 2021), https://www.sydney.edu.au/news-opinion/news/2021/02/02/Human-activity-forces-animals-move-further-to-survive-ecology-hunting.html [https://perma.cc/CD23-QJM9].

151. *See* Kristoffer Tigue, *Why Do Environmental Justice Advocates Oppose Carbon Markets? Look at California, They Say*, Inside Climate News (Feb. 25, 2022), https://insideclimatenews.org/news/25022022/why-do-environmental-justice-advocates-oppose-carbon-markets-look-at-california-they-say/ [https://perma.cc/V59X-HPYE].

152. See discussion *infra* Part II.

153. *See* Pratto et al., *supra* note 36, at 275.

154. *Id.* at 275–76.

155. *Id.* at 277.

156. *Id.*

157. N.J. Stat. Ann. §§ 13:1D–157 to 13:1D–161 (West 2020).

158. *See generally id.*

159. *See generally* Waterhouse, *supra* note 85; Brandon J. Murrill, Cong. Rsch. Serv., LSB10897, The Nineteenth Amendment and Women's Suffrage Part 2: The Founding Era and the Civil War 1 (2023) (noting that "[s]everal state constitutions in existence at the time of the Founding specifically limited suffrage to men"); Aoki, *supra* note 115 (examining the state restrictions limiting land ownership based on racial status); Lawrence v. Texas, 539 U.S. 558, 558, 563–79 (2003) (holding that a "Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause").

160. For example, the NAACP Legal Defense Fund, Mexican American Legal Defense Fund, Lambda Legal, and the National Women's Law Center, all legal organizations, have played critical roles in advancing opportunities for People of Color and women, respectively.

that allocates disproportionate access to environmental and ecological goods to dominant groups or subordinate groups. There is no neutral ground.

In the United States, race and class hierarchy independently and jointly frame the environmental quality of the places where people live, work, and play.[161] Moreover, the distribution of the benefits and burdens of pollution flow inversely along the axes of race and class hierarchy. The benefits of activities that cause pollution run up the social hierarchy to dominate groups and the burdens run down to subordinate groups.[162] White Americans enjoy a disproportionate share of environmental benefits—access to green spaces, parks, cleaner water and air.[163] Further, white communities lead in the consumption of the goods and services that cause pollution, while trailing in the burden of exposure and harm the pollution causes.[164] In a study on the subject: "The researchers found that air pollution is disproportionately caused by white Americans' consumption of goods and services, but disproportionately inhaled by Black and Hispanic Americans."[165] The research revealed that "Blacks and Hispanics on average bear a 'pollution burden' of 56% and 63% excess exposure, respectively, relative to the exposure caused by their consumption."[166] In the context of socioeconomic status and climate change in the United States, research indicates that "low-income communities disproportionately bear the consequences associated with climate change despite contributing to it far less compared to groups that financially benefit from industries that fuel warming."[167] Globally, research shows that "The richest 1% of the world's population produced as much carbon pollution in 2019 as the five billion people who made up the poorest two-thirds of humanity."[168] In the United States, the report found that:

> [A] person in the top 1% emits 25 times as much carbon pollution as a person in the bottom 50%. Additionally, while people in the bottom 50% of income reduced their emissions by more than a fifth over the past 30 years, those in the top 1% have not reduced their average emissions at all.[169]

The race and class-neutral approaches to environmental protection that have largely defined the last half-century of commercial, governmental, and nonprofit environmental institutions have failed to prevent or redress the environmental injustice. Rather, these approaches insulate and further replicate environmental disparities along the nation's racial and socioeconomic status hierarchy.[170] To reverse this reality and promote environmental justice, environmental institutions will have to shift their focus to protecting the most polluted, overburdened, and vulnerable communities.

IV. Hierarchy-Attenuating Environmental Institutions

The aforementioned disparities in pollution exposure flow from what this Article identifies as "porous environmental protection."[171] Porous environmental protection reflects the gaps that People of Color, despite socioeconomic status, and lower-income groups across racial and ethnic backgrounds experience. Porous environmental protection means that communities primarily comprised of subordinate group members suffer more pollution exposure and carry more health risks than dominant group members. As noted above, commercial, governmental, and nonprofit environmental protection and advocacy organizations produce and reproduce this phenomenon, through their neglect of the racial and socioeconomic disparities in the pollution exposure and resulting harms that communities experience.

To reverse this, environmental institutions can use the Social Dominance Theory lens to assess their role in establishing environmental justice. By examining whether their policies and programs provide more environmental value to overburdened or socially disadvantaged communities than to those comprised of the most privileged members of society, organizations can measure where they fall on the spectrum of hierarchy-enhancing and hierarchy-attenuating environmental institutions. Through the assessment of their projects, legislative and regulatory proposals, and commitments they can determine whether they inadvertently perpetuate or reverse the environmental injustice norms that have dominated the United States over the last century.[172]

New Jersey's Environmental Justice Law creates a unique opportunity for the state's Department of Environmental

161. For example, consider the racial and socioeconomic status disparities in exposure and harm, including premature death, from fine particulates. *Disparities in the Impact of Air Pollution*, Am. Lung Ass'n, https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities [https://perma.cc/5SL6-Z27Z].

162. In the climate context, research reveals that high-income communities disproportionately produce greenhouse gases. Isabelle Chapman, *Wealthy American Homes Have Carbon Footprints 25% Higher Than Low-Income Residences, Study Says*, CNN (Mar. 20, 2020), https://www.cnn.com/2020/07/20/us/wealthy-american-homes-higher-carbon-footprints-trnd/index.html [https://perma.cc/K4M9-9XDD] (discussing a University of California, Berkeley, study that found "[a]ffluent neighborhoods produce higher emissions, and most neighborhoods with low emissions were below the poverty level," and that "[s]uburbs often have higher greenhouse gas emissions than US inner cities").

163. *See* Rowland-Shea et al., *supra* note 62.

164. Jonathan Lambert, *Study Finds Racial Gap Between Who Causes Air Pollution and Who Breathes It*, NPR (Mar. 11, 2019), https://www.npr.org/sections/health-shots/2019/03/11/702348935/study-finds-racial-gap-between-who-causes-air-pollution-and-who-breathes-it [https://perma.cc/96CX-SDM7].

165. *Id.*

166. Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PNAS 6001, 6001 (2019).

167. Bella Isaacs-Thomas, *This Study Calculated the Carbon Emissions of Getting Rich*, PBS NewsHour (Aug. 29, 2023), https://www.pbs.org/newshour/science/this-study-calculated-the-carbon-emissions-of-getting-rich [https://perma.cc/FB3G-3K2U].

168. Press Release, Oxfam, Richest 1% Emit as Much Planet-Heating Pollution as Two-Thirds of Humanity (Nov. 19, 2023) https://www.oxfamamerica.org/press/press-releases/richest-1-emit-as-much-planet-heating-pollution-as-two-thirds-of-humanity/ [https://perma.cc/FVU6-DNAC].

169. *Id.*

170. See discussion *supra* Part III.

171. *See generally* Walker, *supra* note 4.

172. *See generally* Dorceta E. Taylor, *American Environmentalism: The Role of Race, Class and Gender in Shaping Activism 1820-1995*, 5 Env't & Race, Gender, Class Issues 16 (1997).

Protection to reverse the nation's historic norm of providing disproportionate environmental burdens to working-class white and Black, Indigenous, and People of Color communities and environmental benefits to wealthier and whiter communities.[173] Historically, these disparities have resulted from targeting overburdened communities in some instances and denying or ignoring the adverse effects of pollution concentrations on them in others.[174] Using a vulnerability analysis, scholars argue that governments can focus their resources and attention to communities that need it the most to promote environmental justice.[175] In this way, "the places that score highly on environmental justice vulnerability indexes should be given special consideration in monitoring, permitting, and enforcement as well as public involvement and economic development."[176] To be clear, the "special consideration" called for represents the necessary steps to provide equal protection to communities otherwise suffering from cumulative environmental exposures and risks that environmental law and policies have otherwise neglected. Rather than an unfair advantage, this Article proffers that these efforts would at best counterbalance the disparate share of pollution exposure and harm wrought over decades by confronting a long history of "porous environmental protection" by seeing that all communities are truly protected.[177]

Because of the long legacy of environmental harms and pollution, discussed above, governments have a long road to travel with overburdened communities to address the adverse ecological and health consequences caused by decades of environmental injustice.[178] Some of which, like the long-term health effects of lead exposure of children and the disease and premature deaths precipitated by air pollution, cannot be reversed.[179] Moving forward, however, governmental actors can attenuate or diminish the relevance of social hierarchy in environmental protection by preventing harmful pollution exposures, addressing legacy pollution, promoting green infrastructure, and supporting community adaptation to climate change. When governments protect the most burdened people and at-risk communities, they foster environmental justice by ensuring that the positive social value of a clean environment becomes available irrespective of social location. This approach allows them to see that clean air, clean water, pollution free land, access to greenspaces, climate resilience, and sustainable development represent shared social goods that all should enjoy rather than a privilege reserved for dominant social groups.

Corporations and businesses can also benefit from the insights of Social Dominance Theory in their relationship to the communities where they operate. Sustainability extends far beyond building construction and natural ecosystem impacts.[180] Businesses that reflect on their social impacts can deeply examine the community benefits that they provide, the land they occupy, the labor experience involved in the construction and development of their operations, and the employment and career opportunities they provide to community members. As the Corporate Knights' annual ranking criteria shows, sustainability requires a robust social and environmental assessment.[181] Businesses' sustainability analysis should include the balance of benefits they create and receive from the communities that host them. When host neighborhoods and communities receive the burden of pollution, truck traffic, odors, noise, and the risks of chemical fires and explosion in exchange for a handful of low-wage job opportunities, businesses engage in unsustainable practices. Leadership in Energy and Environmental Design ("LEED")-certified buildings and ecologically friendly construction and energy use alone fall short of the demands of sustainability. Without the thoughtful use of social equity analyses in the collaborative creation of community benefits agreements and labor practices, businesses will replicate the long legacy of environmental degradation and exploitative community relations that overburden Black, Indigenous, People of Color, and working-class white communities with localized harms while redirecting benefits to CEOs, owners, and shareholders who reside in cleaner, greener communities.[182]

Environmental organizations have played a critical role in shaping environmental protection in the United States.[183] However, a neglect of local community needs dates back three decades for some:

173. Mascarenhas et al., *supra* note 62, at 116.

174. *See generally* Mascarenhas et al., *supra* note 62; Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*, 41 Harv. Env't L. Rev. 493, 514–15 (2017); Press Release, *supra* note 62, at 2–3; Lee, *supra* note 75, at 10208; Walker, *supra* note 4, at 12–13; David Konisky, Failed Promises: Evaluating the Federal Government's Response to Environmental Justice 6–7 (2015); Jarratt-Snider & Nielsen, *supra* note 4; Isaacs-Thomas, *supra* note 168; *see* Rowland-Shea et al., *supra* note 62 (noting the disproportionate access to natural and green spaces available to white and upper class communities).

175. "[T]he 'science' of social vulnerability-identifying and mapping the varied and complex factors giving rise to vulnerable communities-can be effectively used to prod environmental regulators and local officials to be more responsive to our most vulnerable communities." Sheila Foster, *Vulnerability, Equality and Environmental Justice: The Potential and Limits of Law*, *in* The Routledge Handbook of Environmental Justice 146 (Ryan Holifield et al. eds., 2018).

176. *Id.* at 146.

177. *See generally* Lee, *supra* note 75, at 10209–10 (discussing how governments can operationalize disparate impact analysis to address cumulative impacts).

178. See discussion *supra* Parts II, III.

179. *See* Benfer, *supra* note 175; Am. Lung Ass'n, *supra* note 162; *see* Robin Morris Collin & Robert Collin, *Environmental Reparations*, *in* The Quest for Environmental Justice: Human Rights and the Politics of Pollution 209–10 (Robert D. Bullard ed., 2005), for a discussion of environmental preservation districts and other efforts as forms of redress for historic environmental injustices. A full examination of the steps needed to address legacy pollution, build green infrastructure, and adapt to climate change falls outside the scope of this Article.

180. *See generally* Part II, *supra*.

181. Kauflin, *supra* note 31.

182. *See* Tessum et al., *supra* note166; Lambert, *supra* note 164.

183.

> The emergence of strong national environmental public interest organizations during this period also fueled the explosion in environmental lawmaking activities. New organizations, such as the Environmental Defense Fund and Natural Resources Defense Council, joined longstanding, but recently invigorated entities, such as the Sierra Club, National Audubon Society, and National Wildlife Federation, to push for tougher environmental laws. These organizations prodded through lobbying, lawsuits, legislative, executive, and judicial decision-makers to be more responsive to environmental concerns.

Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in*

> While 46 percent of organizations' budgets were spent on fish, wildlife, land preservation, and wilderness, and 16 percent on water conservation, only 8 percent of the budgets were being spent on toxic waste management and 4 percent on land use planning.[184]

At the same time, environmental racism claims were being directed toward these organizations who were accused of being "isolated from the poor and minority communities" who "were the chief victims of pollution."[185] Although some of these organizations' founders and environmentalist icons espoused overtly racist views and other hierarchy-enhancing ideologies and legitimating myths, an increasing number are directing more attention toward environmental and climate justice issues facing overburdened communities.[186] To strengthen their efforts, Social Dominance Theory provides a valuable tool to assist them in directing resources and policy development. Implementing Social Dominance Theory insights would allow them to assess their internal hiring processes and opportunities for leadership considering historic and ongoing concerns raised about organizational staff, leadership, and priorities.[187] By evaluating the backgrounds of organizational leadership and the need to integrate environmentalists from working class and Black, Indigenous, and People of Color communities overburdened with pollution exposure and climate vulnerability, organizations can build a staff with the experience and expertise needed to support a new environmental protection paradigm.[188] Further, hiring staff with experience and expertise in understanding and addressing racial discrimination and social inequality more broadly will play an important role in helping organizations develop the expertise they need to be effective in addressing social hierarchy in environmental protection.

Along with their staff and leadership commitments, organizations will benefit from Social Dominance Theory's insights into the social ideologies that support dominance.[189] The conservationist legacy includes legitimating myths about white supremacy and class superiority that supported and reinforced race and socioeconomic status hierarchy.[190] Further, some historic wilderness ideologies represented ways to escape urban life and social concerns by retreating to nature.[191] Ideologies grounded in the elitism and racism of past environmentalists require revision to guide organization members in ways to address the environmental challenges of the present and future which inextricably link human thriving with that of the non-human natural environment.[192]

The mainline environmental nonprofit organizations can function as hierarchy-attenuating institutions by centering the needs of overburdened and vulnerable communities. Through long-term commitments to local communities overburdened by pollution and partnerships with grassroots environmental justice organizations, these large groups can better inform their regulatory and legislative policy goals and engagements while supporting improved environmental outcomes for local communities and amplifying their voices. Social Dominance Theory enables group leaders to assess how their efforts affect the distribution of environmental good and bad across the nation's social landscape. From policy support to resource commitments, these organizations can advance utilitarian approaches that sacrifice overburdened and vulnerable communities or invest in truly sustainable approaches that center equity and the needs of local communities. This does not require that they disregard wilderness nor the non-human environment. Instead, it reflects sustainability, which requires social equity.[193]

Mainline environmental organizations can also benefit from the research conducted by Social Dominance Theorists regarding individual attitudes. Beyond institutional issues, Social Dominance Theory also helps us understand the attitudes and beliefs of people who explicitly reject environmental concerns as meaningful considerations.[194] Recent research has mapped high social dominance orientation at the individual level to decreased support for environmental concerns and organizations that address them.[195] These global research results indicate that concern

the United States, 20 Va. Env't L.J. 75, 80 (2001); *see also* Taylor, *supra* note 172.

184. Taylor, *supra* note 172, at 49.

185. Philip Shabecoff, *Environmental Groups Told They Are Racists in Hiring*, N.Y. Times (Feb. 1, 1990), at A20.

186. *See* Jedediah Purdy, *Environmentalism's Racist History*, New Yorker (Aug. 13, 2015), https://www.newyorker.com/news/news-desk/environmentalisms-racist-history [https://perma.cc/9Q7A-2EMC]; Darryl Fears & Steven Mufson, *Liberal, Progressive—And Racist? The Sierra Club Faces Its White-Supremacist History*, Wash. Post (July 22, 2020), https://www.washingtonpost.com/climate-environment/2020/07/22/liberal-progressive-racist-sierra-club-faces-its-white-supremacist-history/ [https://perma.cc/LA6G-LXN9]; *see* Press Release, Ctr. for Am. Progress, Environmental Justice and National Environmental Groups Advance a Historic Joint Climate Platform (July 18, 2019), https://www.americanprogress.org/press/environmental-justice-national-environmental-groups-advance-historic-joint-climate-platform/ [https://perma.cc/6LUD-8PWV]. These relationships can still be fraught and require consistency and a long-term commitment as community members and environmental justice advocates have historically criticized groups for "elitism, racism, and valuing wilderness over people." Deeohn Ferris, *Environmental Justice: Moving Equity From Margins to Mainstream*, Nonprofit Q. (Aug. 15, 2019), https://nonprofitquarterly.org/environmental-justice-moving-equity-from-margins-to-mainstream/ [https://perma.cc/D4K2-6ZWM].

187. "Environmentalists that won't embrace fairness for people of color, women, and different cultures in the workplace, and the inclusion of community voices and concerns, face irrelevancy as these populations and younger generations gain numbers and power." Ferris, *supra* note 186.

188. "Organizations must change on the inside before they can change on the outside . . . ." *Id.*

189. *See generally* Part III, *supra*.

190. *See* Purdy, *supra* note 186.

191. "Because these men were financially secure, they were free to embark on outdoor expeditions at will. They sought out the wilderness as an antidote to the ills of the urban environment." They did not include issues relating to the workplace or the poor in their agenda. They were basically middle class activists procuring and preserving environmental amenities for middle class benefits and consumption." Taylor, *supra* note 172, at 19.

192. Brundtland Report, *supra* note 25, at Part I, ch. 1, ¶¶ 1–9.

193. "Conservation of living natural resources—plants, animals, and microorganisms, and the non-living elements of the environment on which they depend—is crucial for development." *Id.* at Part II, ch. 6, ¶ 1.

194. *See* Uenal et al., *supra* note 133; Milfont et al., *supra* note 133.

195. Numerous studies have shown that high social dominance orientation correlates with less concern for the environment, low support for policies that protect the environment, and unwillingness to provide financial or other support to organizations addressing environmental issues. Milfont et al., *supra* note 133.

for the environment correlates with a lower social dominance orientation.[196] Studies connect the belief in human dominance over nature and animals with group-based dominance between humans:

> Theoretically, this confirms a link between support for social inequality among social groups and support for legitimizing myths justifying human dominance over nature, especially when environmental exploitation helps sustain and widen the gap between dominant and disadvantaged groups in society.[197]

Using the group-based analysis discussed above, Social Dominance Theory illustrates how the instrumentalization of nature/animal life relates to the exploitation of subordinate groups under social hierarchies.

The neglect and disregard shown likely flows from the hierarchy-enhancing ideologies placing humans over nature within many human societies and cultures. Ideologies that instrumentalize all non-human life to increase human wealth and well-being also reflect a disregard for nature and other creatures beyond their use value.[198] Likewise, beliefs that place human beings at the pinnacle of creation with little or no relationship or duty to the natural world justify and legitimate the abuse of animals and other creatures for human pleasure and gain. As an example, consider the rise of factory farming and the special protections provided, by some state legislatures, to decrease public scrutiny of industry practices and to hold businesses accountable for adverse impacts to community residents, much less the animals themselves.[199] Using these insights, environmental organizations can connect their membership recruitment efforts and campaigns in ways that connect the concern for communities with concern for the rest of nature. As a resource for current and future generations and based on its intrinsic value, non-human aspects of nature require protection and consideration. When organizations connect that protection with human well-being and the threats from pollution and climate change, they make the vital connection for the creation and protection of vulnerable communities, species, and wilderness that undergirds a sustainable future.

V. Conclusion

Social Dominance Theory provides a necessary and essential perspective to environmentalism and environmental protection. Environmental policies that ignore the inequities within and across societies cement injustice and group-based social hierarchies providing "porous environmental protection." They are not neutral but make up the fundamental practices that ground group-based discrimination in the allocation of environmental resources like clean air, clean water, and ready access to greenspaces. As *Our Common Future* noted nearly four decades ago, sustainability requires social equity to succeed.[200] Accordingly, sustainable practices in commercial, governmental, and environmental organizations should include institutional priorities that attend to the environmental threats facing the most vulnerable and least resilient communities. Recognition of vulnerability and risk in the human population relates to appreciation for the risks and vulnerabilities environmental decisionmaking has on non-human populations as well. The commitment to protecting subordinated groups of people, animals, and the natural environment is essential to moving toward sustainable environmental practices.[201] To do so, institutional change is required. As *Our Common Future* notes:

> The integrated and interdependent nature of the new challenges and issues contrasts sharply with the nature of the institutions that exist today. These institutions tend to be independent, fragmented, and working to relatively narrow mandates with closed decision processes. Those responsible for managing natural resources and protecting the environment are institutionally separated from those responsible for managing the economy. The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must.[202]

Understanding this set of relationships is central to framing and achieving sustainable environmental protection. Further, equity rests at its core rather than on its fringes. In this context, equity means adopting a hierarchy-attenuating approach to environmentalism and environmental protection. Institutions that adopt it will work to diminish the hierarchy humans impose on one another as well as the hierarchy they impose on nature. Ultimately, sustainable environmental protection and environmentalism replaces practices and policies that distribute environmental burdens and benefits in accordance with the nation's existing social hierarchy with those that address climate change, provide comprehensive environmental protection, and enhance environmental quality for vulnerable and overburdened communities to establish environmental protection for all.

196. *Id.*
197. *Id.*
198. *Id.* at 810.
199. *See generally* Ji-Young Son et al., *Distribution of Environmental Metrics for Exposure to CAFOs in North Carolina, USA*, 195 Env't Rsch. 110862 (2021) (finding disparate impacts from factory farms based on race and income); Pamela Fiber-Ostrow & Jarret S. Lovell, *Behind a Veil of Secrecy: Animal Abuse, Factory Farms, and Ag-Gag Legislation*, 19 Contemp. Just. Rev. 230 (2016) (discussing the legislative protection afforded facility operators and its consequences).
200. Brundtland Report, *supra* note 25, at Part I, ch. 2, ¶ 3.
201. *See id.* at Part I, ch. 2, ¶ 9–13.
202. *Id.* at Part III, ch. 12, ¶ 10.

GHOSTS OF COLD WARS PAST: AN ANALYSIS OF NUCLEAR REGULATORY COMMISSION AUTHORITY OVER LONG-LASTING NUCLEAR WASTE

Christine Allen*

ABSTRACT

The ghost of uranium mills past—left behind by companies who profited from the Cold War atomic race—haunts residents of the American West. Communities and residents are subjected to toxic air, soil, and water pollution decades after the uranium mill boom and bust. Companies must now face the daunting task of removing uranium mill pollution. However, some companies claim that cleanup of their former mill sites is not technically feasible. Residents of Milan, New Mexico, live in the shadow of the former Homestake Mine and have experienced high rates of pollution-related cancer and illness for decades. The Homestake Mining Company has promised to clean up remaining waste for decades and continues to struggle to do so. To rid itself of a ghost of its own making, the Homestake Mining Company is currently seeking permission from the Nuclear Regulatory Commission ("NRC") to walk away from the site without completing cleanup or fully addressing residents' concerns. A key component of Homestake's plan includes home buyouts for pennies on the dollar, which residents claim leave them in worse financial state than before. This process is authorized in part by the Uranium Mill Tailings Radiation Control Act ("UMTRCA"). The Act permits companies responsible for waste to request alternate concentration limits ("ACLs") for pollution levels. These ACLs allow companies to request lower cleanup standards before sites are transferred for perpetual monitoring to the Department of Energy. This Note argues that the NRC should use its rule promulgating authority under UMTRCA to enforce regulations that would require stricter cleanup procedures, including a good-faith home buyout bargaining requirement and higher contingency fees to be paid by polluters.

Radioactive ghosts of the Cold War Era continue to linger over the American landscape 50 years later. The United States prioritized radioactive research and materials production as part of a larger energy and national security focus from the start of the Cold War[1] until the 1970s.[2] Uranium milling—the process of refining uranium ore for atomic uses—was central to the production of uranium concentrate and yellowcake uranium needed for United States atomic policy.[3] However, those behind the atomic energy push did not adequately con-

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1. Cody Phillips, *What's Mine Is Yours: An Analysis of the Federal Laws Used to Compensate the Navajo Nation and Remediate Abandoned Uranium Mines and Mills on the Reservation*, 32 Colo. Nat. Res. Energy & Env't L. Rev. 75, 76 (2021).
2. Lance Larson, Cong. Rsch. Serv., R45880, Long-Term Federal Management of Uranium Mill Tailings: Background and Issue for Congress 1 (2021).
3. *Id.*

sider the invisible danger created by radiation released from decaying uranium. As health and environmental risks associated with radiation increased, the U.S. Congress passed the Uranium Mill Tailings Radiation Control Act ("UMTRCA") to address pollution associated with tailings and other fine particulate matter remaining after the milling and refining process.[4]

Despite the passage of UMTRCA to address pollution concerns, over 250 million tons of uranium milling waste remain scattered across the landscape of the western United States.[5] UMTRCA grants the Nuclear Regulatory Commission ("NRC") with authority to clean up these tailings before polluted sites are passed to the U.S. Department of Energy ("DOE") Office of Legacy Management ("Legacy Management") for perpetual monitoring.[6] This regulatory scheme is currently failing the residents of Milan, New Mexico, who live in the shadow of the former Homestake Mine.[7] While cleanup of the former mine is governed by UMTRCA, waste linked to the Homestake Mine continues to impact the daily lives and deaths of residents.[8] Owner of the Homestake Mine site, Barrick Gold, is currently attempting to complete cleanup before transfer to Legacy Management for perpetual monitoring and surveillance.[9]

Before Barrick Gold can complete the process, the company must demonstrate that the pollution in the area does not pose a present or future significant health threat.[10] As part of a strategy to expedite the decades-long transfer process, Barrick Gold is implementing a buyout of homes from current residents.[11] Residents argue that these buyouts are conducted without consideration of relocation costs in an area experiencing cost of living increases, ultimately leaving many in financially vulnerable positions.[12] The Homestake Mine plan represents a potential loophole for future companies responsible for any of the country's remaining 48 uranium mills to also avoid cleanup, ultimately threatening the safety of communities throughout the Four Corners Region.[13] If Barrick Gold is successful, and other companies follow suit, the "safe and environmentally sound disposal" of uranium milling waste will come at the expense of communities in the shadows of milling operations.[14]

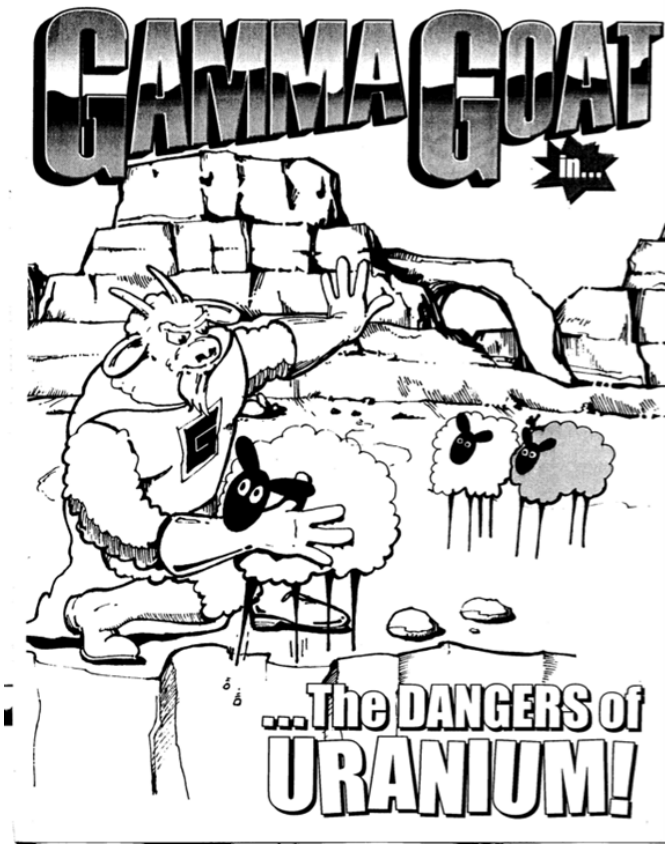
To close this regulatory loophole and provide greater resident protections, the NRC should employ its rulemaking authority to develop heightened home buyout standards that: (1) are reflective of market realities and homeowners' financial needs; and (2) impose higher cleanup contingency fees from companies.

Part I of this Note will provide factual background on the nature and scope of pollution affecting residents near the Homestake Mine. Part II discusses Homestake's proposed buyout strategy. Part III will provide legal background on the NRC regulatory framework—including an overview of UMTRCA Title II, the Legacy Management transfer process, cleanup standards, Alternate Concentration Limits, and administrative law limitations on new NRC regulations. Part IV will recommend updated NRC regulations, first by recommending draft rule language to require good-faith bargaining in any home buyout negotiation; and second by recommending a higher contingency fee recommendation for sites transferred under alternate concentration limits "ACLs").

I. Homestake New Mexico's "Death Map"

The American West is no stranger to uranium and mill tailings lingering after the atomic energy rush to fuel the Cold War.[15] With the U.S. government footing the bill, companies raced to build over 50 mills and processing sites between 1948 and 1971[16]—a period during which the United States government was the sole purchaser of uranium.[17] Nearly 250 million tons of toxic and radioactive waste remain today.[18] Very little of this waste has been remediated to the point of permitting unrestricted human access.[19] Much of this waste is concentrated in the Four Corners Region and is near or on Native American Reservations.[20] Uranium mining and its waste are so prevalent in the region that in the 1990s, the U.S. Environmental Protection Agency ("EPA") published a comic book entitled "Gamma Goat" to warn Navajo children of the dangers associated with abandoned uranium mines and leftover mill tailings (see cover on the next page).[21]

4. Larson, *supra* note 2, at 1.
5. Mark Olalde et al., *The Cold War Legacy Lurking in U.S. Groundwater*, ProPublica (Dec. 3, 2022), https://www.propublica.org/article/uranium-mills-pollution-cleanup-us [https://perma.cc/W9CH-3THN].
6. Larson, *supra* note 2, at 1.
7. Mark Olalde & Maya Miller, *A Uranium Ghost Town in the Making*, ProPublica (Aug. 8, 2022), https://www.propublica.org/article/new-mexico-uranium-homestake-pollution?utm_source=sailthru&utm_medium=email&utm_campaign=majorinvestigations&utm_content=feature[https://perma.cc/6VBN-DEPH] [hereinafter, Olalde & Miller, *A Uranium Ghost Town in the Making*].
8. *Id.*
9. *Homestake*, U.S. Nuclear Reg. Comm'n (NRC), https://www.nrc.gov/info-finder/decommissioning/uranium/homestake.html [https://perma.cc/753E-36KP] [hereinafter NRC, *Homestake*].
10. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7; *see generally* 10 C.F.R. pt. 40, app. A.
11. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
12. *Id.*
13. *Id.*; Olalde et al., *supra* note 5 (noting that of the 48 uranium mills analyzed by ProPublica, 84% have polluted groundwater).
14. Uranium Mill Tailings Radiation Control Act of 1978 § 2, 42 U.S.C. § 7901.
15. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
16. *Id.*; Doug Burgge & Rob Goble, *The History of Uranium Mining and the Navajo People*, Am J. Pub. Health 1410, 1410 (2002).
17. Burgge & Goble, *supra* note 16, at 1410; *see also* Olalde et al., *supra* note 5.
18. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7, at 2.
19. U.S. Gov't Accountability Off., GAO-20-373, Environmental Liabilities: DOE Needs to Better Plan for Post-Cleanup Challenges Facing Sites 1 (2020).
20. Olalde et al., *supra* note 5, at 2.
21. Bonnie Robinson Lipscomb & Jay Robinson, *Gamma Goat in the Dangers of Radiation*, U.S. Env't Prot. Agency Region 9 (1999), https://archive.epa.gov/region9/superfund/web/pdf/gamma%20goat.pdf [https://perma.cc/QLU2-UHWQ].



The Homestake Mill, located near Milan, New Mexico,[22] began operations in 1958 to refine mined uranium ore for nuclear energy and atomic weapons.[23] While mill operations ceased in 1990, the landscape has been permanently altered by a looming 22.2-million-ton pile of mill tailings.[24] These tailings contain heavy metals such as selenium[25] and emit radon—a naturally occurring carcinogenic gas that results from the decay of uranium.[26] Mill tailings are defined by UMTRCA as "the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted."[27] In layman's terms, mill tailings are the small particles and dust left over from the milling and extraction process required to produce atomic fuel and related products.[28] As they decay,[29] mill tailings release radioactive energy that is harmful to the general public and the environment.[30] In particular, the tailings emit radon gas[31] which, when inhaled, releases bursts of radiation into the lungs, causing tissue damage.[32] Inhalation of radon from the decay of uranium[33] is the second leading cause of lung cancer in the United States (see graphic on page 129).[34]

As mill tailings left over from Homestake's atomic boom decay, residents continue to inhale toxic, carcinogenic radon gas.[35] The pollution in the area has caused cancer rates 18 times higher than levels considered acceptable by EPA.[36] Residents, for their part, have chronicled cases of cancer, thyroid disease, and other uranium-related illnesses on a "death map,"[37] where homes of those who are sick or have passed away are marked with color coded arrows.[38] The tailings pile dominates the map as the largest feature, looming over local homes where residents have died or fallen ill.[39]

The risk of sickness is not, however, limited to the pile itself—15,000 people in neighboring communities use water sources that are threatened by pollution from the tailings pile.[40] The pollution from the tailings pile is seeping into underground aquifers.[41] The Homestake Mining company discovered the water contamination in 1961.[42] Residents were not notified until 1974.[43] A 1983 agreement with EPA reached nearly a decade later provided alternative water connections for residents with polluted water sources—paid for by Homestake pursuant to the terms of the EPA consent decree until 1995.[44] While this provided a solution for residents' drinking water needs, there is still outstanding work needed to address pollution of underground aquifers.[45]

In 2020, Homestake determined that full remediation of the groundwater supply was unlikely due to the amount of pollution from tailings that has leeched into the groundwater system.[46] The tailings trapped in the groundwater system continue to create sources of contamination.[47] Ultimately residents have been hit with a two-for-one pol-

22. The mill and the surrounding community of Milan, New Mexico, are referred to throughout this Note as "Homestake" for simplicity.
23. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
24. *Id.*
25. *Id.*
26. *Id.*
27. Uranium Mill Tailings Radiation Control Act of 1978 § 101, 42 U.S.C. § 7911.
28. *Backgrounder on Uranium Mill Tailings*, NRC, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/mill-tailings.html [https://perma.cc/R84W-9WPT] [hereinafter NRC, *Backgrounder on Uranium Mill Tailings*].
29. *Id.*
30. Phillips, *supra* note 1, at 77.
31. NRC, *Backgrounder on Uranium Mill Tailings*, *supra* note 28.
32. Maya Miller, *What Is Radon? The Radioactive Gas Is Found in Homes Across the Country*, ProPublica (Aug. 8, 2022), https://www.propublica.org/article/radon-gas-testing-home-uranium#why-is-radon-a-public-health-threat [https://perma.cc/94HD-KDPS].
33. *Radioactive Decay*, U.S. Env't Prot. Agency, https://www.epa.gov/radiation/radioactive-decay [https://perma.cc/FH58-9MWP].
34. *What Are the Risk Factors for Lung Cancer?*, CDC https://www.cdc.gov/cancer/lung/basic_info/risk_factors.htm#aroundus [https://perma.cc/2L7X-LMZE].
35. *See* Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7; *see also* Miller, *supra* note 32.
36. Olivier Uyttebrouck, *Residents Say "Death Map" Should Spur EPA Action*, Albuquerque J. (June 19, 2013), https://web.archive.org/web/20220810061017/https://www.abqjournal.com/212100/residents-say-death-map.html [https://perma.cc/Y27D-GRXG]; *see also* Ghassan A. Khoury, *Human Health Risk Assessment Homestake Mining Co. Superfund Site Cibola County, New Mexico*, U.S. Env't Prot. Agency Region 6 xxv (Dec. 2014) ("The radon in the area of the Five Subdivisions presents excess cancer risk greater than EPA's acceptable risk range.").
37. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7. Image was originally featured in reporting by ProPublica.
38. *Id.*
39. *Id.*
40. *Id.*
41. NRC, *Homestake*, *supra* note 9.
42. Uyttebrouck, *supra* note 36.
43. *Id.*
44. *Id.*
45. NRC, *Homestake*, *supra* note 9 (The NRC has identified two aquifer systems that require abatement—the San Mateo alluvial aquifer and the Chinle formation aquifer located below the San Mateo system.).
46. *Id.*
47. *Id.*

lution special: the inhalation of toxic gas and particulate matter combined with the contamination of water sources in an area with little water to spare. Instead of working to address this dual crisis, Homestake is seeking to leave the site only partially remediated and is in the process of obtaining NRC approval to do so.[48] Before they can, Homestake must show that there is no present or future hazard to people living in the area.[49] Their main strategy to meet that standard relies on two key components: resident home buyouts for pennies on the dollar and a request for an ACL.

II. Homestake's Buyout and ACL Strategy

As part of their attempt to leave the site and transfer management to the federal government, Homestake is currently in the process of buying out homes in the community surrounding the tailings pile to minimize the number of people affected by the pollution.[50] A buyout permits Homestake to demonstrate low risk to residents in the area by removing residents from the polluted area.[51] Homestake's strategy can perhaps be best summarized as no residents, no risk, no need for additional cleanup.[52]

Homestake representatives state that "the site is at a point where it is not technically feasible to provide additional, sustainable improvements to water quality."[53] Homestake argues that an ACL[54] permits companies to propose alternative criteria and standards for cleanup of pollution provided there is no substantial present or future hazard posed to human health or the environment.[55] Homestake contends that an ACL is warranted because tailings pollution in aquifers is unlikely to migrate or affect additional residents in the region.[56]

However, residents disagree with Homestake's assessment and contend that the price Homestake is willing to offer for area homes does not sufficiently address the high cost of living in the area, placing them in worse financial condition than where they were pre-buyout[57] thanks to property values decimated by pollution.[58] Furthermore, residents who do opt to sell their homes and land to Homestake's parent company, Barrick Gold, are required to sign liability waivers preventing them from suing in the event that they become ill, despite the fact that radiation-related illnesses may take decades to manifest.[59] Thus, while Homestake's strategy may technically lower risk to community members by removing residents altogether, it does not represent the interests of all members.[60]

A. History of Buyouts to Address Pollution

Although they are perhaps not as common as floodplain buyouts conducted by agencies to mitigate weather and climate disasters,[61] corporate home buyouts as a strategy to

48. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. ACLs will be discussed with more depth in the legal background section. *See* discussion Part III *infra* notes 116–19.
55. Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content, 10 C.F.R. pt. 40, app. A.
56. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
57. *Id.*
58. *Bluewater Valley Downstream Alliance Factsheet*, Bluewater Valley Downstream Alliance, https://swuraniumimpacts.org/wp-content/uploads/2016/05/16-BVDA-factsheet.pdf [https://perma.cc/7JM4-FAAX] [hereinafter Bluewater Fact Sheet].
59. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
60. *See id.*; *see also* Bluewater Fact Sheet, *supra* note 58.
61. Floodplain buyouts are primarily conducted at the federal level by the Federal Emergency Management Agency and the Department of Housing and Urban Development and involve sale of flood-prone properties to governments followed by relocation to lower flood risk areas. Some states such as North Carolina and New Jersey and some local towns and

mitigate pollution are not unprecedented.[62] In the 1980s, Waste Management bought homes belonging to six families in Florida after toxic chemicals polluted the groundwater.[63] The buyout was viewed as a more cost-effective strategy compared to large public works projects designed to remediate pollution.[64] A community in Michigan was recently successful in lobbying a petrochemical company to buy out homes—a move regarded by the community as a positive one due to petroleum refinery pollution.[65]

The willingness of communities to participate in buyouts, and the generosity of companies engaged in these practices varies. For example, a home buyout in Louisiana was praised as "one of the most generous industrial buyouts in history."[66] However, later reporting by *The Guardian* revealed that offers were more generous for white homeowners compared to their Black counterparts; compared to white homeowners, chemical company Sasol offered Black homeowners 40% less.[67] A home buyout in Ohio prompted by toxic air pollution from a coal-fired power plant promised residents a buyout of three times the value of their homes.[68] Residents who took the offer did so in part to avoid the daunting, drawn-out legal battle that would be required to compel the company responsible to abate the air pollution.[69] Those who entered the agreement did ultimately receive the triplicate home value promised to them.[70] However, it came at the cost of an agreement to pursue no further legal action against the owner of the coal power plant.[71]

Regardless of whether residents are a willing participant of corporate-led buyouts, the variation in offers to community members indicates a need for increased regulation and expansion of government safety nets to protect residents. Homestake's buyout solution is similar to the one implemented in Ohio. However, the whole community has not yet been convinced that a buyout is the optimal course of action.[72] Some residents are instead demanding that Homestake be required to restore groundwater quality to pre-pollution levels as part of the cleanup.[73] The ACL proposed by Homestake means that, if approved, Homestake will not be required to completely clean up groundwater despite residents' wishes.[74]

Homestake contends that the ACL and buyout plan is safe because groundwater pollution will not spread if they leave the site and pass management to Legacy Management.[75] Other experts disagree and have found a high likelihood that pollution will migrate if left unabated.[76] If Homestake is permitted to abandon the site without more substantial cleanup and the pollution does in fact migrate, a critical community water source in a water-scarce region facing drought will be lost.[77]

III. NRC's Legal Framework for Regulation of Uranium Mill Sites

A. *Abatement and Transfer of Polluted Sites Under UMTRCA Title II*

Homestake's shortcomings in the cleanup process and attempt to bypass default cleanup requirements[78] represent an opportunity to analyze and recommend improvements to NRC rules and regulations promulgated under Title II of UMTRCA, the statute that authorizes the NRC to regulate mill tailing waste sites.[79] In order to understand Homestake's buyout strategy to bend cleanup regulations, analysis of UMTRCA's dual agency approach to cleanup and monitoring is necessary. This portion of the Note will provide legal background on the overall purpose of UMTRCA, the scope of Title II, the NRC's general authority under UMTRCA Title II, and the pro-

cities such as Nashville, Tennessee, and Birmingham, Alabama, have also developed buyout programs. *Property Buyouts Can Be an Effective Solution for Flood-Prone Communities*, Pew Trs. (Apr. 1, 2022), https://www.pewtrusts.org/en/research-and-analysis/reports/2022/04/property-buyouts-can-be-an-effective-solution-for-flood-prone-communities [https://perma.cc/67BQ-Q7NV].

62. *See generally* Michael Weisskopf, *Buyouts Replacing Cleanups as Remedy for Polluted Communities*, Wash. Post (Sept. 3, 1987), https://www.washingtonpost.com/archive/politics/1987/09/03/buyouts-replacing-cleanups-as-remedy-for-polluted-communities/57e4f5cf-9d70-4139-a7c7-779bc0bbc3a0/ [https://perma.cc/2WWK-3Y4Y]; Harmon Leon, *The Strange Deal That Created a Ghost Town*, BBC (May 12, 2021), https://www.bbc.com/future/article/20210511-how-coal-pollution-dismantled-a-town [https://perma.cc/SVY8-CMM9]; Sara Sneath, *A Chemical Firm Bought Out These Black and White US Homeowners—With a Significant Disparity*, The Guardian (Nov. 17, 2021), https://www.theguardian.com/us-news/2021/nov/17/this-communitys-black-families-lost-their-ancestral-homes-their-white-neighbors-got-richer [https://perma.cc/R4C7-5SKG]; *Marathon Petroleum Corporation Offers Home Buyout Program to Nearby Residents*, Mich. United (Dec. 18, 2020), https://www.miunited.org/post/marathon-petroleum-corporation-offers-home-buyout-program-to-nearby-residents [https://perma.cc/F9UR-4DCR] [hereinafter Marathon Home Buyout].
63. Weisskopf, *supra* note 62.
64. *Id.*
65. "I am thrilled about this buyout program," said Lura Taylor, one of the residents on the street that will be purchased, who agitated for the buyout. "Throughout the years, whenever I saw Emma, she would say 'keep praying' and I did. Now, God has answered our prayers." Marathon Home Buyout, *supra* note 62.
66. Sneath, *supra* note 62.
67. *Id.*
68. *See* Leon, *supra* note 62.
69. *Id.* ("The town took the offer. The residents say they thought there was no way they could take on such a big corporation, and a legal battle would likely drag on for years. They felt it was a good solution.").
70. *Id.* Residents received approximately $150,000.
71. *Id.*
72. Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
73. *See* Bluewater Fact Sheet, *supra* note 58.
74. Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content 10 C.F.R. pt. 40, app. A.
75. *Homestake Mining Company of California Grants Reclamation Project ACL Application*, Homestake Mining Co. 18 (Apr. 14, 2022), https://www.nrc.gov/docs/ML2212/ML22124A128.pdf [https://perma.cc/5FH4-XVBP] [hereinafter Homestake ACL Application].
76. *See* Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
77. *Id.*
78. Default cleanup requirements and alternatives to these defaults are discussed in depth in Section III.B.
79. *See generally* Uranium Mill Tailings Radiation Control Act of 1978 § 101, 42 U.S.C. § 7911 (UMTRCA contains three titles. Titles I and III, which are not discussed in depth by this Note, establish a remedial action program and study of two tailings sites in New Mexico respectively. Title II which is the focus of this Note establishes regulations for licensing and regulation of mill tailings cleanup.).

cess of transferring sites to the Legacy Management for perpetual monitoring.

Congress passed UMTRCA after acknowledging the widespread risks uranium mill tailings pose to "public health, safety, and welfare."[80] UTMRCA's overarching goal is to "minimize or eliminate radiation health hazards to the public"[81] at the cost of uranium mill owners and operators, rather than the general public or the federal government.[82] Title II provides for the decommissioning process of byproduct materials—including mill tailings—and requires that cleanup of the byproduct material comply with NRC requirements.[83] Under Section 205 of UMTRCA Title II, the NRC must govern the cleanup of byproduct material in a manner that is safe and protects the "public health and safety and the environment from radiological and nonradiological hazards associated with the processing and with the possession and transfer of [byproduct materials]."[84] Cleanup is performed by agreement states or by companies responsible for the cleanup under a license granted to a polluting company.[85] NRC possesses regulatory oversight when cleanup is performed by companies with a license.[86] Homestake Mining Company received a license to conduct cleanup of byproduct material and tailings in 1986 after the state of New Mexico relinquished cleanup authority to the NRC.[87]

The NRC must also approve a company's long-term surveillance plan ("LTSP")[88] which includes a description of the site; a detailed description of disposal site conditions, including groundwater conditions; a description of the long-term maintenance and surveillance plan, including frequency of inspection, and frequency and extent of monitoring.[89] Standards for subsequent follow-up inspections and criteria for maintenance or emergency response measures are also included in LTSPs.[90] While Legacy Management ultimately takes responsibility for sites under UMTRCA Title II, the NRC has responsibility for setting cleanup standards and ensuring those standards have been met through proper remediation.[91] As a threshold matter, therefore, Homestake must satisfy the standards required by the NRC before management and liability may be passed to Legacy Management.[92]

Cleanup sites governed by UMTRCA Title II are eventually passed to Legacy Management for long-term surveillance.[93] Specifically, Legacy Management is obligated under Title II to provide "monitoring, maintenance, and emergency measures necessary to protect the public health and safety."[94] To transfer to Legacy Management, the licensee must first meet all NRC requirements for reclamation and safety, including abatement of contaminated groundwater sources.[95] For UMTRCA Title II sites, the owner of the site, in this case Homestake's parent company Barrick Gold, must complete "an NRC-approved cleanup of any on-site radioactive waste remaining from former uranium ore-processing operations."[96] Once the NRC is satisfied with the site abatement, the process of transfer will begin with Legacy Management conducting due diligence including review of relevant reclamation plans, groundwater remedies, groundwater data, property evaluations, and cost estimates for annual site surveillance and ongoing maintenance.[97]

Legacy Management places the site into one of three categories designed to reflect the level of ongoing monitoring needed to ensure safety.[98] Category 1 sites typically require records-related management and oversight.[99] Category 2 sites require routine inspections, monitoring/maintenance, records activities, and stakeholder support.[100] Category 3 sites require operation of active remediation efforts in addition to requirements outlined in Category 2.[101] Homestake is one of five UMTRCA Title II sites being remediated by the NRC.[102] Legacy Management currently manages six sites that have passed from NRC regulation to DOE for long-term, permanent oversight.[103] It is projected that Legacy Management will manage as many as 30 UMTRCA Title II sites in the future.[104]

The regulatory structure contemplated by UMTRCA[105] does not permit perpetual abatement and oversight of sites

80. Uranium Mill Tailings Radiation Control Act § 2(a).
81. *Id.* at § 2(b).
82. Larson, *supra* note 2, at 1.
83. *See* Uranium Mill Tailings Radiation Control Act of 1978 § 2(a), 42 U.S.C § 7901.
84. Uranium Mill Tailings Radiation Control Act § 205(a).
85. *Locations of Uranium Recovery Sites Undergoing Decommissioning*, NRC, https://www.nrc.gov/info-finder/decommissioning/uranium/index.html [https://perma.cc/774B-ACT4] [hereinafter NRC, *Locations of Uranium Recovery Sites*].
86. *Id.*
87. NRC, *Homestake*, *supra* note 9.
88. Domestic Licensing of Source Material, 10 C.F.R. § 40.28(b).
89. 10 C.F.R. § 40.28(b)(1)–(5).
90. *Id.*
91. *See* U.S. Dep't of Energy, Site Management Guide, *infra* note 96, at 7.
92. *Id.*
93. *See* Bernadette Tsosie et al., *Uranium Mill Tailings Radiation Control Act Title II DOE Due Diligence and Lessons Learned From a Previous Site Transfer—20352* (July 1, 2020), https://www.osti.gov/biblio/23030512# [https://perma.cc/4548-CKRP].
94. *Id.*
95. *Process for Transition of Uranium Mill Tailings Radiation Control Act Title II Disposal Sites to the U.S. Department of Energy Office of Legacy Management for Long-Term Surveillance and Maintenance* 7, U.S. Dep't of Energy (Apr. 2016), *available at* https://www.energy.gov/lm/articles/process-transition-uranium-mill-tailings-radiation-control-act-title-ii-disposal-sites [https://perma.cc/N3SP-VGGF] [hereinafter U.S. Dep't of Energy, *Process for Transition of Title II Disposal Sites*].
96. U.S. Dep't of Energy, Site Management Guide 4 (June 2022), *available at* https://perma.cc/XSN2-T4LT [hereinafter U.S. Dep't of Energy, Site Management Guide].
97. NRC, *Homestake*, *supra* note 9, at 2.
98. *See* U.S. Dep't of Energy, Site Management Guide, *supra* note 96, at 4.
99. *Id.*
100. *Id.*
101. U.S. Dep't of Energy, UMTRCA Title I & II Disposal and Processing Sites (2023), *available at* https://www.energy.gov/sites/prod/files/2018/12/f58/UMTRCAFactSheet.pdf [https://perma.cc/69MA-NZWP] [hereinafter UMTRCA Fact Sheet].
102. *See* NRC, *Locations of Uranium Recovery Sites*, *supra* note 85.
103. UMTRCA Fact Sheet, *supra* note 101.
104. *Id.*
105. Larson, *supra* note 2, at 10. (Title I of UMTRCA was updated in 1988 to permit indefinite extension of Legacy Management authority to remediate groundwater for Title I sites only. This amendment identified long-term groundwater contamination issues that could not be resolved under a clear timeline as the main impetus for the change. However, Title II of UMTRCA was not updated to permit long-term groundwater abatement by Legacy Management.).

by the NRC; once remediation is complete, sites are meant to be passed to Legacy Management for passive monitoring.[106] For UMTRCA Title II sites, DOE requires that the owner of the site complete "an NRC-approved cleanup of any on-site radioactive waste remaining from former uranium ore-processing operations."[107] Homestake must also provide Legacy Management with some funding to offset the costs of long-term management.[108] Appendix A to Part 40 of the *Code of Federal Regulations* requires "the total charge to cover the costs of long-term surveillance must be such that, with an assumed 1 percent annual real interest rate, the collected funds will yield interest in an amount sufficient to cover the annual costs of site surveillance."[109] To provide for any potential extraordinary surveillance costs, the NRC usually relies on a contingency factor of 15% of the company's total surety bond used to pay for long-term maintenance and surveillance.[110] NRC is provided with final authority in determining whether Legacy Management should be provided with any increase in funding beyond the requirement of $250,000 in 1978 dollars,[111] approximately $1,187,188 in buying power today.

While licensees like Homestake must satisfy NRC requirements before transfer to Legacy Management,[112] two pathways are available to satisfy those requirements—default regulations required by Appendix A to Part 40 of the *Code of Federal Regulations* and relaxed requirements granted under an ACL.[113]

B. A Fork in the Regulatory Road: NRC Default and Alternate Cleanup Regulations

UMTRCA Title II provides two potential standards for the cleanup of uranium mill tailings. Companies may initiate cleanup under the standards established by Appendix A to Part 40 of the C.F.R.[114] If abiding by these standards is technically difficult, companies may also request alternative standards to the default that are more relaxed by seeking NRC approval for ACLs which allow for higher levels of pollution to remain.[115] Default regulations and standards for disposal of mill tailings are established by Appendix A to Section 10, Part 40 of the *Code of Federal Regulations*.[116] Specifically, Appendix A "establishes technical, financial, ownership, and long-term site surveillance criteria relating to the siting, operation, decontamination, decommissioning, and reclamation of mills and tailings or waste systems and sites at which such mills and systems are located."[117]

While a default process is established by UMTRCA and Appendix A to 10 C.F.R. Part 40, "licensees or applicants may propose alternatives to the specific requirements" outlined by Appendix A through ACLs.[118] ACLs allow the NRC to terminate a license using criteria greater than the default criteria provided.[119] Put a different way, an ACL permits a company to use a standard allowing for higher levels of waste to remain, provided that they give a basis for their proposal and consider corrective action.[120] In determining whether or not to grant an application for an ACL, the NRC will consider "practicable corrective actions" and will establish a site-specific ACL if pollution "will not pose a substantial present or potential hazard to human health or the environment."[121]

The burden of supporting a request for ACLs lies with the applicant.[122] The "as low as reasonably achievable" ("ALARA") standard is a critical metric in evaluating ACLs and determining whether they ought to be granted to applicants.[123] "A proposed ACL is considered to be within ALARA levels if the "comparison of the costs to achieve the target concentrations lower than the alternate concentration limit are far in excess of the value of the resource and the benefits associated with performing the corrective action alternative."[124]

C. ACL Shortcomings

Before Homestake's ACL application can be evaluated, it is important to understand past shortcomings within sites transferred to Legacy Management under alternate standards. While ACLs must be approved by the NRC, case study[125] of a previous Title II site transferred to Legacy Management under ACLs indicates that the alternatives are less effective in regulating polluting companies and

106. *See* U.S. Dep't of Energy, Site Management Guide, *supra* note 96, at 3.
107. *Id.*
108. *Id.*
109. *See* U.S. Dep't of Energy, *Process for Transition of Title II Disposal Sites*, *supra* note 95, at 21–22; *see also* Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content, 10 C.F.R. pt. 40, app. A at 20.
110. U.S. Dep't of Energy, *Process for Transition of Title II Disposal Sites*, *supra* note 95, at 22.
111. *Id.*
112. *Id.*
113. Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content, 10 C.F.R. pt. 40, app. A.
114. S*ee generally id.*
115. *See generally id.*
116. Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content, 10 C.F.R. pt. 40, app. A.
117. 10 C.F.R. pt. 40, app. A at "Introduction."
118. *Id.*
119. 10 C.F.R. pt. 40, app. A at § 5B(6).
120. *Id.*
121. *Id.*
122. Nuclear Regulatory Comm'n, NUREG-1620 Standard Review Plan for the Review of a Reclamation Plan for Mill Tailings Sites Under Title II of the Uranium Mill Tailings Radiation Control Act of 1978 K-1 (2003) [hereinafter *NUREG-1620*]:
> The application should contain sufficient information to show that a hazardous constituent will not pose a substantial present or potential harm to human health or the environment, as long as the proposed Alternate Concentration Limit is not exceeded; and the proposed Alternate Concentration Limit is as low as reasonably achievable, considering practicable corrective actions. This demonstration should assess the hazards of the constituent in question and evaluate the consequences presented by potential exposures to the constituent. The application must consider the 19 factors listed in 10 C.F.R. pt. 40, app. A, Criterion 5B(6).

123. *Id.* § 4.3.3.3(4).
124. *See id.*; *see also* Homestake ACL Application, *supra* note 75, at 22.
125. Tsosie, *supra* note 93.

ensuring thorough cleanup.[126] UMTRCA Title II sites that have been transferred to Legacy Management under ACLs have resulted in higher management expenses than anticipated.[127] Accordingly, the Milan community may not take comfort in the regulation of site cleanup under an ACL proposed by Homestake because of these previous shortcomings.

As an example, the Bluewater, New Mexico, disposal site reclamation began in 1991 and attempted to remediate mill tailings and groundwater contamination.[128] Like Homestake, the site managers attempted groundwater remediation with no significant improvement in water levels observed.[129] In light of this, the NRC granted an ACL.[130] The site was ultimately transferred to Legacy Management for long-term maintenance after the company met the ACL cleanup standards.[131] After transfer, surface depressions perhaps best thought of as miniature ponds appeared on top of the tailings piles, creating a risk to the structural integrity of these piles in the event of heavy rainfall.[132] The depressions ultimately required installation of 10 new monitoring wells after the original transfer under the ACL, resulting in additional expense.[133] Because Legacy Management is not meant to actively abate or expend funds on long-term surveillance, the Bluewater transfer serves as a warning for sites transferred under alternate criteria.[134] While Legacy Management did ultimately address the unforeseen pollution, the emergency abatement took place outside the original purpose and role contemplated by UMTRCA.[135]

D. Homestake's ACL Application

Homestake has not yet completed cleanup of the former site under an ACL standard; as such, assessment of potential successes, pitfalls, and risks to residents must be evaluated based on the content of Homestake's application. Homestake's application for an ACL provided for three potential options.[136] Homestake has identified their third potential option as the best available.[137] Homestake's third option provides for a cover over the large tailing pile to reduce infiltration and "[g]roundwater access controls via fee title ownership, monitoring and reporting."[138] To achieve this, Homestake will likely continue buying out homes to control groundwater through land acquisition.[139] Homestake argues that this alternative is the best possible under the ALARA standard because the other two alternatives presented require "perpetual treatment in order to maintain groundwater concentrations below the protective standard due to the persistent sources."[140]

To prevent reliance on opportunistic home buyouts as an alternative to long-term cleanup, the NRC should promulgate rules providing for transfer guidelines that specifically prescribe protections for homeowners as a component of NRC's environmental and public health mandate. Before proposing such guidelines, this Note provides a brief overview of the NRC's rule promulgating authority under its organic statute and discussion of the major questions doctrine's effect on administrative law.

E. NRC Regulatory Authority Permits Updated Requirements for Site Transfer

The rule writing and regulatory authority vested in the NRC to address pollution in Homestake does not provide carte blanche to write any rule the NRC sees fit. Federal agencies—including the NRC—are limited to the organic, authorizing statute when promulgating rules to address issues in the scope of the agency.[141] Accordingly, rule promulgation as a solution to Homestake's cleanup loopholes is limited to exercises originally contemplated by UMTRCA's scope and purpose.

In considering updated and improved regulations, it is important to first revisit the purpose of UMTRCA. As the authorizing statute for the NRC's mill tailings cleanup procedures, UMTRCA in large part was designed to respond to human health and environmental concerns related to mill tailings.[142] UMTRCA identifies "stabilization, disposal, and control in a safe and environmentally sound manner of . . . tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings" as a key regulatory purpose.[143] Pursuant to this purpose, NRC possesses the ability to promulgate rules governing standards set for public health and environmental protection in the remediation and transfer process.[144]

It is, however, important to note trends in administrative law and how they may impact rule promulgation by the NRC to address the Homestake problem. In *West Virginia v. EPA*, the U.S. Supreme Court elevated the major questions doctrine into a component of statutory analysis for issues of agency authority under administrative law.[145] The

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. Homestake ACL Application, *supra* note 75, at 24.
137. *Id.*
138. *Id.* at 18.
139. *Id.* at 25; *see also* Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
140. *See* Homestake ACL Application, *supra* note 75, at 24.
141. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("the question for the court is whether the agency's answer is based on a permissible construction of the statute"); *see also A Guide to the Rulemaking Process*, Off. Fed. Reg., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/HQT4-YNRH].
142. *See* Larson, *supra* note 2, at 2.
143. Uranium Mill Tailings Radiation Control Act of 1978 § 2, 42 U.S.C. § 7901.
144. 42 U.S.C. § 2113(b) ("The Commission shall require by rule, regulation, or order that prior to the termination of any license which is issued after the effective date of this section, title to the land, including any interests therein.").
145. Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online, 175, 178 (2022); *see also* West Virginia v. U.S. Env't Prot. Agency, 597 U.S. 697, 724, 729 (2022); *see also*

Court expanded on rationale from *Alabama Ass'n of Realtors v. Dept. of Health & Human Services*.[146] Specifically, the Court held that the major questions doctrine requires Congress to speak with undeniable clarity if it desires to give an agency the authority to regulate large sectors of the economy.[147] The major questions doctrine accordingly prohibited EPA from using generation shifting as a means of addressing power plant pollution because the Clean Air Act did not provide such sweeping authority.[148] Based on these opinions, the Court has recently looked with some skepticism toward broad, overarching regulations that reach areas of governance or the economy that the Court views as beyond the scope of the agency's responsibilities.[149] In light of these recent developments in administrative law, a proposed rule promulgated by the NRC must take special care to align with the authorities vested in the NRC by UMTRCA. Moving beyond those powers could pave the way for arguments that buyout considerations are beyond the scope of NRC promulgating authority because of the economic implications at play.[150]

In light of recent shifts in administrative law doctrine, it behooves regulators to look toward existing NRC regulations to confirm that the NRC is not exercising authority that may be viewed by the courts as impermissibly broad.[151] Updating NRC regulations to place limits on home buyouts as part of the cleanup process is consistent with existing NRC regulation. For example, Section 10 Part 40 of the *Code of Federal Regulations* is designed to regulate the long-term care of radioactive materials remaining after mills have closed.[152] Appendix A to Part 40 of the *Code of Federal Regulations* further establishes standards for decommissioning, long-term surveillance, and disposal of tailings and wastes.[153] The rules proposed by this Note to address Homestake's loopholes, and prevent their duplication, therefore, likely align with preexisting NRC regulations. The Analysis section discusses these proposed rules to restrict home buyouts and assess higher contingency fees for transfers under ACLs.

Biden v. Nebraska, 143 S. Ct. 2355 (2023) (applying the major questions doctrine to President Joseph Biden's student loan forgiveness plan enacted under the HEROES Act).

146. *See West Virginia*, 597 U.S. at 721.

147. *West Virginia*, 597 U.S at 722–23, 732.

148. *See West Virginia*, 597 U.S. at 724, 729.

149. *See, e.g.*, Alabama Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2022) (holding the Centers for Disease Control and Prevention could not establish a nationwide eviction moratorium under its rule promulgating authority because Congress could not have intended to delegate such sweeping authority to an agency without a clear statement so indicating).

150. *See* Richardson, *supra* note 145, at 193.

151. *Id.* at 175 n.1.

152. Domestic Licensing of Source Material, 10 C.F.R. § 40.1 ("These regulations also provide for the disposal of byproduct material and for the long-term care and custody of byproduct material and residual radioactive material. The regulations in this part also establish certain requirements for the physical protection of import, export, and transient shipments of natural uranium.").

153. *See* Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content, 10 C.F.R. pt. 40, app. A at "Introduction"; *see also* NRC, *Backgrounder on Uranium Mill Tailings*, *supra* note 28.

IV. Closing the Regulatory Loophole Through Bargaining and Contingency Fee Requirements

Homestake's ability to buy low-cost homes to avoid fully cleaning up waste signals weaknesses in UMTRCA Title II and NRC regulations to other companies. Homestake's use of buyouts to meet NRC standards could incentivize other corporations in possession of Title II licenses to emulate Homestake's practices. Accordingly, Homestake represents a new test site for the future of nuclear byproduct cleanup.

It is important to acknowledge that this Note does not intend to dispense with the home buyout process as a regulatory tool completely. While some may balk at the idea of allowing Homestake to leave the site despite not implementing a complete cleanup, the UMTRCA regulatory regime does not contemplate perpetual, active abatement.[154] Rather than eliminating buyouts and their availability to licensees, regulators, and communities, the NRC should set higher standards through its rule promulgating authority to ensure protection of public health, private property, and environmental protection during the corporate buyout process.

As previously discussed, the NRC possesses broad authority to regulate health and safety concerns related to decommissioning and cleanup of uranium mill tailings facilities.[155] In light of that authority and the current state of administrative law, the NRC should promulgate rules to address (1) the use of home buyouts as part of Homestake's proposed ACL, and (2) underlying long-term groundwater pollution driving the home buyouts. This Note will first describe the proposed rule to address home buyouts alongside application for ACLs. It will then discuss a proposed higher contingency fee requirement to address long-term groundwater pollution and potential complications post-DOE transfer.

A. Proposed Rule to Address Housing Buyouts as Part of Homestake's ACL

Homestake contends that cleanup is no longer technically feasible.[156] As part of their plan to pass the site from NRC supervision to Legacy Management, Homestake is relying on an ACL and home buyouts.[157] These buyouts

154. *See* U.S. Dep't of Energy, Process for Transition of UMTRCA Title II Disposal Sites to DOE for LTS&M, Doc. No. S0596 (Apr. 2016).

155. *See* Standards for Protection Against Radiation,10 C.F.R. § 20 (1991), Domestic Licensing of Source Material, 10 C.F.R. § 40 (1991); *see also* 10 C.F.R. pt. 40, app. A, Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content at "Introduction."

156. *See* Homestake Mining Co. & Hydro-Engineering, LLC, *2020 Annual Monitoring Report/Performance Review for Homestake's Grants Project Pursuant to NRC License SUA-1471 and Discharge Plan DP-200*, NRC, 1.1-1 (2021), https://www.nrc.gov/docs/ML2109/ML21090A190.pdf [https://perma.cc/9EQC-JH9B].

157. *Id.* at. E-1 (describing the process of purchasing homes as the following: "additional lands have been acquired as opportunity has arisen and acquisition of such lands are deemed appropriate in relation to ongoing ground-

do not account for prevailing market-based home prices and are instead based on decimated property values,[158] leaving residents in a more financially precarious position than before cleanup began.[159] Homestake's third proposed ACL option[160]—acquisition of lands in fee combined with monitored natural attenuation[161]—allows Homestake to pass the site to Legacy Management without further active abatement.[162] Lessons learned from the Bluewater, New Mexico, site remediation have already demonstrated potential adverse outcomes both in terms of pollution threats and higher monitoring costs shouldered by DOE.[163]

To effectively close the loophole in the cleanup process and prevent other UMTRCA Title II site managers from relying on insufficient buyout prices, the NRC should promulgate regulation modeled after DOE requirements for mineral rights transfer. Doing so would result in regulations better aligned with the broad mandate of UMTRCA: to protect health and safety while also preventing incursion of costs by Legacy Management which were not considered or authorized by Title II.[164]

DOE's mineral rights transfer regulation requires the NRC to obtain mineral rights for all land transferred in fee and a "serious effort" to obtain mineral rights belonging to third parties[165]:

> The serious effort to obtain the mineral rights required by the regulations should (1) inform the owners that the surface estate is being used for the disposal of radioactive materials under NRC's jurisdiction, (2) inform the owners of the regulatory protections in place applicable to the encapsulated materials, and (3) include a defensible "best and final" offer to obtain the minerals that is based on current market valuations.[166]

The same standard should be applied to Homestake's attempts to engage in home buyouts as part of the company's proposed ACL. To address financial concerns of residents, consider the realities of the housing market, and prevent predatory offers, a new rule promulgated by the NRC addressing home buyouts may read:

> In the event that cleanup is no longer technically feasible and home buyouts are deemed necessary by the NRC to address public health and environmental concerns, companies in possession of licenses under UMTRCA Title II shall be required to engage in a good-faith, serious effort to acquire homes and accompanying lands in fee. A good-faith, serious effort shall include thorough bargaining culminating in a defensible offer which considers housing market realities. Consideration of housing market realities shall include depreciation of home values; bargaining reflective of home values prior to the presence of pollution; median housing costs within 300 miles[167]; and costs required for relocation of individual homeowners and homeowners with family members in the area.
>
> If such bargaining fails to result in a good-faith, defensible offer or a resident declines to accept a home buyout, UMTRCA Title II licensees shall be required to provide abatement and pollution mitigation in alignment with ALARA levels at cost to them. This will include collaboration with the NRC and DOE Office of Legacy Management to ensure long-term funding availability for mitigation to ALARA levels until either (a) the homeowner dies, and the company may acquire lands affected by pollution in fee or (b) a minimum of 50 years subject to renewal if the homeowner is still alive—whichever may come first.

A rule with the language proposed above would require Homestake to engage in good-faith, defensible bargaining efforts for private home buyouts while considering surrounding market conditions. This combination of defensible bargaining and consideration of market conditions should work in tandem to prevent companies like Homestake from providing only "fair" market value and thus leaving homeowners worse off than they were before due to increasing home prices.[168] Finally, the language proposed would further complement the regulations and ACL requirements established by Appendix A to Part 40, Criterion 11 by land transfer criteria.

Consideration of housing market realities in NRC regulations would require more transparency in Homestake's buyout process. Homestake's PowerPoint summary of its proposed ACL, including discussions of land acquisition in fee, offers little insight into market considerations used by the company or proposed costs in negotiations.[169] Requiring Homestake and other corporate licensees under

water remediation and restoration activities and final reclamation/closure of the site"); *see also* Homestake ACL Application, *supra* note 75, at 18.

158. Letter from Rocky Chase, Manager, Closure Properties, Homestake Mining Co., to Larry Carver, Pres., Murray Acres Homeowners Ass'n (Feb. 24, 2005), *available at* https://www.nrc.gov/docs/ML0510/ML051040041.pdf [https://perma.cc/SE2K-LWCN]. Homestake has contested pollution as the cause of the decline in property values and instead claims that it is attributed to the demise of the region's uranium industry and loss of population. *Id.*

159. *See* Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.

160. Homestake ACL Application, *supra* note 75, at 18, 25.

161. Kirsten S. Jorgensen et al., *Monitored Natural Attenuation*, Methods in Molecular Biology (2010), https://pubmed.ncbi.nlm.nih.gov/19882289/ [https://perma.cc/XVB8-HHK5] ("Monitored natural attenuation (MNA) is an in-situ remediation technology that relies on naturally occurring and demonstrable processes in soil and groundwater which reduce the mass and concentration of the contaminants.").

162. *See* Homestake ACL Application, *supra* note 75, at 18, 25.

163. *See* Discussion *supra* Section III.C; *see also* Tsosie, *supra* note 93.

164. *See* Uranium Mill Tailings Radiation Control Act of 1978 §§ 2, 203, 42 U.S.C. §§ 7901,2201.

165. *See* U.S. Dep't of Energy, *Process for Transition of Title II Disposal Sites*, *supra* note 95, at 27.

166. *Id.*

167. The 300-mile calculation is based on consideration for longer-distance moving from a rural area. *See* William H. Frey, *Americans' Local Migration Reached a Historic Low in 2022, But Long-Distance Moves Picked Up,* Brookings Inst. (Feb. 2, 2023), https://www.brookings.edu/research/americans-local-migration-reached-a-historic-low-in-2022-but-long-distance-moves-picked-up/ [https://perma.cc/2C24-5L2W]. *See also Uranium Location Database Compilation*, U.S. Env't Prot. Agency 1, 22–23 (Aug. 2006), https://www.epa.gov/sites/default/files/2015-05/documents/402-r-05-009.pdf [https://perma.cc/Q3JA-5F8A]. While Criterion 11 of Appendix A to Part 40 does discuss a "serious effort" to obtain certain lands in fee, no consideration is provided for market realities to ensure residents are not left worse off financially. As such, the language suggested should be included in the *Code of Federal Regulations* as a clarification to Criterion 11.

168. *See* Olalde et al., *supra* note 5.

169. *See* Homestake ACL Application, *supra* note 75, at 18, 25.

UMTRCA Title II to engage in good-faith, defensible offers for homes could lower the risk of residents falling into further debt or finding themselves priced out of safe housing markets after a buyout has been completed.[170]

B. *Proposed Rule to Address Groundwater Remediation and Abatement for Residents of Homestake*

As previously discussed, UMTRCA Title II does not grant Legacy Management express authority to mitigate or clean up groundwater pollution post-transfer.[171] This statutory gap, combined with previous complications for sites transferred under ACLs, could result in expensive, emergency cleanup costs once Legacy Management gains control of the site.[172] Accordingly, the NRC should promulgate regulations requiring higher contingency fees for sites transferred under ACLs to ensure companies, rather than taxpayers, are responsible for all costs of cleanup and abatement. Promulgating a rule requiring higher contingency fees ensures that potential future groundwater complications for sites closed under ACLs, such as migrating pollution flumes or further aquifer decline, are swiftly addressed by Legacy Management.

To understand the role of contingency fee increases in closing Homestake's regulatory loophole, it is important to revisit discussion of the regulatory structure created by Title II. Once a site is remediated to the NRC's satisfaction, the site is passed to Legacy Management for perpetual supervision.[173] As part of this process, Homestake must provide funding to offset some of the costs associated with long-term surveillance, monitoring, and maintenance,[174] as well as a contingency fee to account for any "extraordinary costs for post-closure care."[175] To provide for these potential extraordinary costs, the NRC usually relies on a contingency factor of 15% of the company's total surety bond to pay for long-term maintenance and surveillance.[176] Because the NRC has a final say in determining how much funding should be given to tDOE, Legacy Management is not in a position to bargain for additional funds in the event of an extraordinary emergency once the site has been transferred.[177]

Once sites are approved by the NRC and passed to Legacy Management, they are categorized using one of three levels to describe actual or anticipated long-term surveillance needs with Category 3 representing the highest need.[178] Currently, Homestake is projected to transition to a Category 2 site to Office of Legacy Management custody in Fiscal Year 2035.[179] This means that Legacy Management will assume supervision of Homestake with heightened monitoring requirements despite Homestake's proposal to transfer the site without any additional abatement or cleanup.[180] Accordingly, while Homestake's plan envisions a hands-off approach to cleanup, Legacy Management's perpetual monitoring will require some active oversight at a cost to taxpayers.

In light of monitoring costs greater than those originally envisioned by UMTRCA,[181] the NRC should promulgate a rule adopting a bifurcated approach. For companies that transfer sites to Legacy Management under ACLs, the NRC should assess a contingency fee of 30% rather than 15%. A contingency fee twice as high for sites transferred under ACLs would ensure adequate funding for Legacy Management maintenance in the event that alternate transfer standards result in unforeseen expenses. Companies that transfer under default regulations and do not rely on relaxed standards through ACLs should be assessed the original fee of 15%. The lower contingency fee for companies completing cleanup under default standards acts as an incentive to truly exhaust all available cleanup avenues before transferring a site to Legacy Management custody.

The NRC should also remove discretion from contingency fee requirements and should instead require higher funding levels for sites transferred under ACLs. Section 203 of UMTRCA commits regulations for contingency fees to the discretion of the NRC.[182] While transfer under an ACL may be the best option to meet NRC ALARA levels, the discretionary nature of the contingency fee could result in Legacy Management paying higher costs for sites transferred under ACLs.[183] Accordingly, the NRC should use rule promulgating authority under Section 203 to *require* higher funding levels when a site remediated under an ACL is passed to DOE Office of Legacy Management with a Site Category higher than Category 1. The NRC already acknowledges discretionary authority to require a higher long-term surveillance charge from companies like Homestake when alternatives to requirements under Appendix A are proposed.[184] Currently, NRC regulation for contingency fees states "variance in funding requirements may be considered by the commission."[185] Solidifying a higher

170. *See* Olalde et al., *supra* note 5.
171. *See* Larson, *supra* note 2, at 10–11.
172. See discussion of the Bluewater Site, *supra* Section III.C.
173. *See* UMTRCA Fact Sheet, *supra* note 101.
174. *See* U.S. Dep't of Energy, Site Management Guide, *supra* note 96, at 3.
175. *See* U.S. Dep't of Energy, *Process for Transition of Title II Disposal Sites*, *supra* note 95, at 22.
176. *Id.*
177. *Id.* at 27.
178. *See* U.S. Dep't of Energy, Site Management Guide, *supra* note 96, at 4.
179. *Id.* at 16, *Sites Planning to Transition in FY 2035*. "Category 2 activities typically include routine inspections (site visits are conducted to verify the integrity of engineered or institutional barriers) and monitoring/maintenance, records-related activities, and stakeholder support." In comparison, Category 1 sites typically only require "records-related activities and stakeholder support." *Id.* at 4.
180. *See* Homestake ACL Application, *supra* note 75, at 18.
181. See discussion of the Bluewater NM site, *infra* Section III.C.
182. *See* Uranium Mill Tailings Radiation Control Act of 1978 § 203, 42 U.S.C. §§ 2201, 2231 (The NRC may establish regulation "the Commission may deem necessary or desirable to ensure that an adequate bond, surety, or other financial arrangement (as determined by the Commission) will be provided before termination of any license for byproduct material . . . .").
183. *See* Tsosie, *supra* note 93.
184. *See NUREG-1620*, *supra* note 122, at § E3.4.2.
185. *See* Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content, 10 C.F.R. pt. 40, app. A at "Criterion 10."

ACL contingency fee is therefore within the scope of the NRC's authority to promulgate cleanup standards prior to Legacy Management transfer. Without an increased contingency fee, Homestake is able to use an ACL that considers only long-term groundwater monitoring rather than abatement,[186] goes against residents' wishes,[187] and is disagreed on by experts[188] without paying into a safety net for Legacy Management's perpetual monitoring requirement. With 30 UMTRCA Title II sites predicted to fall under Legacy Management authority,[189] requiring increased funding from companies like Homestake will provide Legacy Management with more flexibility to manage unforeseen site complications while closing the cleanup loophole Homestake is currently relying on.

V. Conclusion

The regulatory scheme created by UMTRCA Title II is a complex one that requires collaboration between multiple agencies. The partnership between Homestake Mining Company, the NRC, and Legacy Management has failed to deliver the complete cleanup envisioned by UMTRCA. Residents are paying for these shortcomings with their health, their homes, and their stability. Home buyouts under an ACL may be the best-case scenario for residents facing long-term mill tailings pollution. However, the NRC must exercise increased oversight through bargaining requirements and higher contingency fees to ensure that conditions for residents near Homestake do not further deteriorate. With more UMTCRA Title II sites on the horizon, the NRC must swiftly promulgate rules and other regulations to protect against further haunting from ghosts of Cold Wars past.

186. *See* Homestake ACL Application, *supra* note 75, at 18.
187. *See* Olalde & Miller, *A Uranium Ghost Town in the Making*, *supra* note 7.
188. *Id.*
189. *See* UMTRCA Fact Sheet, *supra* note 101.

THE NATIONAL MARINE SANCTUARIES ACT: A PROMISING YET IMPERFECT TOOL FOR PRESIDENT BIDEN'S 30x30 INITIATIVE

Erik Cervantes*

ABSTRACT

The National Marine Sanctuaries Act of 1972 ("NMSA") provides the United States government with a powerful tool to provide long-term, holistic protection for marine ecosystems through the use of Marine Protected Areas. However, the statute is an underutilized conservation tool in part due to its requirement that it complies with the National Environmental Policy Act's burdensome public participation requirements for sanctuary designations. However, as global fish stocks continue to deplete at an alarming rate due to overfishing and climate change, the United States needs to pull out every weapon in its arsenal to combat this problem. Given the unique merits of the NMSA, the Biden Administration, as part of its ambitious 30x30 Initiative, should direct Congress to reauthorize the statute and exempt the law from its burdensome public comment period requirements in order to better combat this looming ecological threat.

On October 10, 2022, the Alaska Department of Fish and Game canceled all crab fishing in its waters for its 2022-2023 fishing season.[1] After recording shockingly low numbers of opilio snow crab, red king crab, and blue king crab, the decision came as a radical effort to preserve stocks of a crucial economic resource of Alaskan waters.[2] It is projected that this move will cause a loss in revenue of $500 million, with many fishing companies within the crabbing industry at risk of bankruptcy and job losses.[3] "It didn't have to be this way," as one crab fisher put it.[4] "The crab will eventually bounce back and could do so sooner if the North Pacific Fishery Management Council had taken steps to protect the stock, as requested by the fishermen themselves."[5]

What this fisherman is referring to is the fishery management system established in 1976 under the Magnuson-Stevens Act.[6] This statute was created to prevent overfishing in U.S. waters by establishing eight regional fishery management councils, such as the North Pacific Council, which oversee fishery management within their respective regions.[7] However, fishery management alone is inherently insufficient to protect fish populations.[8] Even the best-managed fisheries, such as Alaska's, have unintentionally depleted various species partially due to their extensive use of fishing gear.[9]

Climate change has proven to be detrimental to global fish and trawl populations across U.S. waters. The rapidly declining stocks of red king crab have largely been caused by the rapidly warming waters in the North Pacific, resulting in very little area for them to grow.[10] The Gulf of Maine has also experienced a drop in its supply of New England cod due to changing ocean temperatures that have severely impeded the state's efforts to rebuild their previously over-

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1. *See* Kirk Moore, *Alaska Shuts Down Crab Seasons After Dismal Survey Results*, Nat'l Fisherman (Oct. 11, 2022), https://www.nationalfisherman.com/alaska/alaska-shuts-down-crab-seasons-after-dismal-survey-results [https://perma.cc/9AWU-MMPJ].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1884. The eight fishery management councils include the New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf, Pacific, North Pacific, and Western Pacific Councils.
7. 16 U.S.C. § 1852(a).
8. *See* Virtual Legislative Hearing on H.R. 8632 Before the H. Comm. on Natural Resources, 116th Cong. 10 (2020) (statement of Jane Lubchenco, Distinguished Professor, Oregon State Univ.).
9. *Id.*
10. *See* Margaret Cooney, *How Marine Protected Areas Help Fisheries and Ocean Ecosystems*, Ctr. for Am. Progress (June 3, 2019), https://www.americanprogress.org/article/marine-protected-areas-help-fisheries-ocean-ecosystems/ [https://perma.cc/DX6W-83S4].

fished stocks.[11] Combined with the demands of commercial and recreational fishing, climate change has exacerbated the depletion of fish stock, posing a serious ecological problem for the United States.[12]

One tool of ocean conservation, practiced around the world, includes the use of Marine Protected Areas ("MPAs").[13] MPAs are defined as "any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein."[14] Experts and policy analysts have applauded the use of MPAs as a more efficient way of not only rebuilding fish stock, but also improving biomass, numerical density, and fish size.[15] Although the MPA approach to natural resource conservation is widely used, less than 5% of the global ocean is protected by MPAs.[16] By comparison, more than 15% of the world's land area has designated protections or management.[17] This is significant because a recent study found that on a global scale, protecting just 5% more ocean internationally could increase future catch by at least 20%, which would generate between 9 and 12 million metric tons of additional seafood.[18]

In the United States, the designation and maintenance of MPAs is governed by Title III of the Marine Protection, Research, and Sanctuaries Act ("MPRSA") of 1972.[19] Title III, also known as the National Marine Sanctuaries Act ("NMSA"), grants authority to the Secretary of Commerce to create MPAs that feature "special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archeological, educational or esthetic qualities as national marine sanctuaries."[20] Although designation authority is assigned to the Secretary of Commerce, management of MPAs is delegated to the National Ocean and Atmospheric Administration ("NOAA"), a subset of the U.S. Department of Commerce.[21]

Not all MPAs are the same, however. Each MPA contains different levels of protection that allow for specified uses.[22] Examples of MPAs in the United States include the Channel Islands Marine Sanctuary, which restricts commercial fishing, and the Florida Keys Marine Sanctuary, which prohibits all types of wildlife or natural resource extraction.[23] As it stands today, 26% of United States ocean territory is covered by these MPAs.[24] However, only 3% of these areas are "no-take" marine reserves, where extraction of wildlife is prohibited completely.[25]

International pressure to create more sustainable ways of conserving fish populations has led the United States, more recently under the Joseph Biden Administration, to focus on heightened conservation efforts in its ocean territory.[26] On January 27, 2021, President Biden signed into law Executive Order No. 14008: "Executive Order on Tackling the Climate Crisis at Home and Abroad."[27] Section 216 of the order lays out a broad plan to conserve at least 30% of U.S. lands and ocean areas by 2030,[28] hence the moniker "the 30x30 Initiative."[29] Although supported by various legislators and conservation groups,[30] the plan lacks specific prerogatives to give the initiative effective enforcement because it only directs agency heads to submit reports recommending what steps the United States should take.[31]

Given this renewed interest in marine conservation, the Biden Administration should revisit the NMSA as a viable mechanism to conserve marine ecosystems through the establishment of MPAs. The NMSA is preferable over other authorities because it utilizes a more holistic, ecosystem-based approach to conservation.[32] The Outer Continental Shelf Lands Act ("OCSLA")[33] and the Magnuson-Stevens Fishery Act,[34] for example, are use-based, limiting their scope to oil/gas development and capping fish capture respectively.[35] Similarly, the Endangered Species Act ("ESA")[36] and the Marine Mammal Protection

11. Marianne Lavelle, *Collapse of New England's Iconic Cod Tied to Climate Change*, Sci. (Oct. 29, 2015), https://www.science.org/content/article/collapse-new-england-s-iconic-cod-tied-climate-change [https://perma.cc/5SWM-EQF3].
12. *Id.*
13. Cooney, *supra* note 10.
14. Exec. Order No. 13158, 65 Fed. Reg. 34909 (May 26, 2000).
15. *See generally* Sarah E. Lester et al., *Biological Effects Within No-Take Marine Reserves: A Global Synthesis*, 384 Marine Ecology Progress Series 33 (2009).
16. Cooney, *supra* note 10.
17. *Id.*
18. *See* Lubchecno, *supra* note 8, at 18.
19. National Marine Sanctuaries Act, 16 U.S.C. §§ 1431–1445.
20. 16 U.S.C. § 1431(a)(2).
21. Off. of Nat'l Marine Sanctuaries, *Legislation*, Nat'l Oceanic & Atmospheric Admin., https://sanctuaries.noaa.gov/about/legislation/ [https://perma.cc/46AS-4EBA].
22. Nat'l Marine Protected Areas Ctr., *About Marine Protected Areas*, Nat'l Oceanic & Atmospheric Admin., https://marineprotectedareas.noaa.gov/aboutmpas/ [https://perma.cc/3RY9-AHXV].
23. Nat'l Marine Protected Areas Ctr., *MPA Viewer*, Nat'l Oceanic & Atmospheric Admin, https://marineprotectedareas.noaa.gov/dataanalysis/mpainventory/mpaviewer/ [https://perma.cc/29Q7-KGFD].
24. Nat'l Marine Protected Areas Ctr., Marine Protected Area Coverage for the United States, Nat'l Oceanic & Atmospheric Admin. 1 (Apr. 2021), *available at* https://nmsmarineprotectedareas.blob.core.windows.net/marineprotectedareas-prod/media/docs/202104-us-mpa-coverage.pdf [https://perma.cc/44H6-JH57]; *see also* Off. of Nat'l Marine Sanctuaries, Road to Sanctuary Designation, Nat'l Oceanic & Atmospheric Admin., *available at* https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/archive/management/pdfs/designation-process.pdf [https://perma.cc/3APN-ANPZ]. There are only 15 national MPAs established under MRSA: Olympic Coast, Greater Farallones, Cordell Bank, Hawaiian Islands Humpback Whale, Monterey Bay, Channel Islands, American Samoa, Thunder Bay, Wisconsin Shipwreck Coast, Stellwagen Bank, Monitor, Gray's Reef, Florida Keys, Mallows Bay-Potomac River, and Flower Garden Banks.
25. *Id.*
26. Cooney, *supra* note 10.
27. Exec. Order No. 14008, 86 Fed. Reg. 7619, 7633 (Jan. 27, 2021).
28. *Id.* at 7,627.
29. Helen O'Shea, *Biden Administration Lays Out 30x30 Vision to Conserve Nature*, Nat. Res. Def. Council (May 6, 2021), https://www.nrdc.org/experts/helen-oshea/biden-administration-lays-out-30x30-vision-conserve-nature [https://perma.cc/E4VG-9EU5].
30. *Id.*
31. Exec. Order No. 14008, 86 Fed. Reg. at 7627.
32. *See* Don Baur et al., Area-Based Management of Marine Resources: A Comparative Analysis of the National Marine Sanctuaries Act and Other Federal and State Legal Authorities 2 (June 2013), *available at* https://nsglc.olemiss.edu/publications/files/nmsf-report.pdf [https://perma.cc/YX7E-W48P].
33. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356c.
34. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1884.
35. Baur et al., *supra* note 32, at 2.
36. Endangered Species Act, 16 U.S.C. §§ 1531–1544.

Act[37] are species-based, with their authority only applying to individual species of animals.[38] Additionally, the NMSA is flexible, offering a range of protection levels on MPAs and permitting compatible uses of certain human activity while still offering baseline protection.[39] Finally, the NMSA includes enforcement mechanisms that grant the Department of Commerce license to impose civil liability without relying on federal prosecutors.[40]

However, while the NMSA might be a viable policy solution, President Biden must overcome several obstacles to revitalize the statute. Firstly, there is currently a moratorium imposed on the NMSA that prevents its use in proposing designations of MPAs.[41] Secondly, even if the U.S. Congress were to consider removing the designation moratorium, the NMSA requires further amendment to enhance its efficiency. Although the NMSA already requires Congress, executive agencies, and state and local governments to review sanctuary proposals,[42] the MPA designations must also conform to the National Environmental Policy Act of 1969 ("NEPA"),[43] which requires sanctuary proposals to be subject to a lengthy public comment period where private interests and concerned citizens may respond to the designation proposals.[44] Although the 92nd Congress in 1972 intended to create a designation process that contained adequate levels of review to prevent arbitrary decisionmaking,[45] they vastly overcorrected. The NEPA public comment period has proven to be not only redundant, but obstructive, allowing dissenting parties to delay the MPA designation process and reduce the levels of marine protection originally envisioned.[46] As a result, the designation process has lasted several years in some cases, with some proposals even being rejected altogether due to successful obstruction by zealous dissenters.[47] For every minute spent navigating through bureaucratic red tape and appeasing the onslaught of public comment, the United States foregoes urgent conservation action.

Thirdly, the Biden Administration simply does not have the authority on its own to amend the statute. Congress holds the key to fixing the relevant provisions of the NMSA, leaving President Biden with very little unilateral authority on the matter.[48] Given this political reality, President Biden's 30x30 Initiative must include key lawmakers in Congress as well if there is any hope for the NMSA to be revitalized and amended.

To combat the rapid depletion of fish populations in U.S. waters, the Biden Administration's 30x30 Initiative must direct Congress to lift the moratorium on the NMSA and amend the statute by adding a clause that explicitly exempts the designation process from NEPA public comment requirements found in 40 C.F.R. 1503.1(a)(2)(v) to streamline marine sanctuary implementation.

Part I of this Note will address the current moratorium on the NMSA designations imposed by Congress and recent consideration of its removal to contextualize the contemporary legal landscape. Part II of this Note will provide a detailed overview of the NMSA and outline the steps required to designate an MPA under current law. This section will outline the multiple levels of government review already prescribed by the NMSA to highlight the redundancy of the act's further compliance with NEPA's subsequent public comment period. Part III will then provide two examples of MPAs, Florida Keys and Monterey Bay National Marine Sanctuaries, to illustrate how this public comment period mandated by the NEPA has unduly delayed the length of the designation process and reduced the amount of protection ultimately provided. Part IV will discuss the unique merits of this Note's proposal and its potential as a suitable solution to the current fish stock crisis. Part V will offer an overview of other proposed solutions to the current problems facing MPA implementation that have been put forth by other legal scholars, such as adding a "citizen suit" provision to the MSA and using the Antiquities Act as an alternative authority to establish MPAs. These solutions will then be compared to the proposal in this Note to further advocate for the unique advantages found in simply removing the public participation requirements in the MSA. Finally, Part VI will then address the various shortcomings and possible disadvantages of this Note's proposed solution.

The NMSA is a landmark piece of legislation that provides a very promising framework for the federal government to provide long-term protection of the oceans' natural resources. In turn, this level of protection is likely to rebuild not only the numbers of U.S. fish stock, but also their size and vitality. However, creating efficient legislation in a democratic society is a delicate dance, one that needs to strike the right balance between swift executive action and the wishes of the American people. As it stands today, the NMSA, burdened by a redundant and regressive level of review, has yet to find its footing. By amending the act to bypass NEPA's public comment requirement, the Biden Administration has the opportunity to obtain a powerful tool for their conservation arsenal and meet its 30x30 objectives.

37. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423.
38. Baur et al., *supra* note 32, at 2.
39. *Id.*
40. *Id.*
41. *See* William J. Chandler & Hannah Gillelan, *The History and Evolution of the National Marine Sanctuaries Act*, 34 ELR, 10505, 10558 (June 2004); *see* Part I, *infra*.
42. National Marine Sanctuaries Act, Sanctuary Design Standards, 16 U.S.C. § 1433(b)(2).
43. Procedures for Designation and Implementation, 16 U.S.C. § 1434 (a)(2); National Environmental Policy Act, 42 U.S.C. §§ 4321–4347.
44. Inviting Comments and Requesting Information and Analyses, 40 C.F.R. § 1503.1(a)(2)(v) (2020).
45. *See* Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. Env't L.J. 711, 718 (2003).
46. *See* Harold Upton & Eugene Buck, Cong. Rsch. Serv., RL32154, Marine Protected Areas: An Overview 11 (2010).
47. *Id.*
48. U.S. Const., art. I, § 8, cl. 3; *see also* The White House, *The Legislative Branch*, https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/ [https://perma.cc/EF4D-645A] ("All legislative power in the government is vested in Congress, meaning that it is the only part of the government that can make new laws or change existing laws.").

I. Moratorium on the NMSA

Before amendment of the NMSA is given any serious thought, the current moratorium on the NMSA must first be lifted.[49] In 2000, Congress added a provision to the statute that established a budget-dependent moratorium on the addition of any new sanctuaries.[50] To propose or designate a new sanctuary, this provision requires a finding that (1) the new sanctuary would not have a negative impact on the Sanctuaries program, and (2) that sufficient resources were available in the fiscal year in which the finding is made to implement management plans and complete site characterization studies.[51]

This means that the moratorium on designations will not be lifted unless NOAA proposes an adequate budget plan for sanctuary management, and that Congress provides these appropriations.[52]

It was not until recently that Congress made any moves toward removing this moratorium. The Ocean-Based Climate Solutions Act of 2020, a congressional bill sponsored by Rep. Raul Grijalva (D-Ariz.) in 2020,[53] was introduced "to provide for ocean-based climate solutions to reduce carbon emissions and global warming; to make coastal communities more resilient; and to provide for the conservation and restoration of ocean and coastal habitats, biodiversity, and marine mammal and fish populations; and for other purposes."[54] In relevant part, Title II of the legislation is devoted to enhancing marine conservation efforts through the use of MPAs.[55] In line with this goal, the act proposed repealing the 2000 amendments that imposed a budget-dependent moratorium on the NMSA.[56] Unfortunately, upon re-introduction of the updated bill in its 2021 version, its sponsors dropped the moratorium-removal provision.[57] This recent legislative action, although unsuccessful, indicates an emerging awareness within Congress that removing the moratorium on new sanctuaries could be a promising step toward more effective ocean conservation, and should point out to future legislators and administrations the first step in the amendment process.

II. MPA Designation Process

Reviewing the purpose and relevant provisions of the NMSA is instrumental in appreciating the act's potential, as well as its shortcomings. Even if the moratorium on the NMSA was lifted, its lengthy and complicated designation process, made worse so by NEPA's public comment requirement, demonstrates a desperate need for reform if there is any hope for the statute to be efficient.

A. Purpose

The stated purpose of the NMSA is to protect those areas of the ocean that possess "conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities which give them special national, and in some cases international, significance."[58] This laundry list of characteristics provides a very broad scope of U.S. marine areas that could be eligible for MPA designation and protection. However, while the legislation's primary objective may be to protect those natural marine areas that possess any of the important qualities listed above,[59] Congress also explicitly intended the Act to be compatible with "all private and public uses of the natural resources"[60] in said areas, illustrating a holistic approach to MPA designation that balances the interests of all stakeholders involved.

B. Determining Suitability for Sanctuary Designation

Sections 303 and 304 can be described as the "meat and bones" of the legislation, as they detail how an MPA is actually created after designation by the Secretary of Commerce (herein the Secretary).[61] Step 1 of the process occurs once the Secretary designates an area as a marine sanctuary, as long as the area in question meets any of the criteria listed in Section 303 of the MSA.[62] The factors to be considered include the area's natural resource and ecological qualities, historical or cultural significance, present or potential uses, manageability, public benefits to be derived from sanctuary status, and socioeconomic effects of sanctuary designation.[63]

It is important to note that although the language of the legislation dictates that the Secretary "shall" consider these factors, the statute does not assign specific weight to any of them.[64] Without any emphasis on which factors should be most salient in the Secretary's determination, one is hard-pressed to think of a marine area that would not be eligible for sanctuary status on its face. The permissive criteria of the NMSA make the statute extremely flexible from a substantive perspective.

C. Consultations

While up to this point it may appear that the Secretary has wide latitude in designating MPAs, the consultation requirements can pose a significant obstacle for final des-

49. *See* Chandler & Gillelan, *supra* note 41, at 10558.
50. Peter H. Morris, *Monumental Seascape Modification Under the Antiquities Act*, 43 Env't L. 173, 183 (2013).
51. Procedures for Designation and Implementation, 16 U.S.C. § 1434(f)(1); National Marine Sanctuaries Amendments Act of 2000, Pub. L. No. 106–513, § 6(f), 114 Stat. 2381, 2385 (2000).
52. Chandler & Gillelan, *supra* note 41, at 10560.
53. Ocean-Based Climate Solutions Act of 2020, H.R. 8632, 116th Cong. (2020).
54. *Id.*
55. *Id.*
56. *Id.*
57. Ocean-Based Climate Solutions Act of 2022, H.R. 3764, 117th Cong. (2022) (introduced June 8, 2021).
58. National Marine Sanctuaries Act, Findings, Purposes, and Policies; Establishment of System, 16 U.S.C. § 1431(1)(a)(2).
59. 16 U.S.C. § 1431(b)(1)–(2), (b)(6).
60. 16 U.S.C. § 1431(b)(6).
61. 16 U.S.C. § 1433.
62. 16 U.S.C. § 1433.
63. 16 U.S.C. § 1433(b)(1).
64. 16 U.S.C. § 1433(b)(1).

ignation. However, the Secretary's ability to consider relevant factors is not unilateral. The Secretary must then consult with other authorities that all possess the power to review, critique, amend, or reject sanctuary proposals by the Secretary in light of the factors enumerated in 16 U.S.C. § 1433(b).[65] During consultation, these relevant authorities "discuss and assess the public benefits, the socioeconomic effects, and the 'negative impacts' of a proposed new sanctuary."[66] First, the Secretary must consult with both chambers of Congress, specifically, the Committee on Resources of the U.S. House of Representatives and the U.S. Senate's Committee on Commerce, Science, and Transportation.[67] Second, the Secretaries of State, Defense, Transportation, and the Interior are also required to be consulted with regarding a new marine sanctuary.[68] Third, state and local governments that "will or are likely to be affected" by the sanctuary designation must also share a seat at the table. Fourth, the appropriate Regional Fishery Management Councils[69] must be offered the opportunity to issue fishing regulations that pertain to the proposed area. Finally, and perhaps most broad of all, any "other interested persons"[70] are included in the designation process, opening the floodgates so that an incredibly wide array of interests are entitled to have a seat at the table. This signals yet another instance where the vague language of the statute leaves one hard-pressed to find a way to limit who can oppose sanctuary designation.

D. NEPA Requirements

Nonetheless, despite surviving multiple levels of close scrutiny by other authoritative bodies within the U.S. federal government, a sanctuary designation proposal must be subjected to yet *another* level of review—NEPA.[71] Not to be confused with the Administrative Procedure Act ("APA"),[72] NEPA requires "federal agencies to consider the potential environmental consequences of their proposals, to consult with other interested agencies, to document the analysis, and to make this information available to the public for comment before the implementation of the proposals."[73] This NEPA requirement is an incredibly burdensome process, which can make the administrative rulemaking process take years at a time.[74]

1. Notice of Proposal

After the Secretary completes their consultations, they must then issue a notice of proposal in the *Federal Register*.[75] This notice shall also include any regulations "that may be necessary and reasonable to implement" their proposal, along with a summary draft management plan in the *Federal Register*.[76] These documents are then provided to the House Resources Committee, the Senate Commerce, Science, and Transportation Committee, and to the state governors that have jurisdiction over the area to be protected.[77]

2. Environmental Impact Statement

Additionally, the Secretary must also procure an environmental impact statement ("EIS") in accordance with NEPA.[78] This statute requires that an EIS is prepared "for each proposed major Federal action significantly affecting the quality of the human environment before making a decision on whether to proceed with the proposed action."[79] The statement itself is required to fully disclose, among other things, the purpose and description of the designation, and its impact on the environment.[80]

3. Resource Assessment

A resource assessment must also be made available to the public. This document primarily outlines all present and potential uses of the region, which includes "commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial, governmental, or recreational uses."[81]

4. Draft Management Plan

A Draft Management Plan must also be published when a new marine sanctuary is proposed.[82] This document outlines the terms of the proposed designation, mechanisms to coordinate the authorities that manage the area,

65. 16 U.S.C. § 1433(b)(2).
66. Mark Laemmle, *Monumentally Inadequate: Conservation at Any Cost Under the Antiquities Act*, 21 Vill. Env't L.J. 111, 138 (2010).
67. 16 U.S.C. § 1433(b)(2).
68. 16 U.S.C. § 1433(b)(2).
69. Magnuson-Stevens Fishery Conservation and Management Act, Regional Fishery Management Councils, 16 U.S.C. § 1852.
70. 16 U.S.C. § 1433(b)(2).
71. Procedures for Designation and Implementation, 16 U.S.C. § 1434(a)(2); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370m12.
72. Administrative Procedure Act, 5 U.S.C. §§ 551–559; *see generally* Nina Hart & Linda Tsang, Cong. Rsch. Serv., IF11932, National Environmental Policy Act: Judicial Review and Remedies (2021). While NEPA and the APA may be similar in that they structure agency rulemaking, there are some key differences. Unlike the APA, NEPA only applies to federal action that impacts the environment. Additionally, APA decisions are subject to judicial review, while NEPA decisions are not. Finally, the text of the NMSA explicitly requires compliance with NEPA, not the APA.
73. Council on Env't Quality, Exec. Off. of the President, A Citizen's Guide to the NEPA: Having Your Voice Heard 4 (2021), https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf [https://perma.cc/FZS7-WCAK].
74. *See* Diane Katz, *National Environmental Policy Act Is a Half-Century Old—And Long Outlived Its Usefulness,* Heritage Found. (Mar. 28, 2018), https://www.heritage.org/environment/commentary/national-environmental-policy-act-half-century-old-and-long-outlived-its [https://perma.cc/PH8B-8STX] ("The average time to complete a NEPA impact assessment of a transportation project has expanded from 2.2 years in the 1970s to 6.6 years in 2011.").
75. Procedures for Designation and Implementation, 16 U.S.C. § 1434(a)(1)(A).
76. 16 U.S.C. § 1434(a)(1)(A).
77. 16 U.S.C. §§ 1434(a)(1)(B)–(C).
78. 16 U.S.C. § 1434(a)(1); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370m12.
79. Timing of Environmental Impact Statement Development, 43 C.F.R. § 46.400 (2023).
80. Environmental Impact Statement Content, Alternatives, Circulation, and Filing Requirements, 43 C.F.R. § 46.415 (2008).
81. 16 U.S.C. § 1434(a)(2)(B)(i).
82. 16 U.S.C. § 1434(a)(2)(C).

the stated objectives, cost estimates for management and enforcement, and all proposed regulations.[83] This plan also includes a map that details the location and dimensions of the MPA.[84]

5. Public Comment

After all the proposal documentation is published with sufficient notice, designation is subjected to public comment period,[85] which is arguably the most burdensome part of the entire designation process. 40 C.F.R. 1503.1(a)(2)(v) stipulates that the Secretary must "request the comments of the public, affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action."[86] The function of this comment period is intended to provide a forum for those affected to express their views regarding the sanctuary designation.[87] However, as the following section will illustrate, the public comment period significantly impedes implementing marine sanctuary protection, either by delaying their designation, limiting their scope, or preventing their existence altogether.[88]

III. Examples of Lengthy Designations

Just by examining the language of the legislation, one can already discern that the NMSA is designed to provide a comprehensive framework for long-term marine protection so long as a designation proposal survives scrutiny from both government authorities and the public. However, history reveals that the practical effect of this thorough public comment process has frustrated the purpose of the statute's objectives by significantly delaying MPA creation and ultimately reducing the area or level of protection they ultimately provide.[89] The most salient examples that highlight this issue are the Florida Keys and Monterey Bay National Marine Sanctuaries.

A. The Florida Keys National Marine Sanctuary

The Florida Keys National Marine Sanctuary is composed of almost 3,000 nautical miles of ocean territory just south of Florida.[90] The sanctuary is home to thousands of species of flora and fauna that thrive in fields of seagrass or coral reefs.[91] This biodiversity brings in millions of tourists each year who come to the area to boat, snorkel, and scuba dive.[92] The robust fish populations in the area also attracted commercial fishing interests that enjoyed millions in revenue per year up until the 1970s.[93]

Prior to the 1970s, the sanctuary originally consisted of a set of small, protected zones at Key Largo, Looe Key, and John Pennekamp Coral Reef State Park.[94] But beginning in the 1970s, the intense human activity in the region began to adversely affect its ecosystem.[95] The populations of fish and lobster began to rapidly shrink as more and more commercial fishing began taking place.[96] The sizes of these fish populations also suffered as their diverse habitats, most notably the miles of seagrass and coral reefs, increasingly died out when subjected to increased human activity.[97]

Recognizing the damage occurring to the marine area, the area was proposed as an MPA in 1990 under the NMSA.[98] However, the designation process was not complete. It would not be until 1997 that the sanctuary we know of today was finalized.[99] During this seven-year period, sanctuary planners faced fervent resistance from the residents of the area, who were mainly concerned with federal regulation harming the local economy by preventing fishing and extracting natural resources through the imposition of no-take zones.[100] After the first draft management plan and NEPA EIS were published in April of 1995, over 6,000 people submitted public comments opposing the no-take provisions contained within.[101] Opponents to the sanctuary designation were able to mobilize a hostile political campaign against sanctuary designation, complete with bumper stickers, protests, and even violence.[102] Even after the final management plan was issued, 55% of local voters opposed the designation by voting in an advisory referendum titled "Say No to NOAA."[103]

The designation proposal initially conceived of five no-take marine reserves that would amount to roughly 20% of the sanctuary today.[104] However, successful opposition to the original proposal for these no-take zones resulted in just one no-take zone being established, which amounts to

83. 16 U.S.C. § 1434(a)(2)(C).
84. 16 U.S.C. § 1434(a)(2)(D).
85. Inviting Comments and Requesting Information and Analyses, 40 C.F.R. § 1503.1 (2020).
86. 40 C.F.R. § 1503.1(a)(2)(v).
87. *Id.*
88. *See generally* Part III, *infra*.
89. *See* Owen, *supra* note 45, at 731. During reauthorization proceedings in 1988, Congress did not attempt to remove the public participation or agency review procedures. However, Congress did supply specific deadlines in the procedure in an attempt to generate more effective results in the sanctuary program. *Id.*
90. *History of Florida Keys National Marine Sanctuary*, Nat'l Oceanic & Atmospheric Admin., https://floridakeys.noaa.gov/history.html [https://perma.cc/DLG6-BP5P] [hereinafter History of Florida Keys Sanctuary].
91. *See* Beth Baker, *First Aid for an Ailing Reef: Research in the Florida Keys National Marine Sanctuary*, 49 BioScience 173, 173 (1999).
92. *Id.*
93. *Id.*
94. *See* Nat'l Oceanic & Atmospheric Admin., Florida Keys National Marine Sanctuary Revised Management Plan 2 (2007), *available at* http://floridakeys.noaa.gov/mgmtplans/2007_man_plan.pdf [https://perma.cc/6ZKX-DE8R].
95. *See* Baker, *supra* note 91, at 173.
96. *Id.*
97. *Id.* at 173–74; Nat'l Acad. Pub. Admin., Protecting Our National Marine Sanctuaries: A Report by the Center for the Economy and the Environment 72, 74 (2000), *available at* https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/archive/management/pdfs/NAPARpt.pdf [https://perma.cc/9YSE-F46Z].
98. *Florida Keys National Marine Sanctuary and Protection Act*, Nat'l Oceanic & Atmospheric Admin., https://floridakeys.noaa.gov/about/fknmsp_act.html [https://perma.cc/PW86-RGQD].
99. *See* History of Florida Keys Sanctuary, *supra* note 90.
100. *See* Baker, *supra* note 91, at 174–75.
101. *Id.* at 173.
102. *See* Morris, *supra* note 50, at 202. Some protestors threw coconuts at sanctuary supporters at one anti-NOAA demonstration. *Id.*
103. Nat'l Acad. Pub. Admin., *supra* note 97, at 72.
104. Baker, *supra* note 91, at 175.

just 0.5% of the area initially proposed.[105] It is clear to see that the public comment process opened the door to fierce opposition that not only delayed the final designation of the sanctuary, but also ultimately reduced the amount of protection initially proposed by NOAA.

B. *Monterey Bay National Marine Sanctuary*

The Monterey Bay National Marine Sanctuary, the country's 11th successfully designated marine sanctuary, encompasses a 6,000-square-mile marine area along the California coast between the northern San Francisco Bay Area to Cambria.[106] The Monterey Sanctuary remains as one of the largest marine sanctuaries established by the NMSA, with its area larger than Yellowstone National Park.[107] The fact that this sanctuary has earned the moniker "Serengeti of the Sea"[108] is not an accident; the area encompassed by this protected sanctuary is teaming with biodiversity.[109] The site hosts 36 species of marine mammals, over 180 species of seabirds, and over 500 species of fish.[110]

While the sanctuary was finally established in 1992, the designation process took over 15 years to earn final designation.[111] This drawn-out designation period, similar to the Florida Keys National Marine Sanctuary, was in large part caused by pushback from interest groups.[112] The commercial fishing industry, for one, initially opposed the sanctuary for fears of heightened fishing regulations that would threaten their livelihood.[113] After significant pushback, Congress and NOAA gave in to these demands by promising to not regulate fishing[114] in exchange for said fishing groups not disturbing select hatching areas within the sanctuary.[115] The oil and gas industry also posed as a considerable opponent to sanctuary planners.[116] The industry lobbied heavily for continued operation of the existing terminals within the sanctuary's territory, which NOAA eventually granted[117] while simultaneously prohibiting future leases of new offshore oil and gas development.[118]

Like the designation of the Florida Keys National Marine Sanctuary, Monterey Bay National Marine Sanctuary faced so much opposition during the public comment period that NOAA was forced to tolerate continued extraction of natural resources from the sanctuary. While the sanctuary was still able to completely prohibit "oil drilling, ocean dumping, and seabed mining,"[119] NOAA's inability to include fishing and gas leasing on that blacklist once again illustrates the obstacle that the public comment period poses to the NMSA.

IV. Advantages of Exempting NMSA From Public Comment Requirements

Not only would exempting the NMSA from NEPA's public comment period bypass the delay caused by public opposition to MPA designations, but doing so would also feature unique benefits, as outlined in this section.

A. *Honors Congressional Intent*

One advantage of exempting the NMSA from the public comment requirement is that it attempts to streamline the MPA designation process without departing from the original intent of Congress. The 92nd Congress in 1971 was very clear in its goals when it drafted the NMSA.[120] Most important was its objective to provide a comprehensive, yet balanced legislative framework that permits multi-use management of our oceans.[121] Additionally, the structure and language of the NMSA legislation indicates Congress' intent to be involved in the designation process by requiring all designation proposals by NOAA to be reviewed by committees in both chambers of Congress.[122]

Removing the public participation requirements in the NMSA honors both these congressional objectives. While removing an opportunity for public opposition to uphold the process eliminates some level of scrutiny to the process, checks by other authorities on the federal and state level exist that ensure the balanced, coordinated approach to sanctuary designation that Congress envisioned.[123] The enumerated oversight authorities, which include the relevant congressional committees, governors, and fishery management councils, are already beholden to constituents in a way that mirrors NEPA's public participation objectives.[124] The existing levels of checks on sanctuary implementation makes another layer of public participation in the process redundant at best. At worst, it is detrimental, given the substantial need for protection of U.S. fish populations. The NMSA can better capture the comprehensive

105. *Id.*
106. *See* Monterey Bay Nat'l Marine Sanctuary, *Monterey Bay National Marine Sanctuary Overview*, Nat'l Oceanic & Atmospheric Admin., https://montereybay.noaa.gov/intro/welcome.html [https://perma.cc/78G5-2NJW] [hereinafter Monterey Bay Sanctuary Overview].
107. *Id.*
108. *See* Tierney Thys, *Why Monterey Bay Is the Serengeti of Marine Life*, Nat'l Geographic (Aug. 21, 2021), https://www.nationalgeographic.com/travel/article/explorers-guide-8 [https://perma.cc/7UGM-BGQ7].
109. *See id.*
110. Monterey Bay Sanctuary Overview, *supra* note 107.
111. Nat'l Acad. Pub. Admin., *supra* note 97, at 100.
112. *See* Kenneth J. Garcia, *Monterey Bay Refuge Exceeds Expectations; However, Environmentalists Worry About Plan's Loopholes*, S.F. Chron., Sept. 14, 1992, at A1.
113. *See* Nat'l Acad. Pub. Admin., *supra* note 97, at 102; Garcia, *supra* note 112.
114. *See* Nat'l Acad. Pub. Admin., *supra* note 97, at 102; *see also* Morro Bay Com. Fishermen's Org., *Sanctuary Problems*, New Times (San Luis Obispo, Cal.) (Feb. 27, 2020), https://www.newtimesslo.com/opinion/sanctuary-problems-9334903 [https://perma.cc/Q9LB-X8PC].
115. *See* Garcia, *supra* note 112.
116. *See id.*
117. *See id.*
118. *See* Nat'l Acad. Pub. Admin., *supra* note 97, at 100.
119. Monterey Bay Sanctuary Overview, *supra* note 107.
120. *See* Owen, *supra* note 45, at 718.
121. Findings, Purposes, and Policies; Establishment of System, 16 U.S.C. § 1431(b)(2); Owen, *supra* note 45, at 719.
122. Kevin O. Leske, *Un-Designating Marine Sanctuaries: Assessing President Trump's America-First Offshore Energy Strategy*, 42 Wm. & Mary Env't L. & Pol'y Rev. 693, 725 (2018); Owen, *supra* note 45, at 718.
123. *See* Part II, *supra*.
124. National Marine Sanctuaries Act, Sanctuary Designation Standards, 16 U.S.C. § 1433 (b)(1)–(2).

protection Congress hoped for by removing this level of scrutiny without encroaching on the expectation that Congress be left out of the process.[125]

B. Preserves Science-Based Approach to Sanctuary Planning

The complicated history of the Florida Keys and Monterey sanctuary designations,[126] as just two of many examples, demonstrates the disconnect between sanctuary planners and the public. The contentious process of MPA designations has taught sanctuary planners that the high hopes of sanctuary proponents, who are often initially guided by the scientific recommendations by ecological experts, seldom meet their expectations when confronted with public opposition.[127] While the concerns of those interest groups may oftentimes be based on valid economic concerns, sometimes these concerns can be exaggerated.[128]

C. Complementary to Other Marine Preservation Authorities

Another reason that removing public participation requirements is an attractive initial step for revamping the NMSA is that doing so would complement other authorities that currently pertain to marine preservation. Fishery management powers offered by the Magnuson-Stevens Fishery Act[129] or the OCSLA[130] may still operate within their own limited jurisdictions, allowing NOAA to focus on the more sensitive marine areas that call for more substantial, holistic protection. This flexible approach to natural resource management in our oceans provides the regulatory authorities of the United States with options when confronted with ecological crises without rendering the positions of those in state governments or fishery management councils irrelevant.

V. Comparison to Other Solutions

This Note is hardly the first comment on the NMSA. The legal literature surrounding the legislation is rife with other dissatisfied legal analysts who are similarly frustrated with the ineffective structure of the legislation.[131] While these authors share the same concerns about the efficacy of the statute, none propose removing the NEPA public comment period. Instead, there have been a variety of legal solutions put forth to enhance marine protection by other means.

A. Citizen Suit Provision

One proposed amendment to the NMSA is adding a "citizen suit provision" to the statute.[132] UC Hastings' Dave Owen points out that the NMSA does not contain any procedural or substantive mechanism to direct NOAA or the Secretary of Commerce to make specific designations that any citizen may deem appropriate for protection.[133] The ESA, for example, sets out detailed criteria for agency action, which if not acted on, opens the door to citizen suits that could force agency action.[134] From this, Owen suggests that in the same way, the NMSA could have also included a citizen suit provision that allowed citizens to direct the designation of MPAs.[135]

However, while such a provision may be effective at *initiating* the designation process, such an amendment would not strike the crux of the problem. As discussed in this analysis, the designation process itself mandates a slow, bureaucratic process that is easily disrupted by private interests or opposing authorities in federal or local government.[136] A citizen suit provision is certainly a creative suggestion to improve current legislation by providing an external impetus for an inactive Congress. However, such a proposal would have little bearing on the more pressing source of delay.

B. Executive Action Via the Antiquities Act

Other commentators have looked past the NMSA for a solution in favor of a different statute: the Antiquities Act of 1906.[137] This law, passed under the Administration of Theodore Roosevelt, authorizes the president of the United States to declare "historic landmarks, historic and prehistoric structures"[138] within U.S. territory to preserve those lands in order to protect and manage historic relics that the president declares deserve protecting.[139] Although originally legislated for the purpose of preserving history, there are several examples of the president exercising this Antiquities power to establish marine reserves, including the Channel Islands,[140] Santa Rosa Island,[141] and Buck Island Reef National Monuments.[142] Perhaps most famously, out of frustration with the bogged-down designation process of

125. *Compare with* Part V, *infra*.
126. *See* Part III, *supra* (recounting the history of the Florida Keys and Monterey Bay National Marine Sanctuaries and how public opposition to their designations delayed the implementation process and ultimately reduced the amount of protection they now offer).
127. *See id*.
128. *See* Nat'l Acad. Pub. Admin., *supra* note 97, at 78.
129. Magnuson-Stevens Fishery Conservation and Management Act, Regional Fishery Management Councils, 16 U.S.C. § 1852.
130. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1451–1467.
131. *See generally* Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 Ecology L.Q. 71 (2002); Morris, *supra* note 50, at 202.; Jason Patlis et al., *The National Marine Sanctuary System: The Future Promise of Comprehensive Ocean Governance*, 44 ELR 10932 (Nov. 2014).
132. Owen, *supra* note 45, at 753.
133. *Id.*
134. *Id.* at 752–53.
135. *See id.* at 753.
136. *See* Part II, *supra*.
137. The Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303; *see generally* Brax, *supra* note 131, at 123–27; Morris, *supra* note 50, at 189–91.
138. 54 U.S.C. §§ 320301–320303.
139. 16 U.S.C. § 431.
140. Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938).
141. Proclamation No. 2337, 3 C.F.R. § 88 (May 17, 1939).
142. Proclamation No. 3443, 3 C.F.R. § 152 (Dec. 28, 1961) (redesignated Channel Islands National Park in 1980).

the Marine Sanctuaries Program,[143] President George W. Bush used the Antiquities Act to declare the Northwestern (or Papahānaumokuākea) Marine National Monument in 2006.[144] Through this executive action, President Bush added an additional 8,000 square nautical miles of protected ocean area, which made it the largest marine sanctuary in the entire world at the time.[145]

This expanded use of the Antiquities Act has been highlighted by scholars as a promising alternative legal mechanism to achieve a more efficient marine preservation process.[146] Admittedly, the Antiquities Act contains many unique characteristics that make it an attractive tool for reserve designation. Firstly, unlike the NMSA, it does not mandate any congressional oversight or public participation in designation considerations.[147] Secondly, because it technically proclaims monuments, it does not trigger the burdensome requirements imposed by NEPA like an EIS or public comment period.[148] Thirdly, it is essentially immune to judicial review, as no federal or U.S. Supreme Court has ever been successful in invalidating a national monument.[149]

While this streamlined alternative to provide ocean protection on a federal level may seem enticing, the Antiquities Act nevertheless should not be relied on as a backdoor to circumvent the environmental and administrative process of marine sanctuary implementation. This vast authority bestowed to the president circumvents the stop gates and oversight that environmental laws were designed to ensure careful planning of environmentally impactful decisions.[150] This Note joins the choir of other legal scholars that criticize this approach for being undemocratic.[151] While the NMSA is overly burdened by administrative procedure and public participation, the Antiquities Act overcorrects by swinging too far into swift executive action at the end of the spectrum. Recent high-profile litigation against the Biden Administration's use of the Antiquities Act, which challenge designations of Bears Ears and Grand Staircase-Escalante National in Utah[152] and the Northeast Canyons and Seamounts Monument off the coast of New England,[153] signals the growing unpopularity of the law. Reforming the NMSA pursuant to this Note's proposals is a more balanced, less radical means of achieving the streamlined MPA system than the Antiquities Act promotes.

VI. Shortcomings of Exempting the NMSA From Public Comment

A. *Unique Merits of Public Comment*

Perhaps the most obvious problem in exempting the NMSA from NEPA public comment is that doing so would deprive the NMSA designation process of a legal feature that, although causing delay, has unique benefits. Firstly, and perhaps most importantly, participation by those in the public increases agency responsiveness and checks arbitrary decisionmaking.[154] As an agency's own expertise is limited, communication with interested parties is "necessary for the sound operation of government."[155] Secondly, it is important for a democracy that its citizens have public confidence in its institutions, and the public comment function helps preserve this pillar of civil society by guaranteeing representative decisionmaking.[156] Not only would NMSA establishment lose out on this additional guidance, but as illustrated by the history of the statute, citizen activists have proven to be very passionate about opposing MPAs when their economic interests are threatened,[157] which indicates that removing this feature would be unpopular. Suffice to say, removing the public comment period may be a tough sell, as any politician that proposes such a measure may anger their constituents, frustrating their political bottom-line.

B. *Political Reality*

Another key shortcoming of this proposal is its reliance on the congressional legislative process, which features a range of obstacles on its own. Firstly, this proposal presumes that Congress has a desire to amend the statute in the first place, which is a bold presumption to say the least. It has been more than 20 years since Congress last visited the NMSA, which resulted in a moratorium on

143. *See* Morris, *supra* note 50, at 205.
144. Proclamation No. 8031, 71 Fed. Reg. 36443 (June 15, 2006) (officially creating the Northwestern Hawaiian Islands Marine Monument); Proclamation No. 8112, 72 Fed. Reg. 10031 (Feb. 28, 2007) (redesignating the Northwestern Hawaiian Islands Marine Monument as Papahānaumokuākea Marine National Monument).
145. *See* Robin Kundis Craig, *Are Marine National Monuments Better Than National Marine Sanctuaries? U.S. Ocean Policy, Marine Protected Areas, and the Northwest Hawaiian Islands*, 7 Sustainable Dev. L. & Pol'y 27, 28–31 (2006).
146. *See generally* Brax, *supra* note 131, at 123–27; Morris, *supra* note 50, at 189–91; Randall Abate, *Marine Protected Areas as a Mechanism to Promote Marine Mammal Conservation: International and Comparative Law Lessons for the United States*, 88 Or. L. Rev. 255, 301 (2009).
147. *See* Brax, *supra* note 131, at 125.
148. *See id.*
149. *See, e.g.*, Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 Wm. & Mary Env't L. & Pol'y Rev. 159, 172–84 (2004); Chris Chase, *Seamounts Monument Lawsuit Appeal Rejected by Federal Court*, SeafoodSource (Jan. 3, 2020), https://www.seafoodsource.com/news/environment-sustainability/seamounts-monument-lawsuit-appeal-rejected-by-federal-court [https://perma.cc/7TBM-SNL4].
150. *See* Part II, *supra*.
151. *See generally* Joseph Briggett, Comment, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 Tul. Env't L.J. 403 (2009) (opposing the executive designation of marine national monuments through the Antiquities Act because it bypasses notice-and-comment procedures and denies public access rights); Laemmle, *supra* note 66, at 111–57 (critiquing executive designation of marine sanctuaries under the Antiquities Act and advocating for public comment, community involvement, and legislative deliberation as a preferential means of designating and establishing MPAs).
152. *See* Garfield Cty. v. Biden, No. 4:22-cv-00059-DN, 2022 WL 3648358 (D. Utah Aug. 24, 2022).
153. *See* Fehily v. Biden, No. 3:22-cv-02120 (D.N.J. Apr. 12, 2022).
154. *See* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. Pa. L. Rev. 540, 540 (1970).
155. *Id.* at 541.
156. *Id.*
157. *See* Part III, *supra*.

future new designations.[158] Although there has been some renewed interest in reauthorizing the NMSA through the Ocean-Based Climate Solutions Act, the lack of momentum toward a floor vote indicates continued disinterest in the legislation.[159] Given the contentious history of national marine sanctuaries, it will cost some political capital to generate enough momentum within Congress to reauthorize the statute. Moreover, congressional leaders who follow through on amending the NMSA may lose popularity among their constituents, who may interpret the removal of public comment as an irresponsible way of suppressing civic engagement and shutting out the public from a very impactful process.

Additionally, political partisanship pertaining to environmental issues has worsened severely in recent decades, which could severely obstruct any moves toward reauthorizing or amending the NMSA.[160] Support for the marine sanctuary program used to be seemingly unanimous back in the early 1990s, with conservative and liberal members of Congress alike embracing the program by opting into sanctuary designations and periodically reauthorizing the Act.[161] However, this country's political climate has changed within the last 30 years, with some of the highest levels of political polarization in recent history[162] and no signs of improvement.[163]

Furthermore, even if the NMSA was successfully amended, these political problems could continue to frustrate the designation process. As discussed, the NMSA requires coordination between governing bodies and authorities, and unless there is sufficient support across all these authorities, then a sanctuary nomination is unlikely to proceed. The Monterey Bay National Marine Sanctuary, for instance, faced early opposition by appointed officials in the Ronald Reagan Administration, unduly delaying the process until the subsequent administration.[164] Even if sanctuary proposals survive federal government review by the relevant congressional committees and agency heads, they still must be greenlit by governors and local powers. For instance, the Hawaiian Islands Humpback Whale National Marine Sanctuary, although proposed in the early 1980s, did not see final designation until 1999 because the then-governor vetoed its implementation.[165]

158. *See* National Marine Sanctuaries Amendments Act of 2000, Pub. L. No. 106–513, § 6(f), 114 Stat. 2381, 2385 (2000).
159. *See* Ocean-Based Climate Solutions Act of 2022, H.R. 3764, 117th Cong. (2022).
160. *See generally* E. Keith Smith et al., *Polarisation of Climate and Environmental Attitudes in the United States, 1973-2022*, Nature (Jan. 10, 2024), https://www.nature.com/articles/s44168-023-00074-1 [https://perma.cc/J4KP-PHVS].
161. *See* Owen, *supra* note 45, at 737.
162. *See generally* Pew Rsch. Ctr., *As Partisan Hostility Grows, Signs of Frustration With the Two-Party System* (Aug. 9, 2022), https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/ [https://perma.cc/ZH4G-YJEF].
163. *See* Rob Garver, *Experts See Gridlock, Dysfunction Likely in Incoming Congress*, VOA News (Nov. 16, 2022), https://www.voanews.com/a/experts-see-gridlock-dysfunction-likely-in-incoming-congress/6838134.html [https://perma.cc/P26V-E35N].
164. *See* Owen, *supra* note 45, at 728.
165. *See* Nat'l Acad. Pub. Admin., *supra* note 97, at 91.

C. *Reducing Participation in Sanctuary Establishment May Frustrate Efficacy*

Like the Antiquities Act, although not to the same degree, exempting the NMSA from NEPA public participation requirements could, interestingly, render it less efficient. Many experts[166] praise MPAs in part for their consensus-based approach to ocean conservation. Success or failure of MPA designations are more often a reflection of "socio-economic, cultural, and political factors than to reflect biological considerations."[167] One study compared a marine sanctuary in American Samoa with one in Puerto Rico and found that the former was far more successful than the latter because it required retaining local voices in management decisions.[168] By removing an opportunity for locals to voice their opposition to designations or even propose suggestions for them, the initial purpose for amending the legislation may not be successful.

VII. Conclusion

The dwindling of global fish populations, caused by overfishing and exacerbated by the adverse effects of climate change, demands immediate and effective action from leaders around the world. It has been more than three years since President Biden announced his ambitious 30x30 Initiative, but now as the president's first term draws to a close, the United States has not yet seen any novel solutions to this country's ecological crisis.

The NMSA, although flawed, contains a promising framework for the U.S. federal government to provide long-term, holistic protection for some of its most precious natural resources within its territory. The NMSA provides an extensive list of criteria that guides NOAA to nominate sanctuaries, along with multiple stop gates within the federal and state government to ensure adequate veto power and careful tailoring of designation proposals. Given this burdensome process, the additional level of scrutiny posed by NEPA's public comment period is at best redundant, and at worst regressive, as evidenced by the contentious history of sanctuary designations within the past 50 years. But while political elements have operated as an obstacle to successful MPA designation by the NMSA, they also threaten any chance of revitalizing and subsequently amending the statute to bypass this flaw.

Creating a new MPA framework is a delicate dance that must ideally balance swift executive action with incorporation of stakeholder concerns. The current NMSA leans too much in the direction of democratic rulemaking, but other calls for increased use of the Antiquities Act lean too heavily into the scales of unilateral executive action. By directing Congress to tune the NMSA, the Biden Administration can help the legislation find its footing.

166. *See, e.g.*, Cooney, *supra* note 10; Lubchenco, *supra* note 8.
167. Upton & buck, *supra* note 46, at 11.
168. *See generally* Shirley J. Fiske, *Sociocultural Aspects of Establishing Marine Protected Areas*, 17 Ocean & Coastal Mgmt. 25 (1993).

ASSIMILATION, CONTINUED: MITIGATING *CASTRO-HUERTA* IN THE CONTEXT OF TRIBAL AIR POLLUTION REGULATION

Rachel Johnson*

ABSTRACT

Federal Indian law governs the legal relationships between tribes, states, and the federal government. Grounded within the Constitution's one-sentence "Indian Commerce Clause," U.S. Const. art. 1, § 8, cl. 3, *federal Indian jurisprudence is perhaps best understood as a pendulum between opposing policy objectives: on one end, tribal self-governance, and on the other, assimilation. Despite this flux, several constant principles have long survived to form a regime of shared jurisdiction between tribes and the federal government—and occasionally, the states. However, in a recent decision granting states power to prosecute crimes that occur in Indian country—*Oklahoma v. Castro-Huerta*—the Supreme Court effectively flipped this long-standing presumption in favor of state prosecutorial power, and in doing so, placed the inherent tribal sovereignty doctrine in limbo. This Note analyzes the jurisdictional implications of* Castro-Huerta *with a particular focus on how the holding may be extended to challenge the Tribal Authority Rule in the Clean Air Act ("CAA"). Ultimately, this Note argues that the assimilationist framework re-introduced by* Castro-Huerta *should not affect tribal implementation of the CAA's programs because basic principles of construction negate its application to the CAA's regulatory scheme.*

> *When you aren't viewed as real people, it's a lot easier to run over your rights.*[1]

Native Americans[2] have long been the last to receive equal justice under law. On the ground, this lag in justice today means Native Americans are some of the first domestic climate change refugees.[3] The contemporary jurisprudential state of affairs is likewise bleak, as the U.S. Supreme Court's most recent swing toward assimilationist policy cuts against tribal sovereignty. And in the midst of a climate crisis, infringements on tribal sovereignty pose an alarming threat to tribal implementation of federal environmental protection programs.[4]

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1. Tara Houska (Couchiching First Nation), Address at TEDWomen 2017: The Standing Rock Resistance and Our Right for Indigenous Rights (Nov. 2, 2017).
2. This Note uses the terms "Native American," "Native," "Indian," and "Indigenous" to refer to Indigenous individuals whose communities have occupied lands since time immemorial. For this Note's purposes, these terms include members of one of more than 570 federally recognized tribes located in the contingent United States. This Note acknowledges the heterogeneity of Indigenous cultures and the plain error of categorizing all under the same umbrella. This Note only narrows its scope to simplify analysis under a non-Native legal framework. Additionally, this Note also uses the terms "federal Indian law" and "Indian law" to refer to law developed by a non-Native (American) government.
3. Dalia Faheid, *Indigenous Tribes Facing Displacement in Alaska and Louisiana Say the U.S. Is Ignoring Climate Threats*, Inside Climate News (Sept. 13, 2021), https://insideclimatenews.org/news/13092021/indigenous-tribes-alaska-louisiana/ [https://perma.cc/9MK5-FLAK]; Christopher Flavelle & Kalen Goodluck, *Dispossessed, Again: Climate Change Hits Native Americans Especially Hard*, N.Y. Times (June 27, 2021), https://www.nytimes.com/2021/06/27/climate/climate-Native-Americans.html [https://perma.cc/7CUM-G77W].
4. The "Marshall Trilogy," a string of seminal 19th-century opinions authored by Chief Justice John Marshall, laid the foundation for the Supreme Court's development of federal Indian law jurisprudence. *See* Johnson v. McIntosh', 21 U.S. 543, 585–87 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831); Worcester v. Georgia, 31 U.S. 515, 561 (1832). In part, this Note attempts to explain that the Court's reliance on the inherent tribal sovereignty and trust doctrines have depended on fluctuating policy trends. More centrally, however, this Note argues that the Supreme Court's recent abrogation of the inherent sovereignty doctrine in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), demonstrates a flawed understanding of federal Indian law jurisprudence.

Until 2022, two doctrines established early in the Supreme Court's history guided its resolution of federal Indian law questions: first, that tribes were sovereigns prior to the Nation's establishment and retain inherent sovereignty (i.e., "inherent sovereignty doctrine"); and second, that a trust relationship exists between the federal government and tribes (i.e., "trust doctrine").[5] Courts have undoubtedly struggled to consistently and coherently balance states' interests with the unique trustee-beneficiary relationship and the inherent sovereignty doctrine.[6] The near absence of guiding constitutional text has further muddied development of helpful, authoritative rules. An accurate understanding of the doctrines and their evolution is thus impossible without acknowledging the historical contexts in which individual cases were decided. In other words, without historical grounding, federal Indian cases are simply snapshots of dominant policies at a given point in time.

The Supreme Court's decision in *Oklahoma v. Castro-Huerta* is a demonstration of the doctrinal pendulum phenomenon. Effectively toppling the notion of inherent tribal sovereignty, *Castro-Huerta* holds that states have concurrent jurisdiction with the federal government to prosecute crimes committed by non-Indians against Indians in Indian country.[7] The majority's underlying reasoning misconstrues long-standing precedent regarding the political classification of tribes, frustrates the federal government's ability to fulfill its duties to tribes, and most central to this Note, attacks the doctrine of inherent tribal sovereignty.[8] This pivot in policy comes during a time when aggressive environmental protection is needed at every level of government.[9] And unfortunately, for the first time since the 1990 Amendments to the Clean Air Act ("CAA"),[10] the varied jurisdictional options created by *Castro-Huerta* may allow states to challenge, and ultimately displace, tribal implementation of federal environmental air programs.[11]

This Note argues that challenges against tribal implementation of air programs under the CAA's Tribes as States ("TAS") provision should be framed as questions of statutory interpretation. By resolving state challenges to tribal implementation using basic canons of interpretation, courts may preserve tribes' power to implement federal environmental programs. Part I of this Note provides essential background on the historical development of federal Indian law, policy trends, and the modern jurisdictional landscape.[12] Part II then analyzes *Castro-Huerta* and its abrogation of the inherent tribal sovereignty doctrine. Part II also discusses pending cases that, following *Castro-Huerta*, may further degrade tribal self-governance. Part III briefly introduces federal environmental regulatory schemes, with special focus on the CAA and the Tribal Authority Rule ("TAR"). Finally, the Note argues that in the context of federal environmental regulatory implementation, *Castro-Huerta*'s prudential threat to tribal governance should yield to basic principles of statutory construction.

I. Historical Development of Federal Indian Law

Current archeological evidence estimates that Indigenous presence in the present-day United States predates the arrival of European imperialists by approximately 10,000 years.[13] Upon their arrival, colonizers struggled to develop a uniform framework in which to achieve their primary goal: acquisition of land for agricultural development.[14] But while their objectives were similar, their approaches to colonization differed. For example, English jurists believed that Christian rulers who conquered "infidel" kingdoms abrogated any existing laws by default.[15] Meanwhile, early Puritan settlers attempted to obtain consent to occupy Indigenous lands and resorted to coercion and force when those attempts proved unsuccessful.[16] This said, no matter how different in method, all approaches resulted in the taking, occupation, and domination of Indigenous lands.

5. *See, e.g.*, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester*, 31 U.S. at 519; "[Indian tribes'] relation to the United States resembles that of a ward to his guardian." *Cherokee Nation*, 30 U.S. at 17; *see also* Thompson, *infra* note 137, at 423–24.
6. *See infra* Parts I.B–C.
7. *Castro-Huerta*, 597 U.S. at 632.
8. For example, the majority states that early in the Nation's history, "the Federal Government sometimes treated Indian country as separate from state territory—in the same way that, for example, New Jersey is separate from New York." *Castro-Huerta*, 597 U.S. at 636. Respectfully, this observation is flawed. Relationships between Indian tribes and the U.S. federal government were initially governed solely by treaties. 31 U.S. at 520. Additionally, the Court's use of the term "Indian country" here misleadingly reflects a more contemporary statutory definition of tribal lands which was not imagined at the time the Court supposedly treated "Indian country" as distinct from states; rather, "'Indian country' is the term that has been used consistently since 1948." Mn. House Rsch. Dep't, *American Indians, Indian Tribes, and State Government*, n.1, (Feb. 2020), https://www.house.leg.state.mn.us/hrd/pubs/indiangb.pdf [https://perma.cc/SM2Y-HRWF] (citing to 18 U.S.C. § 1151).
9. *See generally* United Nations (U.N.) Environment Programme, *Emissions Gap Report 2022: The Closing Window—Climate Crisis Calls for Rapid Transformation of Societies* (2022), https://www.unep.org/emissions-gap-report-2022 [https://perma.cc/BS8Y-GVPH].
10. Originally enacted as the Air Pollution Control Act of 1955, Pub. L. No. 84-159, the contemporary CAA is primarily traceable to Clean Air Act Amendments of 1970, Pub. L. No. 91-604, with additional major amendments in 1977 and 1990. Pub. L. 95-95, 91 Stat. 685; Pub. L. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401–7671q).
11. 42 U.S.C. § 7601(d).
12. Part I adopts an objective tone to accurately survey the complex development of federal Indian law. Due to ongoing interpretational debate, this part attempts to provide a factual baseline to accurately compare the Court's analysis in *Castro-Huerta*.
13. Roxanne Dunbar-Ortiz, An Indigenous Peoples' History of the United States 15 (2014); Neal Salisbury, *The Indians' Old World: Native Americans and the Coming of Europeans*, 53 Wm. & Mary Q. 435, 438 (1996), *available at* https://www.jstor.org/stable/2947200 [https://perma.cc/2UVF-FWLH].
14. David H. Getches et al., Cases and Materials on Federal Indian Law 47–48 (7th ed. 2017).
15. Calvin v. Smith (1608) 77 Eng. Rep. 377, 397–98 (K.B.) ("All infidels are in law *perpetui inimici*, perpetual enemies . . . if a Christian King should conquer a kingdom of an infidel, and bring them under his subjections, there *ipso facto* the laws of the infidel are abrogated . . . .").
16. *See* Chester E. Eisinger, *The Influence of Natural Rights and Physiocratic Doctrines on American Agrarian Thought During the Revolutionary Period*, 21 Agric. Hist. Soc'y 13, 17 (1947), *available at* https://jstor.org/stable/3739767 [https://perma.cc/6LHY-NGWG]; John Peacock, *Principles and Effects of Puritan Appropriation of Indian Land and Labor*, 31 Ethnohistory 39, 39–40 (1984).

Perhaps as a result of these earlier colonization practices, the American government failed to recognize Indigenous tribes' sovereignty by adopting a rigid, dual-sovereign system in its founding document. The Framers of the U.S. Constitution cursorily allocated the exclusive authority over indigenous affairs in Article 1, § 8, clause 3, granting the U.S. Congress the exclusive power "[t]o regulate Commerce . . . with the Indian Tribes." While the Supreme Court has firmly established its appellate authority over cases involving tribal lands and members by referencing the "Indian Commerce Clause,"[17] the Clause's limited text has required the Court to perform interpretational heavy lifting. The Court has consequently struggled to reconcile the ambiguous power expressed in the Clause with the Tenth Amendment, states' general police powers, and the doctrine of federalism. The Court has developed persuasive analytical methods by which to resolve disputes, but ultimately, these methods still leave matters of federal Indian law vulnerable to fluctuating policy interests.[18] For this reason, jurisdictional disputes between Indigenous tribes and federal and/or state governments today still closely resemble the same colonization questions faced by early European settlers.

This part aims to provide historical background on the Court's attempt to form a coherent, consistent body of law balancing two ostensibly irreconcilable policy goals: assimilation[19] and inherent sovereignty.[20] Part I.A discusses seminal federal Indian case law and its progeny. Part I.B then describes the practice of treatymaking and the rising role of the federal government. Finally, Part I.C summarizes the contemporary federal Indian law landscape up until *Castro-Huerta*.

A. Foundations

From its advent, the Supreme Court has continually recognized the unique political position of tribes in relation to the system of dual sovereignty between states and the federal government. The first of the Marshall Trilogy cases,[21] *Johnson v. M'Intosh*, presents a question regarding tribal land ownership.[22] In *M'Intosh*, descendants of pre-Revolutionary purchasers of land tracts from the Illinois and Piankeshaw tribes petitioned to eject William McIntosh, who held a U.S. government-issued patent for the same land.[23] After extensively[24] analyzing previous land transfers and relationships between the transacting parties, the Court determined that the validity of the descendants'[25] title depended on the ability of the conveying tribes to hold recognizable title.[26] According to the Court, European nations—and, via its success in the American Revolution—the United States "asserted in themselves, and [ ] recogni[z]ed in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians."[27] The Court ultimately found that absolute title was acquired and exclusively held by the United States, subject only to tribes' right of occupancy.[28]

While *M'Intosh* has limited practical significance in modern jurisprudence,[29] its lasting value stems from its analytical structure, and particularly, its reliance on history to ascertain parties' claims to land. The Court conducted a detailed and lengthy inquiry into claims of title, beginning by surveying how different European sovereigns employed the doctrine of discovery to assert title on land occupied by tribes.[30] The Court followed successions in

17. *See, e.g.*, United States v. Cooley, 593 U.S. 345, 349–50 (2021); Lara v. United States, 541 U.S. 193, 194 (2004) ("the Constitution, through the Indian Commerce and Treaty Clauses, grants Congress 'plenary and exclusive' powers to legislate in respect to Indian tribes."); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (the "central function of the Indian Commerce Clause is to provide Congress with the plenary power to legislate in the field of Indian affairs);" Worcester v. Georgia, 31 U.S. 515, 583 (1832) (McLean, J., concurring); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). Most recently, the Court inquired whether Congress' plenary power includes the authority to regulate the adoption and foster care placement of Indian children. Haaland v. Brackeen, 599 U.S. 255, 272–78, 275 (2023) (holding in relevant part that the Indian Child Welfare Act does not exceed Congress' power to regulate Indian affairs, and acknowledging that the Court's relevant precedent is "unwieldy, because it rarely ties a challenged statute to a specific source of constitutional authority").
18. In the absence of much constitutional language, the Court has taken varying approaches to resolve Indian law disputes. For example, in *United States v. McBratney*, 104 U.S. 621, 624 (1881), the Court held that there was no federal jurisdiction over a non-Indian who murdered another non-Indian on tribal lands within the limits of Colorado. The Court reasoned that the 1876 admission of Colorado into the Union repealed a provision of the Indian Intercourse Act of 1834, which federal prosecutors used to assert criminal jurisdiction over the defendant. *Id.* at 623. Put differently, because Congress did not explicitly reserve its jurisdictional authority in Colorado's enabling act, the federal government did not have jurisdiction. However, just five years after *McBratney*, the Court relied on the trust doctrine articulated in *Cherokee Nation* to uphold the federal government's assertion of jurisdiction over crimes committed by one tribal member against another. United States v. Kagama, 118 U.S. 375, 378–79 (1886).
19. For the purposes of this Note, "assimilation" refers to the U.S. government's practice of forcibly supplanting Indigenous cultures with Anglo-Saxon customs and language. *See, e.g.*, *A Brief History of Civil Rights in the United States: The Allotment and Assimilation Era (1887-1934)*, Howard Univ. Sch. L. (Jan. 6, 2023), https://library.law.howard.edu/civilrightshistory/indigenous/allotment [https://perma.cc/NM47-JWM7].
20. Inherent tribal sovereignty is the immemorial power of tribes to govern themselves. *See, e.g.*, *Sovereignty*, Coeur D'Alene Tribe, https://www.cdatribe-nsn.gov/culture/sovereignty/ [https://perma.cc/WEP4-GZBD].
21. Johnson v. M'Intosh, 21 U.S. 543 (1923); Worcester v. Georgia, 31 U.S. 515 (1832); and Cherokee Nation v. Georgia, 30 U.S. 1 (1831). To provide an analogy, the Marshall Trilogy is as crucial to understanding federal Indian law as *Marbury v. Madison* is to grounding U.S. constitutional law. 5 U.S. 137 (1803).
22. *M'Intosh*, 21 U.S. at 562.
23. *Id.* at 550–60. For more on the underlying land dispute in *M'Intosh*, see Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 Wm. & Mary L. & Hist. Rev. 67–69, 96–100 (2001).
24. *M'Intosh*, 21 U.S. at 543–62.
25. *Id.*
26. *Id.* at 572, 576–88. The question presented is whether the claimants' title can be recognized by U.S. courts.
27. *Id.* at 584.
28. *Id.* at 592.
29. Prior to *Castro-Huerta*, the Court had not mentioned *M'Intosh* since 1990. Duro v. Reina, 495 U.S. 676, 699 (1990) Brennan, J., dissenting) (superseded by statute). The Court's traditional use of *M'Intosh*, along with the other Marshall Trilogy cases, has been to explain the foundations of federal Indian law. *See, e.g.*, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 452 (1989) (Blackmun, J., concurring); Choctaw Nation v. Oklahoma, 397 U.S. 620, 623 (1970) (explaining the impact of *M'Intosh*'s holding on conception of Indian land rights); Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945) ("Since [*M'Intosh*], decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss.").
30. *M'Intosh*, 21 U.S. at 573–84.

ownership through time and eventually determined that states adopted the doctrine of discovery and therefore, possessed absolute title of land subject only to tribes' right of occupancy.[31] It is critical to note here that analysis of historical facts viewed in their context played an indispensable role in the Court's reasoning and holding.

Less than a decade after deciding *M'Intosh*, the Court considered whether it possessed original jurisdiction over tribes in *Cherokee Nation v. Georgia*.[32] Chief Justice John Marshall never reached the merits of the case[33] and instead wrote at length about the status of Indigenous tribes.[34] Marshall concluded that tribes are neither foreign nations nor states, but instead are most analogous to "domestic dependent nations."[35] Marshall first explained that the relationship between the United States and Indigenous tribes is not like that of two independent sovereigns because tribes "rely" on certain services from the federal government.[36] Second, tribes lie within the physical boundaries of the United States on land owned in title by the United States.[37] Third, the structure of the Commerce Clause indicates that the Framers did not view tribes as independent foreign nations.[38] For these reasons, Chief Justice Marshall surmised that tribes' "relation to the United States resembles that of a ward to his guardian,"[39] in which a trust duty from the U.S. government flowed to Indian Nations.[40]

Despite *Cherokee Nation*'s limited authoritative value, the supposed existence of a trust relationship between the federal government and tribes was commonly cited to justify assimilationist policies in the century that followed.[41] The impact of the trust relationship identified by the Court is further discussed in subsequent sections.[42] For now, it is sufficient to emphasize that the reasoning structure of *Cherokee Nation* markedly does not follow that used in *M'Intosh*.

In the final Marshall Trilogy decision, the Supreme Court addressed states' powers to govern activity on local tribal lands in *Worcester v. Georgia*.[43] *Worcester* first reiterates that the doctrine of discovery enabled the United States to succeed all of Great Britain's previous land claims.[44] However, insofar as these claims "existed merely in theory [and had not in fact been exercised] . . . they still retain[ed] their original character, and remain[ed] dormant."[45] Since Britain had not interfered with tribes' abilities to self-govern during the time it possessed exclusive title of all settled lands, this theoretical claim remained uninvoked—and thus unchanged—when the United States succeeded all British claims following the American Revolution.[46]

The Court further determined that the United States had not usurped the power to self-govern in later treaties with the Cherokee Nation.[47] Interpreting Article III of the Treaty of Hopewell[48] relative to the parties' situations, the Court viewed[49] the commonplace treaty protection provision[50] as "receiv[ing] the Cherokee [N]ation into [the United States'] favor and protection," wherein "[p]rotection does not imply the destruction of the protected."[51] Thus, as the claim over tribal self-governance was neither invoked by the United States nor consented to by tribes, the claim remained dormant.

Finally, the Court noted that Art. 1, § 8, cl. 3 of the Constitution provides Congress the "*sole and exclusive right* of regulating the trade and managing all the affairs with the Indians."[52] Despite this vast field of total authority, the federal government was still bound by the Constitution and accordingly, could not infringe upon or violate the legislative power of any state.[53] Here, the Court concluded, Georgia's attempted usurpation of tribal self-governance in the disputed statutes could not outweigh the supreme authority of the federal Constitution.[54]

Worcester's analysis begins with one belief: Indian tribes, similar to other nations, have inherent sovereignty.[55] Indian tribes possessed an unqualified power to govern themselves prior to the taking of lands by European settlers.[56] This

31. *Id.* at 587.
32. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
33. Put differently, whether the Georgia State Legislature could abrogate a federal treaty with the Cherokee Nation. *Id.* at 2.
34. *Id.* at 8, 16–18.
35. *Id.* at 17.
36. *Id.* ("Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy . . . [t]hey look to our government for protection; rely upon its kindness and its power . . . .").
37. *Id.*
38. *Id.* at 18.
39. *Id.* at 17.
40. *See* Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 Tulsa L. Rev. 271, 273 (2013).
41. *See infra* Part I.B.
42. *Id.*
43. *Worcester v. Georgia*, 31 U.S. 515 (1832). Worcester, a white non-Native man living on Cherokee Nation land, was convicted of violating a Georgia statute making "all white persons, residing within the limits of the Cherokee [N]ation . . . without a license or permit [from the governor of Georgia], and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeano[ ]r." *Id.* at 542.
44. *Id.* at 536. Significantly, that the Court employs a similar reasoning structure despite *M'Intosh* and *Worcester*'s respective factual differences strongly implies the Court's fashioning of particular analytical model for addressing all questions of tribal governance authority.
45. *Id.* at 547.
46. *Id.* at 547. "Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers . . . ." *Id.*
47. *Id.* at 581 (defining a treaty as "a compact formed between two nations or communities, *having the right of self-government*" (emphasis added)).
48. *Id.* at 551 ("The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power. This stipulation is in Indian treaties, generally."); *see also* Treaty With the Cherokee, 7 Stat. 18 (Nov. 28, 1785).
49. *Worcester*, 31 U.S. at 582 ("The language used in treaties with the Indians should never be construed to their prejudice.").
50. Treaty of Hopewell, *infra* note 58.
51. *Worcester*, 31 U.S. at 551–52.
52. *Id.* at 559–59 (internal quotations omitted).
53. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
54. *Worcester*, 31 U.S. at 560, 592 ("Why may not these powers be exercised by the respective states? The answer is, because they have parted with them, expressly for the general good . . . these powers have been expressly and exclusively given to the federal government.").
55. *Id.* at 542–43 (prior to European occupation, "America . . . was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws." Chief Justice Marshall continues, noting that "[i]t is difficult to comprehend the proposition, that the inhabitants of *either* quarter of the globe could have rightful original claims of dominion over the inhabitants of the other . . . ." (emphasis added)).
56. *Id.*

power was not ceded to the British; therefore, the United States did not acquire it by default following the American Revolution.[57] The governing law between the United States and the Cherokee Nation vests the power to "manage all the affairs with the Indians" exclusively in the federal government.[58] Thus, if a tribe consents to be governed by the United States, then the tribe's inherent sovereignty would be qualified by its consent to be governed by another power.[59] While the Court ultimately interprets the Hopewell Treaty as not abrogating the tribes' self-governance power, the Court is emphatic that *only* the federal government may engage in matters involving Indian affairs—hard stop.[60] Combined with the inherent sovereignty premise initially articulated by the Court, *Worcester* ultimately holds that Indigenous tribes may only be governed by the federal government, and only when power has been ceded to do so.[61]

But *Worcester*'s reasoning is far from complete. For one, *Worcester* provides little practical guidance on how to settle more complex jurisdictional disputes. The concurrence left the door wide open for states to claim criminal jurisdiction over defendants who commit crimes on tribally owned land[62]—the central issue in *Castro-Huerta*.[63] Further, the Court in dicta claims that tribes' exercise of self-government was "contemplated to be temporary" because "a sound national policy [requires] that Indian tribes within [the United] States should exchange their territories . . . or, eventually, consent to become amalgamated in [the United States'] political communities."[64] This point cannot be binding law, for it is undisputedly beyond the power of the judiciary to declare what should be federal policy.[65]

As discussed in more detail in Part II, it is important to highlight here that the inherent tribal sovereignty doctrine expressed in *Worcester* was presumably valid law until *Castro-Huerta*. While the Court's understanding of the doctrine has not remained static[66] in the nearly 200 years since its introduction, *Castro-Huerta* marks first instance in which the Court expressly abrogated *Worcester* and the inherent sovereignty doctrine.[67] In fact, in *McGirt v. Oklahoma*,[68] announced only two years before *Castro-Huerta*, the Court cited *Worcester* for the proposition that tribal powers are "subject to no state authority."[69]

To recap, the Marshall Trilogy establishes the foundation of U.S. federal Indian law. *Worcester* and *Cherokee Nation* outline two enduring principles. First, Indian tribes possess inherent sovereignty. This sovereignty was not given to tribes by any imperial power; rather, like European sovereigns, it was possessed by tribes from time immemorial.[70] Second, where ceded, the federal government has a duty to keep tribal sovereignty in trust and broad power[71] to carry out this duty. But following *Worcester*, a new period in federal Indian law emerged. The federal government assumed a dominant role in forming political relationships with Indian tribes via treatymaking, and rising tensions between states and the national government galvanized an assimilation-driven policy scheme. Combined with the Court's characterization of the "ward-state" relationship in *Cherokee Nation*, the succeeding four decades witnessed the swift and coerced cessation of tribal lands—culminating in a sudden, unilateral end to treatymaking in 1871.

B. *Treaties and Policy Trends*

This part discusses the rollercoaster of federal policy objectives occurring in the period between *Worcester* and the termination of tribal status in the 1950s, and ultimately, aims to explain how policy influenced federal Indian law jurisprudence in a not-so-subtle conflict with the inherent sovereignty doctrine. In short, treatymaking was the federal government's temporary solution for satiating the Nation's appetite for tribal lands. The United States formed nearly 400 treaties with tribes prior to passage of the Dawes Act in 1871.[72] Approximately 150 of these treaties were signed between 1833 and 1868.[73] While the language of individual treaties varied depending on the land and tribe(s) involved, provisions stipulating the cessation of specified land, relinquishment of tribal land interests, and removal of tribes to different plots of land were prevalent.[74]

57. *Id.* at 544, 545–48 (analyzing various charters and grants given by Great Britain to the colonists).
58. 1785 Treaty of Hopewell, Art. IX; *Worcester*, 31 U.S. at 553–54. The Court also observes that subsequent congressional enactments support interpreting federal preemption of tribal affairs. *Worcester*, 31 U.S. at 556–57.
59. *Worcester*, 31 U.S. at 560 ("Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent . . . .").
60. *Worcester*, 31 U.S. at 561. Specifically, the laws of Georgia "interfere forcibly with the relations established between the United States and the Cherokee [N]ation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union." *Id.*
61. *Worcester*, 31 U.S. 515 (1832).
62. *Id.* at 590 (Mclean, J., concurring).
63. *See infra* Part II.
64. *Id.* at 593 (Mclean, J., concurring).
65. *Castro-Huerta* effectively abrogated the inherent sovereignty doctrine in contradiction with its usual aversion to political questions by relying on the political rationale provided in *Worcester*'s concurrence. *See generally* Cong. Rsrch. Serv., The Political Question Doctrine: An Introduction (Part 1) 1 (2022) ("the term political question expresses the principle that some issues are either entrusted solely to another branch of government or beyond the competence of the judiciary to review").
66. While the Supreme Court has refined the inherent sovereignty doctrine since *Worcester*, it did not feel the need to expressly abrogate *Worcester* until *Castro-Huerta*. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 359 (2001) (holding that tribes cannot regulate activities of state officials on tribally owned land in part because doing so was not "necessary to protect tribal self-government or to control internal relations." (quoting Montana v. United States, 450 U.S. 544, 564 (1981))); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157 (1973) (holding that a state could impose state tax on resort operated by Tribe on land Tribe leased from federal government, based on interpretation of treaty articles and state's enabling act).
67. Despite the Court's claim that *Worcester* has long been abandoned. Oklahoma v. Castro-Huerta, 597 U.S. 629, 636 (2022).
68. 140 S. Ct. 2452 (2020).
69. *Id.* at 2477.
70. Worcester v. Georgia, 31 U.S. 515, 547 (1832).
71. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). Additionally, this broad power is often called a "plenary" power of Congress. *See generally* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. Rev. 666 (2016). To avoid sidestepping into tangential (but no less important) issues, this Note uses the term "broad power" instead.
72. *See American Indian Treaties: Catalog Links*, U.S. Nat'l Archives & Recs. Admin. (Jan. 21, 2021), https://www.archives.gov/research/native-americans/treaties/catalog-links [https://perma.cc/UEN9-BNLU].
73. *See id.*
74. *See, e.g.*, Nov. 23, 1838, Treaty With the Creeks, 7 Stat. 574, Art. 1; Aug. 2, 1847, Treaty With the Chippewa of the Mississippi and Lake Superior,

For the present inquiry, there are three key takeaways vis-à-vis federal treaties during this period. First, most if not all the treaties invoked the federal government's trust power[75] as enumerated in *Cherokee Nation*. Second, treaties preserved only narrow classes of tribal land use rights[76] (e.g., fishing on accustomed grounds, hunting on public lands, etc.). Third, treaties allowed the United States to pursue a "twin policy": territorial dispossession and assimilation.[77] These common features ensured Indigenous tribes' increasing dependence on the federal government. But significant to note here is that tribes continued to retain political sovereignty tribes and did not cede their inherent governance powers.

Following a renewed spirit of white nationalism and desire for unity after the Civil War,[78] Congress passed the Indian Appropriations Act in 1871.[79] In part, the Act provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[80] Although the Act did not void preexisting treaties with Indian tribes,[81] it signaled a poignant shift in the federal government's approach to engaging with tribes. Instead of contracting relationships with tribes,[82] moving forward, Congress would statutorily impose duties and grant rights to Indian tribes as it determined necessary for the welfare of the tribes. The Act confirmed the federal government's position that Indian tribes were not foreign nations, which up until that point, was only implied by its practice of treatymaking. Borrowing the logic of *Cherokee Nation*, Congress formally codified the subordinate position of Indian tribes in the American legal system.[83] Tribes were neither foreign nations nor states and were subject to direct congressional rule.

Congress expanded its broad power over Indian tribes until well into the 20th century.[84] After the Court's decision in *Ex Parte Crow Dog*,[85] Congress enacted legislation granting federal jurisdiction over tribal members who committed any listed offenses, regardless of whether the victim was a tribal or non-tribal member.[86] The federal government's apparent assumption of traditional state police powers most rationally evinces its exclusive jurisdiction over tribal affairs. But as *Castro-Huerta* demonstrates, Congress' broad trust power may not completely preclude state intervention.[87]

The federal government continued its usurpation of tribal power through the taking of land, as well. Passed in 1887, the Dawes Act is a principal example of late-19th-century assimilation policy made possible by the federal trust doctrine.[88] The Act authorized the president to break up existing reservation land into smaller allotments of land to be parceled out to individuals registered on tribal "rolls."[89] In exchange for land previously reserved for tribes during the treaty era,[90] the federal government entrusted in itself the responsibility to protect tribes from encroachments onto divided lands now reserved[91] for individual tribal members.[92] Significantly, the Act's passage represents the federal government's failure to reconcile inherent tribal sovereignty with the general public's desire for

9 Stat. 904, Art. 1, 2; May 12, 1854, Treaty With the Menominee, 10 Stat. 1064, Arts. 1–2.

75. *See, e.g.*, June 22, 1852, Treaty With the Chickasaw, 10 Stat. 974, Art. I ("[t]he Chickasaw tribe of Indians acknowledge themselves to be under the guardianship of the United States"); July 4, 1866, Treaty With the Delawares, 14 Stat. 793, Art. 5. ("[t]he United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife").
76. *See, e.g.*, Aug. 24, 1835, Treaty With the Comanche and Witchetaw Indians and Their Associated Bands, 7 Stat. 474, Art. IV ("It is understood and agreed by all the nations or tribes of Indians[ ] . . . that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timber to the western limits of the United States."); May 25, 1837, Treaty With the Kioway, Ka-ta-ka and Ta-wa-ka-ro, Nations of Indians, 7 Stat. 533, Art. 4 ["each and all of the said [N]ations or tribes have free permission to hunt and trap in the Great Pairie west of the Cross Timber to the western limits of the United States.").
77. Bryan Newland, Federal Indian Boarding School Initiative—Investigative Report 20, U.S. Dep't of the Interior (May 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [https://perma.cc/LRQ4-2MD8].
78. Encyclopedia Staff, *Indian Appropriations Act (1871)*, Colorado Encyc. (Mar. 13, 2020), https://coloradoencyclopedia.org/article/indian-appropriations-act-1871 [https://perma.cc/F2SC-WCBW].
79. 16 Stat. 544 (1871).
80. 25 U.S.C. § 71.
81. Encyclopedia Staff, *supra* note 78:
    > nothing in this act contained, or in any of the provisions thereof, shall be so construed as to ratify, approve, or disaffirm any treaty made with any tribes, bands, or parties of Indians since the twentieth of July, eighteen hundred and sixty-seven, or affirm or disaffirm any of the powers of the Executive and Senate over the subject.

    But according to the federal Indian trust doctrine, Congress could breach its contractual responsibilities if it believed doing so was in the best interest of tribes.
82. This is not to imply that the practice of treatymaking was fair or voluntary for tribes. *See generally* Alfred A. Cave, *Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830*, 65 The Historian, 1330 (2003), *available at* https://perma.cc/ZSM5-M498.
83. *See generally* Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (denying Cherokee Nation's request for injunction and declaring that Indian tribes are not foreign nations entitled to original jurisdiction).
84. Department of Tribal Governance, *Crow Dog Case (1883)*, Univ. Alaska-Fairbanks, https://perma.cc/B5ZX-U5J9 [hereinafter *Crow Dog Case (1883)*].
85. *See generally* 109 U.S. 556 (1883) (holding that a federal court had no jurisdiction over one tribal member for the murder of another on reservation land).
86. Act of March 3, 1885, § 8, 23 Stat. 385. This legislation is the predicate for the Major Crimes Act, codified at 18 U.S.C. § 1153. *See generally Criminal Resource Manual*, *The Major Crimes Act—18 U.S.C. § 1153*, U.S. Dep't of Just. (Archives) (Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153 [https://perma.cc/6E8V-3BGD].
87. *See infra* Part II.
88. Nat'l Park Serv., *The Dawes Act*, U.S. Dep't of the Interior (July 9, 2021), https://www.nps.gov/articles/000/dawes-act.htm [https://perma.cc/TR8Y-WPRD]. In 1898, the Dawes Act was amended by the Curtis Act to allow for the allotment of lands previously exempted. An Act for the Protection of the People of Indian Territory, 30 Stat. 495 (June 28, 1898).
89. U.S. Nat'l Archives & Recs. Admin., *Dawes Act (1887)* (Feb. 8, 2022), https://www.archives.gov/milestone-documents/dawes-act [https://perma.cc/L8RA-L3QL].
90. *See, e.g.*, July 31, 1855, Treaty With the Ottawa and Chippewa Indians of Michigan, 11 Stat. 621, Art. 1.
91. Several elements of allotment evince the Dawes Act's true assimilative purpose: pastural lifestyles envisioned for the plots were vastly different than the lives of many tribes; lands were commonly arid; and lands could be sold to non-tribal members at a loss to tribal control. U.S. Nat'l Archives & Recs. Admin., *supra* note 89.
92. At the time, diminishment of tribal lands for assimilative purposes was not a hidden agenda. The Indian Bureau, tasked with distributing allotments, publicly argued that individualizing property would help tribal members learn the "spirit of personal independence and manhood." *See* U.S. Dep't of the Interior, 1885 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at v, vi.

Indian lands.[93] The resulting displacement from allotment was markedly different from the federal government's previous diminishment and taking of Indian lands during the treatymaking era. Instead of pushing tribes to western territories, allotment under the Dawes Act created a checkerboard or fractionation of Indian lands.[94] Allotment stripped over an additional[95] 90 million acres of land from tribes. The surplus plots were distributed to white settlers, creating complicated landscapes of land interests across what were previously jurisdictionally homogenous areas "reserved" for tribes.[96] The checkerboard of ownership resulting from the Dawes Act and associated assimilation efforts[97] continue to create jurisdictional challenges for tribes.[98] And, as explained further in Part II, the breakdown of homogeneous reservations makes it easier to conceptualize states as properly having jurisdiction over all territory within reservations.

Policy trends in the 20th century fluctuated even more drastically than in the 1800s. In 1924, the Snyder Act created national citizenship for Indigenous individuals,[99] and a decade later, the Indian Reorganization Act ("IRA")[100] ended the allotment system.[101] However, beginning in the 1950s, dominant attitudes once again shifted against tribal sovereignty and in favor of assimilation. The federal government employed a combination of strategies to carry out its re-imagined termination policy,[102] which ultimately sought to eliminate tribes and geographically separate Indigenous individuals and communities.[103] Congress' termination policy included immediate and phased-out termination of federally recognized tribes and accompanying federal assistance, as well as urban relocation programs.[104] The Bureau for Indian Affairs (the "BIA") established a regulatory process for federally recognizing tribes following public condemnation of the termination policy in the 1960s and 1970s.[105] Today, there are nearly 600 federally recognized tribes throughout the contiguous United States and Alaska.[106]

This is a grossly abridged history of 20th-century U.S.-tribal relations. Nonetheless, even a cursory survey reveals that recognition of the inherent tribal sovereignty doctrine has depended on contemporaneous political values and policy goals. The next section will briefly discuss how modern case law parallels this vacillated statutory history.

C. *Contemporary Legal Landscape*

Williams v. Lee is widely considered the beginning of modern federal Indian law.[107] Following the Supreme Court's 1959 decision in *Williams*, the Court repeatedly fortified the doctrine of inherent tribal sovereignty by prioritizing tribal self-governance.[108] But the Court soon began to limit tribal powers by curtailing authority based on federal legislation, which tended to either delegate jurisdiction over certain matters involving tribal members to states or explicitly restrict tribal jurisdiction.[109] For example, in response to the enactment of Public Law 280,[110] the Court held that

93. Mary K. Nagle, *Nothing to Trust: The Unconstitutional Origins of the Post-Dawes Act Trust Doctrine*, 48 Tulsa L. Rev. 63, 71 (2012).
94. In combination with the Homestead Act of 1862, which encouraged white Western settlement, the Dawes Act caused lands within the geographic territory of tribal reservations to develop varied ownership statuses. *Fractionation*, *infra* note 98; Act of May 20, 1862 (Homestead Act), Pub. L. 37-64, 12 Stat. 392.
95. It is estimated that treaties and other agreements resulted in the cessation of approximately one billion acres of tribal lands. Comm. on Lab. & Pub. Welfare, Indian Education: A National Tragedy—A National Challenge, S. Rep. No. 91-501, at 143 (1969).
96. *Fractionation*, U.S. Dep't of the Interior, https://www.doi.gov/buyback-program/fractionation [https://perma.cc/SH5T-8WL6].
97. For example, treaties frequently included education-related provisions. *See, e.g.*, 15 Stat. 635, 637, 1868 Treaty Between the United States of America and Different Tribes of Sioux Indians, Art. 7.
98. *Fractionation*, *supra* note 96. For a discussion of "checkerboarding," see *Seymour v. Superintendent*, 368 U.S. 351 (1962) (holding that a 1906 federal statute transferring a large portion of reservation to non-Indian ownership is inconsistent with 18 U.S.C. § 1151, because § 1151 did not intend for police to "search tract books in order to determine" jurisdiction).
99. *See* An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, Pub. L. 68-175, 43 Stat. 253. (June 2, 1924). The Snyder Act, also called the Indian Citizenship Act, granted citizenship to any Native Americans born within the United States. State citizenship eligibility was still reserved to the states, so many were still denied voting rights by states and/or local laws; *see also Today's Document*, U.S. Nat'l Archives & Recs. Admin., https://www.archives.gov/historical-docs/todays-doc/?dod-date=602 [https://perma.cc/4ZND-6ZBQ].
100. *See* Indian Reorganization Act of 1934, Pub. L. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5129).
101. In significant part, the IRA extended existing trust periods for allotments where fee patents had not yet been issued. The Indian Reorganization Act and Subsequent Legislation, 1934 to the Present, Am. Indian L. Deskbook § 1:13 (2023).
102. *See* H.R. Con. Res. 108, 67 Stat B132 (Aug. 1, 1953). This official federal policy announced the immediate and unilateral termination of federal relationships with over 100 tribes.
103. *See* Native Voices, *1953: Congress Seeks to Abolish Tribes, Relocate American Indians*, Nat'l Lib. of Med., https://www.nlm.nih.gov/nativevoices/timeline/488.html [https://perma.cc/XUK2-NHVQ] (providing general synopsis of the federal government's termination policy in the 1950s).
104. Indian Relocation Act of 1956, Pub. L. 84-959, 70 Stat. 986 (1956); *see also* Newland, *supra* note 77, at 97 (established by the Bureau of Indian Affairs and Child Welfare League of America, the Indian Adoption Project Indian removed children from their homes and placed them in boarding schools or with non-Native families; passage of the Indian Child Welfare Act ended the Project in 1978).
105. Testimony of Barry T. Hill Before the Sen. Comm. On Indian Affairs, Basis for BIA's Tribal Recognition Decisions Is Not Always Clear (Sept. 17, 2002), *available at* https://www.gao.gov/assets/gao-02-936t.pdf [https://perma.cc/S2S3-E5XA].
106. Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 88 Fed. Reg. 2,112 (Jan. 12, 2023). Only recently has the federal government began to narrowly consult with federally unrecognized Native Hawaiian communities. Timothy Hurley, *Feds' Consultation Process Will Put Native Hawaiians on Par With Indian Tribes*, Honolulu Star-Advertiser (Oct. 19, 2022), https://www.staradvertiser.com/2022/10/19/hawaii-news/feds-consultation-process-will-put-native-hawaiians-on-par-with-indian-tribes/ [https://perma.cc/2JG7-5CJT].
107. 358 U.S. 217, 223 (1959) (holding that state courts lack jurisdiction over civil claims arising on Indian lands against Indian defendants without congressional authorization); *see also* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/ [https://perma.cc/Q5NH-6SW8] (citing Charles F. Wilkinson, American Indians, Time, and the Law 1 (1987)).
108. *See, e.g.*, McClanahan v. State Tax Comm'n of Arizona., 411 U.S. 164, 172–73 (1973) ("[t]he Indian sovereignty doctrine is relevant, then, . . . [as] a backdrop . . . claim to sovereignty long predates that of our own Government."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978); Washington. v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 (1979); Merrion v. Jicarilla Apache Tribe, 445 U.S. 130, 159 (1982).
109. While there are dozens of cases that may be used to illustrate the Court's oscillation between policy and preemption, for practical purposes, this Note limits its discussion to only a few of the most prominent.
110. In 1953, Congress enacted Public Law 280 to extend criminal laws of participating states to Indian Country within the state. Pub. L. No. 83-280,

tribal courts do not have the "power to try non-Indians according to their own customs and procedure."[111] Somewhat similarly in *Montana v. United States*,[112] the Court fashioned a two-part test to determine whether tribes may regulate the recreational activities of non-Indian landowners within reservation territory. While *Montana*'s legacy has limited the exercise of tribal sovereignty, the Court notably did not hold that tribes lack inherent sovereignty.[113] The Court briefly returned to favoring tribal self-governance in *White Mountain Apache Tribe v. Bracker*,[114] adding that while "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members," tribes have not been "brought under the laws of the Union or of the States within whose limits they reside."[115]

In 2001, the Court again shifted to endorsing assimilationist policy.[116] Writing for the majority in *Nevada v. Hicks*, Justice Antonin Scalia cited 1950s termination-era regulatory guidance to support the proposition that "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."[117] And in *McGirt*, the Court in 2020 again changed course with perhaps its strongest embrace of tribal sovereignty, holding that the Creek Nation possessed the "unrestricted right of self-government" within its lands.[118]

II. Reconciling *Castro-Huerta*

This part will dissect *Castro-Huerta*'s use of case law to abrogate *Worcester*.[119] For context, *Castro-Huerta* stems from a case of child neglect in which a non-Indian stepfather[120] of a 5-year-old Cherokee Indian child was criminally charged by the state of Oklahoma.[121] While the stepfather's appeal for conviction was pending in state court, the Court decided *McGirt v. Oklahoma*,[122] and the stepfather subsequently challenged the state's authority to prosecute a non-Indian for crimes against an Indian in Indian Country.[123] The stepfather's state conviction was ultimately overturned and he received a seven-year sentence of imprisonment as part of the federal prosecutors' plea agreement.[124]

Writing for the majority, Justice Brett Kavanaugh characterized the question presented as a dichotomy between either concurrent state and federal prosecutorial jurisdiction *or* exclusive federal prosecutorial jurisdiction.[125] Instead of handling the analysis as one of federal preemption—which is the typical starting point when a federal statute provides the grounds for challenging state action[126]—the majority begins with a survey of states' powers.[127] Citing the Tenth Amendment and precedent having nothing to do with federal Indian law,[128] the Court maintained that "a State has jurisdiction over all of its territory, including Indian country."[129]

When confronted with jurisdictional questions in the federal Indian law context, preemption has been the starting point of the Court for decades. In *New Mexico v. Mescalero Apache Tribe*, the Court held that a state could not exercise concurrent jurisdiction over non-Indian hunting and fishing on land owned by the Tribe absent sufficient state interest, because regulation of these activities had been preempted via federal approval of tribal regulations allowing the activities.[130] While the Court acknowledged here that *Worcester*'s "conceptual clarity" had long been inadequate to resolve jurisdictional disputes,[131] the implication was that the overarching rule of *Worcester* had only been refined, not abrogated or abandoned. In *McGirt*, the Court framed the crux of its rejection of state jurisdiction on the fact that "Congress had not said otherwise" since the land in question was promised to the Creek Nation in 19th-century treaties.[132] And even when the Court has upheld challenges to state jurisdiction, it still begins by inquiring whether federal law has expressly preempted state action.

67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1325, 28 U.S.C. § 1360). For context, see generally *To Confer Jurisdiction on States Over Offenses Committed Within Indian Country: Hearing on H.R. 459, H.R. 3235, and H.R. 3624 Before the H. Subcomm. on Indian Affairs*, 82nd Cong. (1952).

111. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978), *superseded by statute as acknowledged in* United States v. Lara, 541 U.S. 193, 197-98 (2004) (new federal statute specifically allowed tribe to prosecute Indian members of a different tribe, so tribe's exercise of its own sovereignty to prosecute nonmember was not violative of double jeopardy).
112. 450 U.S. 544 (1981).
113. *Id.* at 563–64.
114. 448 U.S. 136 (1980).
115. *Id.* at 142 (internal quotations omitted).
116. *See* Nevada v. Hicks, 533 U.S. 353, 361–62 (2001).
117. *Id.*
118. McGirt v. Oklahoma, 140 S. Ct. 2452, 2461 (2020) (quoting Aug. 7, 1856, Treaty With Creeks and Seminoles, 11 Stat. 704, Art. XV).
119. *Castro-Huerta* involves the interplay of several statutes which are substantively irrelevant to this Note's argument. While critical of the Court's expansion of states' criminal jurisdiction, this Note's main thrust is that the assimilationist policy fueling the Court's expansion can and likely will be used to challenge tribal authority in areas where states desire control, including implementing federal environmental regulation.
120. The stepfather is Respondent Victor Manuel Castro-Huerta. Oklahoma v. Castro-Huerta, 597 U.S. 629, 629 (2022).
121. *Id.* at 633. Respondent was later convicted and sentenced to 35 years' imprisonment. *Id.*
122. *McGirt*, 140 S. Ct. 2452 (holding that a state trial court did not have the jurisdiction to prosecute a tribal citizen who engaged in criminal activity on land Congress had not disestablished from the Creek Nation).
123. *Id.* at 635.
124. *Id.* "In other words, putting aside parole possibilities, Castro-Huerta in effect received a 28-year reduction of his sentence as a result of *McGirt*." *Id.*
125. *Id.* at 632–33.
126. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1982); Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 471–75 (1979); McClanahan v. State Tax Cmm'n of Arizona, 411 U.S. 164, 168–70 (1973); Rice v. Olson, 324 U.S. 786, 788–91 (1945).
127. *Castro-Huerta*, 597 U.S. at 636. In stark contrast, in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), published less than a week before *Castro-Huerta*, the Court analyzed the text and legislative history of a state statute argued to conflict with federal law. The Court wrote extensively on the history of abortion—citing some sources from the 13th century—before ultimately deciding that "the right to an abortion is not deeply rooted in the Nation's history and traditions." *Dobbs*, 597 U.S. at 250.
128. *See Castro-Huerta*, 597 U.S. at 636 (citing Lessee of Pollard v. Hagan, 44 U.S. 212, 228 (1845).
129. *Castro-Huerta*, 597 U.S. at 636.
130. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. at 337, 338–39 (1983).
131. *Id.* at 331–32.
132. McGirt v. Oklahoma, 140 S. Ct. 2452, 2452 (2020).

Devoid of any historical context, the majority then listed quotes from a string of federal Indian law cases. It conceded "Indian country"[133] was treated as separate from state territory in the "early years of the Republic."[134] But, the Court explained, *Worcester* has long since "yielded to closer analysis"[135] as demonstrated by *New York ex rel. Cutler v. Dibble*,[136] *Surplus Trading Co. v. Cook*,[137] *New York ex rel. Ray v. Martin*,[138] *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*,[139] and *Nevada v. Hicks*.[140] The Court argued that time and again, it narrowed and re-interpreted *Worcester*, effectively abrogating the sharp jurisdictional distinction between states and "Indian country."[141] Therefore, the Court claimed, *Worcester* and the inherent tribal sovereignty doctrine it espoused are not valid law and have not been for some time.[142]

The main problem with the Court's reasoning here is that it ignores how policy trends shape federal Indian law jurisprudence. Federal Indian law is unique from other fields of law because it has an exceptionally small foothold within the text of the Constitution and is frustrated by the doctrine of federalism.[143] While other areas of constitutional law such as interpretation of the Commerce Clause[144] also draw on little direct constitutional text, the coherent development of federal Indian jurisprudence has been uniquely frustrated because the coexistence of three interested sovereigns (i.e., the federal government, the state governments, and tribal governments) was not imagined by the Framers, who instead crafted a dual-sovereign system to be shared between the federal government and states.[145] Thus, federal Indian case law is not merely valuable because it exists as precedent, but also because individual cases embody contemporaneous political values and policy objectives.

Without placing federal Indian law in the context in which it was decided, the Court opted to resolve the question presented based purely on statements of policy disguised as legal authority. It expressly chose to ignore[146] the reality that federal Indian law cannot be fully understood outside the political context in which it was made. While it is conceded that history alone cannot resolve legal questions in a *stare decisis* system, this Court often heavily relies on history to fashion decisions.[147] The Court cannot claim with any veracity that history has no place in legal reasoning—particularly in an area of law that is inextricable from public sentiment and policy goals.[148]

133. As mentioned previously, it is at best unclear what "Indian country" means here, since neither the phrase nor its contemporary meaning was imagined at the time the Court allegedly treated such as separate from state territory in 1832. Mn. House Rsch. Dep't, *supra* note 8. Nevertheless, what is particularly worrisome about the Court's use of the term "Indian country" is that it erroneously equates the territory controlled by tribes with tribes themselves.
134. *Castro-Huerta*, 597 U.S. at 636.
135. *Id.* (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962) (holding that the Secretary of the Interior was not statutorily empowered to permit Indigenous Alaskans to violate state law)). Reliance on *Organized Village of Kake* demonstrates a gross misunderstanding of federal Indian jurisprudence. The United States federally recognized Alaskan Native tribes in an amendment (Act of May 1, 1936, ch. 254, 49 Stat. 984 (codified at 25 U.S.C. §§ 461–469)) to the Indian Reorganization Act. Following the *de jure* termination era in the 1950s, *ante* Part I.B, subsequent actions effectively terminated Alaskan Natives' federal tribal statuses by abrogating the federal trust responsibility. Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 Am. Indian L. Rev. 421, 440–43 (1999/2000). Therefore, while *Organized Village of Kake* does revisit *Worcester*, read in the context of the termination era, it does so only to say *Worcester* may not be dispositive in all sovereignty disputes given the diversity of factual situations that may arise. *Organized Village of Kake*, 369 U.S. at 72.
136. 62 U.S. 366, 370 (1859) (upholding state statute which "made it unlawful for *any persons other than Indians* to settle or reside upon any lands belonging to or occupied by any nation or tribe of Indians within that State[ ] and providing for the summary ejectment of such persons" because it was not in conflict with the Constitution, any treaty, or any congressional enactment (emphasis added)). The Court last cited *Cutler* in *Oneida Indian Nation of New York. State v. Oneida County*, 414 U.S. 661, 672 (1974) for the proposition that Oneida Nation's possessory right to land is a federal right. Relevant to the present inquiry, the Court there noted that *Cutler* was analogous to *Worcester* in that, similar to the Cherokee Nation's federal right to occupy its own territory, Oneida Nation's federal possessory right to occupied lands could not be interfered with by state law. *Id.* at 670–71.
137. 281 U.S. 647, 651 (1930) (holding that state could tax a company located on "lands which are set apart and used for public purposes; "[a] typical illustration [of this] is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life").
138. 326 U.S. 496, 499 (1946) (finding that state had criminal jurisdiction over non-Indian charged with murder of another non-Indian on reservation lands, where only "8 Indian families liv[ed] among [the reservation's] 9,000 inhabitants," and no limiting treaty obligation or federal law imposed federal law).
139. 502 U.S. 251, 257–58 (1992) (holding that county may impose taxes on lands owed in fee by non-Indians within territory of Indian reservation, because state taxing authority was not exempted from general principle that states generally do not have jurisdiction within reservations).
140. Nevada v. Hicks, 533 U.S. 353, 361 (2001).
141. Oklahoma v. Castro-Huerta, 597 U.S. 629, 636–37 (2022).
142. *Id.* at 652 ("this Court has repeatedly ruled that Indian country is part of a State, not separate from a State . . . this Court long ago made clear that *Worcester* rested on a mistaken understanding of the relationship between Indian country and the States").
143. U.S. Const. art. 1, § 8, cl. 3. The Constitution's brevity has caused ongoing debate in many areas of constitutional law. *See, e.g.*, Walter C. Noyes, *Development of the Commerce Clause of the Constitution*, 16 Yale L.J. 253, 255 (Feb. 1907) ("while the purpose of the framers of the Constitution in respect of interstate commerce was limited in its scope to the language used was broad and comprehensive and has become applicable to conditions incomparably changed"). However, federal Indian law faces a particularly cumbersome challenge because the overarching structure of the federal Constitution seemingly allows for only a dual-sovereign governmental system.
144. Noyes, *supra* note 143, at 255.
145. In the criminal context—particularly relevant for analysis of *Castro-Huerta*—the dual-sovereignty doctrine is the notion that the Sixth Amendment's rule against double jeopardy applies only to offenses against the same sovereignty. When the same act constitutes a crime against two sovereigns (a state or states and the federal government), prosecution under one does not bar prosecution under the other. *See generally* 22A C.J.S., Criminal Procedure and Rights of the Accused, § 656 (2023).
146. *Castro-Huerta*, 597 U.S. at 652.
147. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26 n.6 (2022) ("The job of judges is not to resolve historical questions in the abstract; it is to resolve legal questions presented in particular cases or controversies . . . [c]ourts are thus entitled to decide a case based on the historical record compiled by the parties.").
148. It should be noted that the Court also heavily relies on *United States v. McBratney*, a late-19th-century decision holding that federal courts do not have jurisdiction when a criminal offense is committed against a non-Indian by a non-Indian within an Indian reservation. 104 U.S. 621 (1881). *McBratney* is a narrow decision and has been criticized for its inconsistency with federal law. *See* United States v. Haggerty, 997 F.3d 292, 298 n.7 (5th Cir. 2021); Mull v. United States, 402 F.2d 571, 573 (9th Cir. 1968). To explain,

> [a] holding consistent with the *McBratney* decision would deny federal courts jurisdiction over crimes by or against Indians on the reservation if the state containing that reservation was admitted to the Union after 1834, because the admission would repeal Section 25 of the [Indian Intercourse] Act of 1834 which extends the general laws of the United States to Indian Country.

Despite the problem explained above, *Castro-Huerta* remains "good" law. There is no evidence that the Court will suddenly shift away from its endorsement of the assimilationist policy echoed in *McBratney, Organized Village of Kake*, *New York ex rel. Ray*, or *Hicks*.[149] Accordingly, Part II.B explains how *Castro-Huerta* could be expanded in light of active challenges. After surveying the relevant regulatory landscape in Part III.A, the Note then turns to possible implications for tribal implementation of federal environmental regulatory programs in Part III.B and argues that *Castro-Huerta* should not affect tribal implementation of the CAA.[150]

A. *In the Pipeline*

Prior to shifting to its penultimate argument, this Note briefly explores two developing situations that have the potential to further diminish tribal jurisdiction.[151] The first case that may provide the Supreme Court with such an opportunity is *Hooper v. City of Tulsa*.[152] Here, a Choctaw Nation citizen was issued a speeding ticket by a city of Tulsa police officer on a stretch of road on the Muscogee (Creek) Nation Reservation.[153] This area was not annexed into Tulsa until 1966.[154] Tulsa initially claimed that the Curtis Act[155] allows the city to prosecute Indians for crimes committed on the Nation's Reservation—a power not even the state of Oklahoma possesses.[156] Upon review of Tulsa's denial of post-conviction relief, the District Court for the Northern District of Oklahoma agreed with Tulsa's contention that Section 14 of the Curtis Act[157] provided the legal basis for Tulsa's jurisdiction.[158] The U.S. Court of Appeals for the Tenth Circuit reversed the district court's ruling, but punted on the issue of applying *Castro-Huerta*.[159] At this point, it is still unclear how courts will reconcile *Castro-Huerta* with *McGirt* and prior federal Indian jurisprudence.

The second case is more obscure, even with *Halaand v. Brackeen*[160] placing a few scattered pieces of the "strategic attack" together.[161] In short, *Brackeen* presented a challenge to the long-standing[162] political classification of tribes.[163] The named individual non-Native petitioners argued in part[164] that the federal statute preventing the forced removal of Indigenous children from their communities[165] is racially discriminatory.[166] The Supreme Court granted certiorari for *Brackeen* in February 2022 and issued an opinion in June 2023.[167] Ultimately, the Court sidestepped addressing the Equal Protection Clause issue on the merits by finding that the non-Native litigations failed redressability.[168]

But just a month before the Supreme Court granted certiorari in *Brackeen*, in January 2022, counsel representing the same individual petitioners[169] filed a complaint on behalf of Maverick Gaming LLC ("Maverick") alleging that the Indian Gaming Regulatory Act[170] ("IGRA") creates an unconstitutional, race-based monopoly over casino-style gaming.[171] And while the presiding district court dismissed Maverick's complaint in February 2023,[172] Maverick has since appealed to the U.S. Court of Appeals for the Ninth Circuit.[173] Thus, similar to *Hooper*, it has yet

James E. Murphy, *The McBratney Decisions: A Pattern of Inconsistency*, 3 Am. Indian L. Rev. 149, 151 (1975).

149. *Castro-Huerta*, 597 U.S. at 632–33. To the contrary, there is instead strong data supporting the prediction that the Court is more likely to double-down on *Castro-Huerta*. *See generally* Stephen Jessee et al., *A Decade-Long Longitudinal Survey Shows That the Supreme Court Is Now Much More Conservative Than the Public*, Proc. Acad. Sci. 1 (June 6, 2022) (using surveys conducted in 2010, 2020, and 2021 to conclude in part that the Court is "to the ideological right of roughly three quarters of all Americans").
150. *See infra* Part III.
151. The particular issue discussed in this Note is not presently before any U.S. court. But the "temporary" status of tribes contemplated by legislators and the Court for centuries justifies anticipating further diminishment of tribal sovereignty. *See generally* Michael D.O. Rusco, Oklahoma v. Castro-Huerta*, Competitive Sovereignty, and Fundamental Freedom of Native Nations*, 106 Marq. L. Rev. 889 (2023) (discussing how *Castro-Huerta* squarely furthers erosion of Native sovereignty erosion).
152. Hooper v. City of Tulsa, 71 F.4th 1270 (10th Cir. 2023).
153. The Muscogee (Creek) Nation is a federally recognized Indian tribe. Brief of Amicus Curiae Muscogee (Creek) Nation at 1, Hooper v. City of Tulsa, No. 22-5034 (July 7, 2022).
154. Appellant's Brief in Chief at 2, Hooper v. City of Tulsa (No. 22-5034) (June 30, 2022).
155. Curtis Act of 1898, 30 Stat. 495.
156. Brief of Amicus Curiae, *supra* note 153, at 8.
157. Curtis Act of 1898, 30 Stat. 495, 499 (granting jurisdiction to municipalities incorporated under the Curtis Act over "all inhabitants . . . without regard to race.").
158. Hooper v. City of Tulsa, Case No. 21-cv-165-WPJ-JFJ, 2022 WL 1105674, at *3 (N.D. Okla. Apr. 13, 2022). As criticized by Hooper, "[t]he district court's ruling that Section 14 grants [the City] jurisdiction over on-reservation crimes committed by Indians ignores both the history of [the City] and the complexities of Section 14." Appellant's Brief in Chief, *supra* note 154, at 9.
159. Hooper v. City of Tulsa, 71 F.4th 1270, 1276 n.5 (2023) ("Amicus Oklahoma raises an alternative ground for affirming the district court, citing the Supreme Court's recent decision in *Oklahoma v. Castro-Huerta* [ ] to argue Oklahoma has inherent jurisdiction over Indians within its boundaries . . . [but w]e do not exercise our discretion to reach the argument raised only by amicus Oklahoma . . . we leave resolution of this issue for a case where it is properly raised by the parties.").
160. 599 U.S. 255 (2023).
161. "[Petitioners' counsel's] effort is part of a large, well-orchestrated attempt to undermine tribal sovereignty and tribal nationhood . . . [i]t is the biggest and most strategic attack on tribes this century." Vivia Chen, *Why Gibson Dunn's 'Best Interest of the Child' Has a Dark Side*, Bloomberg L. News (Nov. 11, 2022), https://news.bloomberglaw.com/business-and-practice/why-gibson-dunns-best-interest-of-the-child-has-a-dark-side [https://perma.cc/36EB-XD6E] (quoting Kimberly Cluff, Legal Director, California Tribal Families Coal.).
162. *E.g.*, Morton v. Mancari, 417 U.S. 535 (1974).
163. *Brackeen*, 599 U.S. 255 (2023).
164. Petitioners are represented by Matthew McGill, Esq., pro bono. McGill is a firm partner of Gibson, Dunn & Crutcher LLP. *Gibson, Dunn & Crutcher*, People—*Biography*, Gibson Dunn https://www.gibsondunn.com/lawyer/mcgill-matthew-d/ [https://perma.cc/WHM9-JE3S].
165. Newland, *supra* note 77, at 97.
166. Petition for Writ of Certiorari at *ii*, Brackeen v. Halaand, (No. 18-11479) (Sept. 3, 2021).
167. Order Granting Certiorari, Brackeen v. Halaand, (No. 18-11479) (Feb. 28, 2022).
168. *Brackeen*, 599 U.S. at 292–93.
169. Lochlan F. Shelfer, Esq. of Gibson, Dunn & Crutcher LLP, is listed as counsel alongside McGill in the pending *Maverick* litigation and in *Brackeen*. Opening Brief of Plaintiff-Appellant at 1, Maverick Gaming LLC v. United States, No. 23-35136 (9th Cir. July 7, 2023); Complaint at 1, Maverick Gaming LLC v. United States, 658 F. Supp. 3d 966 (No. 3:22-cv-05325); Reply Brief for Individual Petitioners at 1, Haaland v. Brackeen, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, 21-380).
170. 25 U.S.C. §§ 2701–2721.
171. Complaint, *supra* note 169, at 4, 28.
172. Maverick Gaming LLC v. United States, 658 F. Supp. 3d 966 (W.D. Wash. 2023).
173. Opening Brief for Plantiff-Appellant, *supra* note 169; Notice of Appeal, No. 3:22-cv-05325 (W.D. Wash. Feb. 22, 2023), ECF No. 100.

to be seen how federal circuit courts will reconcile *Castro-Huerta* with the federal government's contemporary treatment of Indigenous tribes under *Worcester*.[174]

III. Environmental Regulation and the TAS Provision

With these considerations in mind, this Note now pivots to its discussion of federal environmental regulation. The federal regulatory system is unquestionably as technical and complex as federal Indian jurisprudence is volatile. Accordingly, this discussion is confined to the CAA and its corresponding regulatory TAR.[175] Part III will broadly explain the CAA, the U.S. Environmental Protection Agency's ("EPA") promulgation of the TAR, and EPA's practical use of the TAR.[176] The final part, Part IV, will argue that *Castro-Huerta*'s attack on inherent tribal sovereignty should not affect the TAR because the authorizing CAA provision does not hinge on proving tribal jurisdiction over physical lands.

A. The CAA

At the macro level, the CAA reflects Congress' recognition that modern life increasingly poses risks to public safety and welfare.[177] Through federal, state, local, and tribal regulation, the CAA seeks to improve air quality where it presents a danger to public health and welfare and to preserve air quality where it does not.[178] There are three major programs through which the CAA regulates air pollution: the National Ambient Air Quality Standards[179] ("NAAQS") program; the New Source Performance Standards[180] ("NSPS") program; and the Hazardous Air Pollutants[181] ("HAP") program. This Note limits its discussion to possible challenges against tribal implementation of the NAAQS program.

174. For example, *Morton v. Mancari* cites *Worcester* to justify Indigenous tribes' "unique legal status" and uphold an employment preference as "rationally designed to further Indian self-government." 417 U.S. 535, 555 (1974).
175. The Environmental Protection Agency promulgated the TAR to implement the TAS provision of the CAA, 42 U.S.C. § 7601(d)(2), which in relevant part authorizes the EPA Administrator "to treat Indian tribes as States under [the CAA]."
176. "Indian reservation" is defined in 40 C.F.R. § 49.2(b) as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."
177. 42 U.S.C. § 7401(a). Put differently, the CAA is Congress' recognition that human activity—particularly the emission of greenhouse gases—"has warmed the atmosphere, ocean and land." West Virginia v. U.S. Env't Prot. Agency, 597 U.S. 697, 753 (2022) (Kagan, J., dissenting) (internal citation omitted).
178. 42 U.S.C. § 7401(a). For example, the CAA mandates emissions controls for over 180 hazardous air pollutants, implements the Montreal Protocol to phase out ozone-depleting chemicals, and requires EPA to set health-based standards for ambient air quality. Richard K. Lattanzio, Cong. Rsch. Serv., RL30853, Clean Air Act: A Summary of the Act and Its Major Requirements 2–3 (2022).
179. 42 U.S.C. § 7409.
180. 42 U.S.C. § 7411.
181. 42 U.S.C. § 7412. The HAP program governs stationary sources which emit pollutants not covered by a NAAQS and particularly those which are known or anticipated to be "acutely or chronically toxic." § 7412(b)(2).

1. NAAQS—An Overview

Following a notice-and-comment period, Section 109 of the CAA requires the EPA Administrator to promulgate NAAQS.[182] NAAQS must be tailored to protect public health within an adequate margin of safety and to protect public welfare from any known or anticipated adverse effects.[183] EPA is also required to review the scientific data upon which the NAAQS are based every five years and revise if necessary.[184] Once NAAQS are established, a state must create a State Implementation Plan ("SIP") to attain or maintain NAAQS.[185] SIP development and review use data in the Emissions Inventory System ("EIS")[186] and computer simulations to determine whether, given the SIP, violations of NAAQS will occur.[187] If the data show that NAAQS will be exceeded, a state's SIP must impose additional controls on existing sources to ensure that emissions do not cause violations, or "exceedances," of the standards.[188]

Mandating the development of SIPs demonstrates a cooperative approach to achieving a solution to an interstate issue, allowing states flexibility to choose how best to attain or maintain NAAQS in their respective jurisdictions.[189] When a state fails to exercise its own discretion to determine how it will comply with NAAQS, however, EPA may take several actions; for example, EPA may implement a Federal Implementation Plan ("FIP"),[190] sanction the noncompliant state,[191] and/or allow the state to revise and resubmit a SIP.[192] The regulatory design of NAAQS recognizes that cooperation between different levels of gov-

182. 42 U.S.C. § 7409(a)(1)(A).
183. Lattanzio, *supra* note 178, at 2. To date, EPA has promulgated NAAQS for six "criteria" air pollutants, including sulfur dioxide (SO_2), particulate matter ($PM_{2.5}$ and PM_{10}), nitrogen dioxide (NO_2), carbon monoxide (CO), ozone, and lead. *Id.* at 3.
184. 42 U.S.C. § 7409(d).
185. 42 U.S.C. § 7410(a). Whether a SIP needs to show maintenance or attainment of NAAQS depends in part on whether the state contains nonattainment areas. "Nonattainment" areas are those which do not meet the primary permissible human heath exposure standard as promulgated for a specific criteria pollutant. Off. Air Quality Plan. & Standards, *Nonattainment Areas and Designations*, U.S. Env't Prot. Agency, https://perma.cc/MPV8-ZS8V.
186. The EIS (or, EIS Gateway) is a database which provides registered EPA, state, local, and tribal users with access to emissions data in their respective jurisdiction. *Air Emissions Inventories*, U.S. Env't Prot. Agency, https://www.epa.gov/air-emissions-inventories/emissions-inventory-system-eis-gateway [https://perma.cc/QMY6-NF3V]. The EIS Gateway allows users to view and satisfy reporting mandates under the Air Emissions Reporting Requirements (AERR). Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 40 C.F.R. pt. 51.
187. Lattanzio, *supra* note 178, at 4.
188. *Id.*
189. For example, states may opt to meet and/or maintain NAAQS by using averaging and trading programs, alternative monitoring programs, surrogate standards, and in some cases, the ability to allow facilities to make operational changes without going through major new source review if the facility-wide emissions stay below emissions limits. *See generally Building Flexibility with Accountability Into Clean Air Act Programs*, U.S. Env't Prot. Agency (Dec. 19, 2023), https://www.epa.gov/clean-air-act-overview/building-flexibility-accountability-clean-air-programs [https://perma.cc/9NS5-6GB2].
190. 42 U.S.C. § 74201(c).
191. 42 U.S.C. §§ 7509(a)–(b).
192. 42 U.S.C. § 7509(c).

ernment is essential to protecting public welfare, and ultimately, to achieving the NAAQS themselves.[193]

2. Treatment as States

As part of the 1990 Amendments, Congress added a provision to the CAA authorizing the Administrator of EPA to treat federally recognized tribes, as the Administrator found appropriate, in the same manner as states under the CAA.[194] Pursuant to this TAS provision,[195] the Administrator promulgated the TAR.[196] Currently, the TAR outlines criteria for TAS eligibility.[197] If granted TAS eligibility, tribes may develop Tribal Implementation Plans ("TIPs"),[198] enforce tribal law approved by EPA under the CAA, and author and enforce air quality management rules as approved by EPA under the CAA in Indian country.[199]

Prior to invoking TAS treatment, however, the TAR requires EPA to demonstrate that the *land* over which TAS treatment is exercised, if granted, would concern "the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."[200] In 2014, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit upheld a challenge to EPA's 2011 new source review ("NSR") rule (the "Rule") for allegedly failing to comply with Section 49.6(c).[201] In brief, the Rule established an FIP for all non-reservation land within Indian country without first demonstrating tribal jurisdiction as required for TAS treatment. Relying on the principle[202] that Congress left no "residual . . . EPA jurisdiction, authority, or power"[203] to directly implement FIPs under TAS over lands *outside* the territory of a reservation but *within* "Indian country," the D.C. Circuit vacated the Rule.[204] In contravention of this principle, EPA had erroneously "arrogat[ed] jurisdiction" of the non-reservation land "to itself."[205] Jurisdiction, the majority held, "must either lie with the state or with the tribe—one or the other—and EPA does not have a third option of not deciding."[206] The D.C. Circuit also noted that "states have historically regulated non-Indian CAA-related activities on fee lands within reservation boundaries."[207] Thus, the Court implied that EPA not only erred in failing to find tribal jurisdiction prior to implementing the disputed FIP, but it was unlikely EPA could have made such a finding even if it had tried.

Along with this interpretation of the TAR, *Castro-Huerta*'s strong endorsement of assimilation-era policy makes a state's challenge to the TAR more likely than ever to prevail. By using the flipped presumption in favor of state jurisdiction—or at minimum, concurrent jurisdiction—over lands in question (i.e., Indian Country), states may argue that SIPs necessarily incorporate any FIPs or TIPs within their boundaries regardless. Now that the Supreme Court has given states license to chip away at tribal governing authority by reducing sovereignty to a question of absolute land ownership,[208] tribes are effectively precluded from demonstrating absolute title of disputed lands if unable to garner the support of bordering states. For, as the Court declared in *M'Intosh*, states have adopted the "exclusive right of the discoverer to appropriate the lands occupied by the Indians."[209]

B. Rebutting Challenges to the TAR

This Note ultimately argues that the TAS provision's text disavows a state challenge of tribal CAA implementation. Beginning with the plain language, the TAS provision in relevant part states:

> "(1) [T]he Administrator (A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one half of 1 percent of annual appropriations under section 7405 of this title . . . (2) the Administrator shall promulgate regulations . . . specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if (A) the Indian tribe has a governing body . . . (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and (C) the Indian tribe is reasonably expected to be capable . . . of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter . . . ."[210]

As a preliminary matter, it is well-established that Congress may delegate federal authority to a tribe.[211] It is also clear from the plain meaning of the text that the TAS

193. *See also* 42 U.S.C. § 7416.
194. 42 U.S.C. § 7601(d)(2).
195. *Id.*
196. Indian Country: Air Quality Planning and Management, 40 C.F.R. pt. 49.
197. *Id. See also, e.g.*, Tribal Eligibility Requirements, 40 C.F.R. § 49.6.
198. 42 U.S.C. § 7601(d)(4) ("In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.").
199. *See generally* Program Overview, 40 C.F.R. § 49.1; General Tribal Clean Air Act Authority, *id.* at § 49.3.
200. 40 C.F.R. § 49.6(c).
201. Okla. Dep't of Env't Quality v. U.S. Env't Prot. Agency, 740 F.3d 185 (D.C. Cir. 2014). The issue presented here was "whether the states have CAA jurisdiction over areas of Indian country that, by EPA's own account, no tribe may regulate because no tribe has demonstrated its jurisdiction." *Id.* at 194.
202. *Id.* at 193 (quoting Michigan v. U.S. Env't Prot. Agency, 258 F.3d 1075, 1083 (2001)).
203. *Michigan v. U.S. Env't Prot. Agency*, 258 F.3d at 1083.
204. *Okla. Dep't of Env't Quality*, 740 F.3d at 195.
205. *Id.* at 193.
206. *Id.*
207. *Id.* at 191.
208. While not explored in depth here, this change in presumption is analogous to the Jim Crow-era "grandfather clause," which was commonly used in Southern states to restrict voting rights to men who were allowed to vote, or whose male ancestors were allowed to vote, prior to 1867. This had the effect of disenfranchising nearly all African American men; the Fifteenth Amendment, ratified in 1870, gave all male U.S. citizens the constitutional right to vote. *See generally* U.S. Const. amend. XV; Alan Greenblatt, *The Racial History of the "Grandfather Clause,"* NPR (Oct. 22, 2013), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause [https://perma.cc/B3K4-TDVS].
209. Johnson v. M'Intosh, 21 U.S. 543, 584 (1823).
210. 42 U.S.C. § 7601(d).
211. United States v. Mazurie, 419 U.S. 544, 554 (1975) (holding that Congress may delegate its authority to regulate on privately owned land within an Indian reservation to a tribe).

provision requires EPA to treat eligible tribes as states; EPA cannot treat an ineligible tribe as it would a state, but must treat an eligible tribe as a state. The only exceptions to this compulsive treatment are explicitly listed in Sections 7601(d)(1)(A) and (d)(4).[212] Thus, the provision only imagines three situations in which EPA may refrain from treating a tribe as a state: when the applicant tribe is ineligible based on requirements (i.e., the TAR) EPA itself promulgates; when § 7601(d)(1)(A) applies; or, when EPA determines the treatment of the tribe as a state would be "inappropriate or administratively infeasible."[213] These are the only situations in which the provision permits EPA to not treat tribes as states.

The enactment of the TAS provision demonstrates that Congress intended for tribes to implement the CAA. By carving out authority in a preexisting statute to require treatment as a state, Congress expressed a desire for tribes to implement TIPs—and not be subject to surrounding SIPs. Thus, requiring either EPA or tribes to show that air resources sought to be regulated under TAS are within the tribe's "jurisdiction"[214] would necessarily frustrate the provision's purpose. Reading the TAR requirement in light of *Castro-Huerta*, it would simply be impossible for *any* tribe to show absolute "jurisdiction" over disputed lands.[215]

Further, Section 7601(d)(1)(B)'s language denotes an expansive meaning of jurisdiction in conflict with the impossibly high standard discussed in *Castro-Huerta*: "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." Reasonably construed, this clause affords EPA with the flexibility to apply TAS treatment when tribes possess jurisdiction *outside* "the exterior boundaries of the reservation," because Section 7601(d)(1)(B) allows for the possibility of "other areas" of jurisdiction.[216] The term "jurisdiction" here can therefore take on multiple meanings depending on the context in which it is asserted. Thus, for a tribe (or the federal government on behalf of the tribe) to implement a TIP, "jurisdiction" is not necessarily dependent on whatever government entity possesses absolute title over the land regulated.[217] As mentioned throughout this Note, the Court's characterization of tribes as purely land-dependent entities makes it difficult to discern what, if any, jurisdiction tribes retain if "jurisdiction" is to be given the same definition in all contexts.

Where the TAS provision does not expressly prohibit treatment as a state, the legislative record proves that Congress intended for "Indian tribes to administer and enforce the [CAA] in Indian lands."[218] As supported by Congress' broad, indefinite language here, it is clear that Congress did not task EPA or tribes with first delineating "Indian lands" from "State lands" before the substance of the provision could be engaged. Requiring EPA, an agency tasked with promulgating and enforcing environmental regulations, to continually alter implementation plans in response to an extremely volatile area of constitutional law would certainly not be the best approach to "advance[ ] rational, sound, air quality management."[219] Indeed, the TAS provision was expressly designed to "improve the environmental quality of the air wit[h]in Indian country in a manner consistent with . . . 'the *overall Federal position in support of Tribal self-government* and the government-to-government relations *between Federal and Tribal Governments*.'"[220]

IV. Conclusion

At its core, the threat to tribal sovereignty is the legal system's inability to view tribes as inherently deserving of the right to self-determination—put simply, as people.[221] Despite the Supreme Court's swing in favor of assimilation, a challenge to the TAR under *Castro-Huerta* should ultimately be rejected. Framing attacks on tribal implementation of federal environmental programs as issues of statutory interpretation will allow courts to protect the sliver of the inherent tribal sovereignty doctrine remaining in contemporary federal Indian law.

212. "In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." 42 U.S.C. § 7601(d)(4).
213. 42 U.S.C. §§ 7601(d)(1)(A), (d)(4).
214. Tribal Eligibility Requirements, 40 C.F.R. § 49.6(c).
215. Federal law impliedly preempts state laws which pose clear barriers to the "full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see also* Jay B. Sykes & Nicole Vanatko, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer 25–27 (2019).
216. 42 U.S.C. § 7601(d)(1)(B).
217. Furthermore, if Congress wanted to limit TAS application to only those physical lands over which tribes unquestionably have jurisdiction, Congress could have been more precise in its word choice or included an explanation of "jurisdiction." But it did not.
218. S. Rep. No. 228, at 79 (1989). Additionally, under 40 C.F.R. § 49.7(a)(3)ii), a tribe seeking to implement a CAA program in a non-reservation area is only required to "describe the basis for the tribe's assertion of authority." This does not limit tribes to only asserting absolute title as justification for "authority."
219. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7254-55 (Feb. 12, 1998) (codified at 40 C.F.R. pt. 49).
220. S. Rep. No. 228, *supra* note 218 (citing EPA's 1984 Indian Policy) (emphasis added).
221. Houska, *supra* note 1.