

# Do We Really Have the Right to Breathe Clean Air?

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*How come I can't breathe at home and y'all get to breathe at home?*<sup>1</sup>

*The idea that some people may freely poison others is one of the most astonishing but least contested aspects of modern life.*<sup>2</sup>

*Setting environmental standards involves judgment calls about what level of protection is “adequate,” what technical measures are “feasible” and even what level of pollution is consistent with “clean air, clean water and a healthful environment.” On his first day in office, Trump drove a truck through those judgment calls by repealing all the executive orders related to racial justice, environmental justice, and climate change that had been guiding agency exercises of discretion. Since then, his Administration has done its best to gut environmental protections—repealing long-standing regulations and abandoning customary decision-practices. Overall, the Trump Administration has created a regulatory void, leaving environmental judgment calls standardless.*

*That makes state-level law and regulation critically important, particularly the emerging trend toward state-level constitutionally recognized environmental rights. Yet despite the sweeping constitutional language adopted in multiple states, constitutional environmental rights are surprisingly undertheorized. There is little consensus about their contours and content. There is not even agreement about who holds constitutional*

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1. Ariel Wittenberg, *'How Come I Can't Breathe?'* Musk's Data Company Draws a Backlash in Memphis, POLITICO (May 6, 2025, at 10:32 ET) (quoting Boxtown resident Alexis Humphreys), <https://www.politico.com/news/2025/05/06/elon-musk-xai-memphis-gas-turbines-air-pollution-permits-00317582>.

2. George Monbiot, *We Are Being Poisoned Every Day, So Why Do We Keep Voting for More Pollution?* Ask a Lobbyist, GUARDIAN (Sep. 22, 2023, at 01:00 ET), [https://www.theguardian.com/commentisfree/2023/sep/22/air-pollution-lobbying-politics-ulez?CMP=share\\_btn\\_url](https://www.theguardian.com/commentisfree/2023/sep/22/air-pollution-lobbying-politics-ulez?CMP=share_btn_url).

*environmental rights, who bears the duties these rights create, and by what process those determinations might be made. In this moment when federal environmental standards are being obliterated, vulnerable communities and individuals are pressing states to resolve these questions.*

*This Article suggests that properly theorized environmental rights can begin to fill the void created by federal abdication. It offers a vision of the different kind of environmental decision-making that could (and should) flow from constitutional environmental rights. Focusing on the right to breathe clean air, the Article identifies how the right to breathe transforms every stage of environmental decision-making—how, where, and when public participation is sought, who has access to relevant information, how impacts and risks are defined, how risk assessments are conducted, what level of protection is requisite, and who has access to a judicial remedy to allege that their rights have been violated. It also provides a yardstick by which to assess whether the state is fulfilling these obligations.*

*Using New York as a model this article demonstrates how managing environmental decision-making through the lens of environmental rights could deliver better air quality to more people while simultaneously promoting environmental justice.*

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## INTRODUCTION

On his first day in office, President Donald Trump issued a slew of executive orders revoking federal initiatives on racial justice, environmental justice, and climate change.<sup>3</sup> He threatened to massively roll back environmental regulation, lower fuel efficiency standards, and increase mineral extraction.<sup>4</sup> And the administration has been following through on these threats. Indeed, this Administration's Environmental Protection Agency (EPA) is poised to reverse the 2009 Greenhouse Gases Endangerment Finding.<sup>5</sup> This critical agency decision recognizing greenhouse gas emissions as pollutants that "may reasonably be anticipated to endanger public health or welfare"<sup>6</sup> undergirds much of the EPA mandate for greater fuel efficiency from cars and trucks.<sup>7</sup> Like this endangerment finding, environmental standards typically involve choices about what level of protection is "adequate," what technical measures are "feasible," and even what level of pollution is consistent with "clean air and water, and a healthful environment." These are judgment calls. By abandoning environmental justice policies and rolling back long-standing regulations and decision-practices, the federal government is undermining the standards for making these judgment calls. What is left is a regulatory void, where fundamental environmental and public health decisions are subject to the whims of the political moment. Under the Trump Administration, it is clear that the

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3. *All the Executive Orders Trump Has Signed So Far*, GUARDIAN (Apr. 30, 2025, at 13:20 ET), <https://www.theguardian.com/us-news/2025/jan/29/donald-trump-executive-orders-signed-list>.

4. Jonathan M. Gitlin, *Trump's New Head of DOT Rips Up US Fuel Efficiency Regulations*, ARS TECHNICA (Jan. 29, 2025, at 06:11 PT), <https://arstechnica.com/cars/2025/01/trumps-new-head-of-dot-rips-up-us-fuel-efficiency-regulations>; Jeff Brady, *Trump's Energy Emergency Is a Gift to Fossil Fuel Firms. It's Likely Headed to Court*, NPR (Jan. 22, 2025, at 11:36 CT), <https://www.nprillinois.org/2025-01-22/trumps-energy-emergency-is-a-gift-to-fossil-fuel-firms-its-likely-headed-to-court>.

5. Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36288 (proposed Aug. 1, 2025). This proposed rule purported to rely on the U.S. Department of Energy (DOE) Climate Working Group's draft report titled, *A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate* (2025). This draft report so embarrassingly misstated the science of climate change that an international group of scientists wrote a 400+ page detailed rebuttal damning the DOE Report as false and misleading. ANDREW DESSKER & ROBERT E. KOPP, CLIMATE EXPERTS' REVIEW OF THE DOE CLIMATE WORKING GROUP REPORT (2025) (on file with author). Moreover, the Committee that created the DOE report violated the Federal Advisory Committee Act. *Env't Def. Fund, Inc. v. Wright*, No. 1:25-CV-12249, 2026 WL 251626, at \*1 (D. Mass. Jan. 30, 2026).

6. 42 U.S.C. § 7521(a).

7. In 2009, citing an enormous body of scientific evidence, EPA found that greenhouse gases posed a danger to public health and welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66497 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I). This endangerment finding has been the legal underpinning for tailpipe carbon emissions standards. These motor vehicle emission standards not only reduced greenhouse gas emissions but also reduced dangerous co-pollutants like particulate matter. Rob Jordan, *EPA 'Endangerment Finding' Explained: 5 Facts About the Science and Health Risks*, STAN. UNIV.: WOODS INST. FOR THE ENV'T (Sep. 18, 2025), <https://woods.stanford.edu/news/epa-endangerment-finding-explained-5-facts-about-science-and-health-risks>.

federal government will not be a climate or environmental leader but instead will be an obstacle to progress.<sup>8</sup>

As the federal government retreats, state environmental law and regulation becomes much more important. For instance, New York could be a leader in newly invigorated state-level environmental protection. Just four years ago, New York added an Environmental Rights Amendment to its Bill of Rights.<sup>9</sup> This Amendment, now Article I, Section 19 of the New York Constitution, provides: “Each person shall have a right to clean air and water, and a healthful environment.”<sup>10</sup> Make no mistake, in voting on this amendment, New Yorker voters knew they were choosing between more or fewer instances of cancer, heart disease, stillbirths in their communities, and higher or lower risks of early death for themselves and their children.<sup>11</sup> By voting overwhelmingly—by more than 70 percent—to amend their state constitution to guarantee environmental rights to all,<sup>12</sup> New Yorkers declared that a clean environment is not a luxury good. It is instead a fundamental right that belongs to everyone—regardless of race, income, accent, or zip code.<sup>13</sup> The Environmental Rights Amendment, thus, must be read alongside the New York Constitution’s Equal Protection Amendment, which guarantees that “[n]o person shall be denied the equal protection of the laws of this state . . . .”<sup>14</sup>

Giving substance to these positive, constitutional environmental rights could be an important counterweight to federal abdication. Yet, despite New

8. Lisa Friedman & Brad Plumer, *Trump’s Halt on Climate Spending Freezes Jobs and Stalls Project*, N.Y. TIMES (Feb. 1, 2025, at 22:42 ET), <https://www.nytimes.com/2025/02/01/climate/trump-ira-climate-spending-halt-jobs-construction.html>; Nate Perez & Rachel Waldholz, *Trump Is Withdrawing from the Paris Agreement (Again), Reversing US Climate Policy*, NPR (Jan. 21, 2025, at 05:00 ET), <https://www.npr.org/2025/01/21/nx-s1-5266207/trump-paris-agreement-biden-climate-change>.

9. For more information on constitutional environmental amendments, see generally MAYA K. VAN ROSSUM, *THE GREEN AMENDMENT: THE PEOPLE’S FIGHT FOR A CLEAN, SAFE, AND HEALTHY ENVIRONMENT* (2d ed. 2022).

10. N.Y. CONST. art. I, § 19 (emphasis added).

11. State Senator, Robert Jackson, lead Senate sponsor of the amendment announced triumphantly. This language will finally put in place safeguards that require the government to consider the environment and our relationship to the Earth in decision making. If the government fails in that responsibility, New Yorkers will finally have the right to take legal action for a clean environment because it will be in the State Constitution. Johan Sheridan, *State Senate Passes ‘Environmental Bill of Rights’*, NEWS10 ABC (Jan. 13, 2021, at 11:14 ET), <https://www.news10.com/news/ny-news/state-senate-passes-environmental-bill-of-rights>.

12. The ballot initiative that added environmental rights as Section 19 of Article I of the New York Constitution was supported by more than 70 percent of voters. *New York Proposal 2, Environmental Rights Amendment (2021)*, BALLOTEDIA, [https://ballotpedia.org/New\\_York\\_Proposal\\_2\\_Environmental\\_Rights\\_Amendment\\_\(2021\)](https://ballotpedia.org/New_York_Proposal_2_Environmental_Rights_Amendment_(2021)). Before being added to the ballot, the proposed amendment first had to be voted on by both houses of the state legislature in two separate legislative sessions. *Id.* Only after two successive legislatures voted to approve the amendment (which they did by overwhelming margins) was the proposed amendment presented to the voters for ratification. *Id.*; see also N.Y. CONST. art. XIX, § 1.

13. At the first National People of Color Environmental Leadership Summit in 1991, Dana Alston famously defined the environment as “where we live, work and play.” Dana Alston, *Transforming a Movement, RACE, POVERTY & ENV’T*, Fall 1991/Winter 1992, at 1, 28. This formula focusing environmental law on protecting human spaces, rather than prioritizing preserving wild lands, lies at the heart of the environmental justice movement.

14. N.Y. CONST. art. I, § 11.

York's sweeping constitutional language, environmental rights are surprisingly undertheorized. There is little consensus about their contours and content. There is not even agreement about who holds constitutional environmental rights, who bears the duties these rights create, and by what process those determinations might be made.

Answering these questions is an urgent interpretive task in this moment when federal standards are eroding. This Article suggests that, if properly theorized, state-level environmental rights can begin to fill that federal void. It offers a vision of a different kind of environmental decision-making that could (and should) flow from constitutional environmental rights. Focusing on the right to breathe clean air, it identifies how this right transforms every stage of environmental decision-making: how, where, and when public participation is sought, who has access to relevant information, how impacts and risks are defined, how risk assessments are conducted, what level of protection is requisite, and who has access to a judicial remedy to allege that their rights have been violated. It also provides a yardstick for assessing whether the state is fulfilling these obligations and responds to critical theorists like Jamal Greene and Usha Natarajan, who assert that rights are the wrong way to think about complex social issues, particularly environmental ones.<sup>15</sup>

Using New York as a model, this Article demonstrates how managing environmental decision-making through the lens of environmental rights could deliver better air quality to more people while simultaneously promoting environmental justice. It uses this constitutional "rights turn"<sup>16</sup> to propose what "getting rights right"<sup>17</sup> should look like in this context. This inquiry takes on additional urgency now that the federal government has ended its decades-long commitment to promoting environmental justice because, unlike the federal

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15. JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 251 (2021); *see also* Usha Natarajan, *Who Do We Think We Are: Human Rights in a Time of Ecological Change*, in LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW 200, 204 (Usha Natarajan & Julie Dehm eds., 2022) (making this case specifically with regard to the environment).

16. I borrowed this phrase from my friend and colleague Hari Osofsky. *See* Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Litigation?*, 7 *TRANSNAT'L ENV'T L.* 37, 49 (2018). The phrase refers to the growing trend for plaintiffs to argue environmental and climate cases not through a statutory interpretation lens, but through a human rights or constitutional rights framework. The first and most ambitious of these rights-turn cases was the 2005 Inuit Petition to the Inter-American Commission of Human Rights. Petition to the Inter-Am. Comm'n on H.R. Seeking Relief from Violations Resulting from Glob. Warming Caused by Acts and Omissions of the U.S., Inter-Am. Comm'n H.R. (Dec. 7, 2005), <https://www.inuitcircumpolar.com/wp-content/uploads/finalpetitionicc.pdf>. This petition was the first to frame the impacts of climate change as a deprivation of human rights. For a discussion of this petition, the hearing it led to even after the petition was denied, and the Commission's ultimate embrace of climate change as a human rights issue, *see* Rebecca Bratspies, *The Human Rights Fulcrum: Using Environmental Rights as Leverage for Change* 38 *PACE INT'L L. REV.* 229, 241–44 (2026).

17. I borrowed this phrase from philosopher Matthew Kramer. *See generally* Matthew H. Kramer, *Getting Rights Right*, in *RIGHTS, WRONGS AND RESPONSIBILITIES* 28 (Matthew H. Kramer ed., 2021) (detailing the Interest Theory of rights).

government, states with constitutional environmental rights provisions cannot abandon environmental justice.<sup>18</sup>

Part I begins with a description of breathing—what it is, how it works, and a brief introduction to the existing law regulating air pollution. Part II documents the racial inequality behind who breathes polluted air and explains what breathing polluted air does to human beings.<sup>19</sup> This Part focuses on how inequality and racism perpetuate environmental injustice and grapples with the stark reality that traditional access to justice mechanisms have failed to remedy the profound injustice of unequal pollution exposure.

Part III explains the significance of the constitutional environmental rights turn. After describing the points at which existing laws governing air pollution fail to protect individuals looking to breathe clean air, and highlighting how current politics makes that situation worse, this Part outlines how the process of environmental decision-making changes when pollution standards, permitting, and other decisions must account for the constitutional rights at stake. This Part ends by identifying minimum requirements for a constitutionally adequate environmental decision-making process. Drawing inspiration from the existing law governing property rights, Part IV proposes an analogy for how the substantive aspects of constitutional environmental rights might be interpreted. It explains how environmental rights might advance environmental justice in overburdened communities, specifying some of the legal and regulatory changes needed to promote equal access to clean air as well as detailing where opposition to these changes is likely to emerge.

Part V briefly explains how individual constitutional environmental rights differ from emerging theories about rights of nature and emphasizes how New York's constitutional turn differs from states where these individual rights are linked to a constitutional public trust duty. Finally, this Article concludes with some musings on the chicken and the egg—whether social change must precede environmental rights and environmental justice or, alternatively, whether recognizing environmental rights can spark a wider social justice transformation.

## I. BREATHING: AN INTRODUCTION

We all need to breathe. On average, an adult takes twenty-two thousand breaths each day—roughly twelve to sixteen per minute or more if they are

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18. Peter Mantius, *New York's Green Amendment Guarantees the Right to a 'Healthful Environment.'* *Activists Want the State to Enforce It*, INSIDE CLIMATE NEWS (July 15, 2024) (quoting Green Amendment advocate Maya van Rossum) (“We are here today to tell our New York leaders that our environmental rights are not discretionary. They are mandatory.”).

19. All terrestrial animals breathe air in some fashion. All reptiles, mammals, and birds breathe using lungs, while other terrestrial animals like earthworms and amphibians breathe through their skin. Pollution affects these animals as well. But for the purposes of analysis, this Article focuses on humans who breathe, with the (hopeful) assumption that a co-benefit of measures taken to protect the human right to breathe will be that improved air quality also benefits those other animals.

exercising.<sup>20</sup> Children breathe more frequently than adults. For example, infants take sixty breaths per minute,<sup>21</sup> while the typical pre-teen breathes twenty times a minute.<sup>22</sup> When air is polluted, each breath takes in not only much-needed oxygen but also dangerous and toxic chemicals. This pollution enters the lungs and sometimes the circulatory system, triggering inflammatory and immune responses, as well as oxidative stress and epigenetic changes.<sup>23</sup>

Burning fossil fuels is a major source of air pollution—releasing particulates, nitrous oxides, sulfur oxides, and ozone.<sup>24</sup> There is no known safe level of exposure to these common pollutants.<sup>25</sup> Rather, they pose a threat to human health at every stage of life. Among the negative health impacts, exposure to these pollutants increases the risk of premature birth, triggers asthma attacks, and contributes to cardiovascular disease (heart attacks and stroke), pulmonary disease (COPD),<sup>26</sup> and cancer.<sup>27</sup> There is growing evidence that air pollution also impacts the central nervous system, causing decreased cognitive

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20. *Breathing*, CANADIAN LUNG ASS'N, <https://www.lung.ca/lung-health/lung-info/breathing> (last visited Mar. 14, 2026); *Pediatric Respiratory Rates*, N.Y. DEP'T OF HEALTH, <https://www.health.ny.gov/professionals/ems/pdf/assmttools.pdf> (last visited Mar. 14, 2026); see also Joachim D. Pleil, M. Ariel Geer Wallace, Michael D. Davis & Christopher M. Matty, *The Physics of Human Breathing: Flow, Timing, Volume, and Pressure Parameters for Normal, On-Demand, and Ventilator Respiration*, J. BREATH RSCH., Sep. 2021 at 1, 2 (providing detailed explanation of breathing).

21. N.Y. DEP'T OF HEALTH, *supra* note 20.

22. *Id.*

23. Álvaro del Real, Ana Santurtún & M. Teresa Zarrabeitia, *Epigenetic Related Changes on Air Quality*, ENV'T RSCH., June 2021, at 1, 2.

24. Industrial processes, waste incineration, and agricultural practices are also significant anthropogenic sources of these common air pollutants. Christopher W. Tessum, David A. Paoletta, Sarah E. Chambliss, Joshua D. Hill & Julian D. Marshall, *PM<sub>2.5</sub> Polluters Disproportionately and Systematically Affect People of Color in the United States*, SCI. ADV., Apr. 2021, at 1, <https://www.science.org/doi/10.1126/sciadv.abf4491>. To be sure, not all air pollution is human generated. Wildfires, dust storms, and volcanic eruptions also release large quantities of pollutants. In June 2023, smoke from wildfires burning in Canada caused many United States cities, including New York, Philadelphia, and Washington D.C., to experience dangerously polluted air. Elizabeth Ziyang Lin, *Canadian Wildfire Smoke Associated with Increased Asthma Cases in NYC*, YALE SCH. OF PUB. HEALTH (Oct. 5, 2023), <https://ysph.yale.edu/news-article/canadian-wildfire-smoke-associated-with-increased-asthma-cases-in-nyc>; Emma Newburger, *New York City Tops World's Worst Air Pollution List from Canada Wildfire Smoke*, CNBC (June 7, 2023, at 20:47 ET), <https://www.cnn.com/2023/06/07/canadian-wildfire-smoke-nyc-residents-urged-to-stay-inside.html>. While human exposure to fires is often dependent on human land use practices, and sometimes the fires themselves are attributed to human negligence, malfeasance, or other anthropogenic climate change, there is no question that wildfire itself is a natural phenomenon. Volcanic eruptions, which are driven by geological processes, can emit large quantities of gases and ash. *Health Effects of Volcanic Air Pollution*, CDC (Apr. 22, 2024), <https://www.cdc.gov/volcanoes/risk-factors/index.html>.

25. Guy B. Marks, *Misuse of Pollution Reference Standards: No Safe Level of Air Pollution*, 205 AM. J. RESPIR. CRIT. CARE 984 (2022); see also Franziska Rosser, *Outdoor Air Pollution and Pediatric Respiratory Disease*, 45 CLIN. CHEST MED. 531 (2024) (documenting the knowledge gaps in pollution exposure, and the wide disparities of health impacts on sensitive populations, even at pollution exposure levels below regulatory standards).

26. AM. LUNG ASS'N, STATE OF THE AIR: 2024 REPORT 28–29 (2024), <https://www.lung.org/getmedia/da-bac59e-963b-4e9b-bf0f-73615b07bfd8/State-of-the-Air-2024.pdf>.

27. Dana Loomis, Yann Grosse, Béatrice Lauby-Secretan, Fatiha El Ghissassi, Véronique Bouvard, Lamia Benbrahim-Tallaa, Neela Guha, Robert Baan, Heidi Mattock & Kurt Straif, *The Carcinogenicity of Outdoor Air Pollution*, 14 LANCET ONCOL. 1262, 1262 (2013).

functions, neurodevelopment diseases, and depressive symptoms.<sup>28</sup> Across the globe, exposure to particulate matter alone is responsible for 7 million premature deaths each year.<sup>29</sup> In the United States, exposure to particulate matter kills nearly 48,000 people annually.<sup>30</sup> A growing body of evidence even connects air pollution with the risk of severe injury or death from COVID-19.<sup>31</sup>

While these common pollutants pose a major threat to human health, they are not the only air pollutants of concern. Many industrial and energy-generating activities also emit an array of less common but extremely hazardous air pollutants like mercury, benzene,<sup>32</sup> and dioxin. Currently, 188 pollutants are regulated as hazardous because they “are known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects.”<sup>33</sup> The United States Clean Air Act<sup>34</sup> regulates the common pollutants emitted from fossil fuel combustion as “criteria” air pollutants,<sup>35</sup> and more toxic but more localized industrial emissions as “hazardous” air pollutants.<sup>36</sup>

28. Lucio G. Costa, Toby B. Cole, Khoi Dao, Yu-Chi Chang, Jacki Coburn & Jacqueline M. Garrick, *Effects of Air Pollution on the Nervous System and Its Possible Role in Neurodevelopmental and Neurodegenerative Disorders*, 210 PHARMACOL. THER. (2020); Lucio G. Costa, Toby B. Cole, Jacki Coburn, Yu-Chi Chang, Khoi Dao & Pamela Roque, *Neurotoxicants Are in the Air: Convergence of Human, Animal, and In Vitro Studies on the Effects of Air Pollution on the Brain*, BIOMED RSCH. INT’L, Jan. 2014, at 1, 2.

29. WORLD HEALTH ORG. [WHO], *Air Pollution and Child Health: Prescribing Clean Air Summary*, at 5, WHO/CED/PHE/18.01 (July 10, 2018), <https://iris.who.int/server/api/core/bitstreams/4ce6e0cf-2bec-4892-8117-25c62af6229f/content>. In 2016 alone, more than half a million children died from air pollution related ailments. *Id.*

30. AM. LUNG ASS’N, *supra* note 26, at 28.

31. Paul B. English, Julie Von Behren, John R. Balmes, John Boscardin, Catherine Carpenter, Debbie E. Goldberg, Sophia Horiuchi, Maxwell Richardson, Gina Solomon, Jhaqueline Valle & Peggy Reynolds, *Association Between Long-Term Exposure to Particulate Air Pollution with SARS-CoV-2 Infections and Covid-19 Deaths in California, U.S.A.*, ENV’T ADVANCES, July 26, 2022, at 1, 8 (finding that California residents living with high long-term PM<sub>2.5</sub> exposure had a 20 percent greater risk of COVID infections and a 51 percent higher risk of COVID-19 mortality); X. Wu, R. C. Nethery, M. B. Sabath, D. Braun & F. Dominici, *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, SCI. ADVANCES, Nov. 4, 2020, at 1, 1, <https://www.science.org/doi/epdf/10.1126/sciadv.abd4049>; Jaime Smith Hopkins, *A Likely but Hidden Coronavirus Risk Factor: Pollution*, CTR. FOR PUB. INTEGRITY (Mar. 27, 2020), <https://publicintegrity.org/health/coronavirus-and-inequality/a-likely-but-hidden-coronavirus-risk-factor-pollution>. For a discussion of the racialized nature of this risk, see, for example, Rebecca Bratspies, *This Great Catastrophe: Bungling Pandemics from 1918 to Today*, 30 MICH. ST. INT’L L. REV. 189, 235–45 (2022).

32. Mark A. D’Andrea & G. Kesava Reddy, *Adverse Health Complaints of Adults Exposed to Benzene After a Flaring Disaster at the BP Refinery Facility in Texas City, Texas*, 12 DISASTER MED. & PUB. HEALTH PREPAREDNESS 232, 232 (2017).

33. *What Are Hazardous Air Pollutants?*, EPA (Nov. 5, 2025), <https://www.epa.gov/haps/what-are-hazardous-air-pollutants>.

34. We call it the Clean Air Act (codified at 42 U.S.C. §§ 7401–7671q), but in many ways its earlier incarnation, the Air Pollution Control Act, was more accurately named. Pub. L. No. 159, 69 Stat. 322 (1955). This law created no federal standards but did authorize the Surgeon General to investigate air pollution, publish studies and reports, and make recommendations for “devising and developing methods for eliminating or reducing air pollution.” *Id.* § 2(a).

35. 42 U.S.C. §§ 7408–7410.

36. *Id.* § 7412. EPA regulates 188 hazardous air pollutants through maximum available control technologies imposed on 174 source categories that are sources of these hazardous air pollutants. To the extent that residual risk exceeds the threshold of one in a million excess cancers, Section 7412 also requires EPA to impose additional requirements to reduce this residual risk.

For criteria pollutants, the Clean Air Act requires EPA to set air quality standards at a level “*requisite to protect the public health*” with “*an adequate margin of safety*.”<sup>37</sup> For hazardous pollutants, the EPA sets “maximum achievable control technology” (MACT) standards, which are benchmarked to the highest degree of emissions reductions possible in a given industry.<sup>38</sup> The EPA is then supposed to supplement those technology-based standards to limit the lifetime excess cancer risk to less than one in a million for the most highly exposed individuals living near a source.<sup>39</sup> The Clean Air Act then tasks states with regulating industry within their borders to achieve that level of air quality.<sup>40</sup>

These standards significantly improved air quality in many parts of the country.<sup>41</sup> Yet, hundreds of counties remain out of compliance with the federal standards.<sup>42</sup> Decades after Congress declared that “the growth in the amount and complexity of air pollution . . . has resulted in mounting dangers to the public health and welfare,”<sup>43</sup> roughly 39 percent of the United States population still lives in counties that fail to satisfy one or more National Ambient Air Quality Standards (NAAQS).<sup>44</sup> In 2023, more than 20 million people lived in Particulate Matter (PM<sub>2.5</sub>) nonattainment zones and 115 million in Ozone nonattainment zones.<sup>45</sup> Residents of multiple counties have cancer risks more than one in ten thousand due to hazardous air pollution.<sup>46</sup> The Air Quality Index (AQI)

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37. *Id.* § 7409(b)(1) (emphasis added).

38. *Summary of the Clean Air Act*, EPA (July 25, 2025), <https://www.epa.gov/laws-regulations/summary-clean-air-act>.

39. 42 U.S.C. § 7412(f)(2). This duty has largely been honored in the breach. It was only in 2024 that EPA promulgated regulations aimed at bringing this undue risk into line with the statutory standard. New Source Performance Standards, 89 Fed. Reg. 42932 (May 16, 2024) (to be codified at 40 C.F.R. pts. 60, 63).

40. 42 U.S.C. § 7401(a)(3) (finding that air pollution prevention is the “primary responsibility of [s]tates and local governments”); *id.* § 7410(a)(1) (requiring state implementation plans to achieve the national ambient air quality standards set under Section 7409).

41. *Progress Cleaning the Air and Improving People’s Health*, EPA (Feb. 19, 2026), <https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health>.

42. *Current Nonattainment Counties for All Criteria Pollutants*, EPA: GREENBOOK (Feb. 28, 2026), <https://www3.epa.gov/airquality/greenbook/ancl.html>.

43. 42 U.S.C. § 7401(a)(2).

44. AM. LUNG ASS’N, *supra* note 26, at 12.

45. See *Summary Nonattainment Area Population Exposure Report*, EPA (Feb. 28, 2026), <https://www3.epa.gov/airquality/greenbook/popexp.html>. Overall, 140 million Americans live in counties where air pollution exceeds one or more NAAQS. *Our Nation’s Air: Trends Through 2023*, EPA, <https://gispub.epa.gov/air/trendsreport2024/#home> (last visited Mar. 15, 2026) [hereinafter EPA, *Our Nation’s Air*].

46. *AirToxScreen Mapping Tool*, EPA (May 22, 2025), <https://www.epa.gov/AirToxScreen/airtoxscreen-mapping-tool>. Nearly two decades ago, the D.C. Circuit interpreted the one in 1,000,000 residual risk language in Section 112 of the Clean Air Act to be a trigger for residual risk regulation, rather than the standard that residual risk regulation must achieve. *Nat. Res. Def. Council v. EPA*, 529 F.3d 1077, 1080, 1083 (D.C. Cir. 2008) (upholding a 1 in 10,000 residual risk as “presumptively acceptable”). In the most overburdened environmental justice communities, the excess lifetime risk of cancer far exceeds one in 10,000. Lylla Younes, Ava Kaufman, Al Shaw & Lisa Song, *Poison in the Air*, PROPUBLICA (Nov. 2, 2021) (mapping risks well in excess of EPA’s 1 in 10,000 standard), <https://www.propublica.org/article/toxmap-poison-in-the-air>. Even if that relaxed standard satisfied the Section 112(f) requirement that EPA set a standard with “an ample margin of safety” to protect human health, it is not being met. See *Nat. Res. Def. Council*, 529 F.3d at 1083. This is an issue where a constitutional right to breathe clean air may rewrite what is considered “presumptively acceptable.” *Id.* at 1080.

designated 822 unhealthy air days—when the air was “unhealthy for sensitive groups” to breathe.<sup>47</sup> The term “sensitive groups” is a bit of a misnomer because it seems to imply a narrow subset of the population. However, the Air Quality Index defines “sensitive groups” to include people with high blood pressure, asthma, diabetes, or heart disease as well as all children, all older adults, and people who are active outdoors.<sup>48</sup> According to the American Heart Association, in 2020, roughly 10 percent of adult Americans had cardiovascular disease, 16 percent had diabetes, more than 40 percent were obese, and more than 51 percent had hypertension.<sup>49</sup> This is a much wider swath of the population than the relatively muted AQI language might suggest. For all the conditions that make one part of the AQI’s “sensitive populations,” Black, Latinx, and Indigenous populations experience markedly higher disease burden.<sup>50</sup>

## II. WHO BREATHE POLLUTED AIR

The proposition that we should all be able to breathe air that will not make us sick should be neither radical nor novel. Yet, decades of increasingly intricate environmental law, domestic and international, have failed to deliver breathable air to large swaths of humanity.<sup>51</sup> These failures of law hold true in New York as well as the rest of the United States and the rest of the world. Moreover, those suffering from the breathable air deficit are overwhelmingly likely to be racialized as nonwhite.<sup>52</sup> Indeed, “[i]t is well-established—almost to the point

47. EPA, *Our Nation’s Air*, *supra* note 45.

48. EPA, AIR QUALITY INDEX: A GUIDE TO AIR QUALITY AND YOUR HEALTH 3 (2014), [https://www.airnow.gov/sites/default/files/2018-04/aqi\\_brochure\\_02\\_14\\_0.pdf](https://www.airnow.gov/sites/default/files/2018-04/aqi_brochure_02_14_0.pdf). Moreover, these 822 unhealthy air days include days when the air quality is rated unhealthy (everyone may experience health effects); very unhealthy (everyone may experience serious health effects); and hazardous (emergency conditions). *See id.*; EPA, *Our Nation’s Air*, *supra* note 45.

49. Karen E. Joynt Maddox et al., *Forecasting the Burden of Cardiovascular Disease and Stroke in the United States Through 2050—Prevalence of Risk Factors and Disease: A Presidential Advisory from the American Heart Association*, 150 CIRCULATION e65, e69 (2024) (using NHANES data). The Trump Administration is dismantling the long-running NHANES study, despite (because?) of its critical role in collecting and disseminating public health data. Elizabeth Cooney, *CDC Team Running Top Survey on Health and Nutrition Is Laid Off*, STAT (Oct. 14, 2025), <https://www.statnews.com/2025/10/14/cdc-behind-top-nutrition-survey-nhanes-laid-off>.

50. Maddox et al., *supra* note 49, at e66, e69–e73.

51. Although not directly relevant to Article I, Section 19, it is worth pointing out that in 1894, New York added its first environmental preservation provision to the state constitution. Article XIV, Section 1, known as “the forever wild” provision, provides in relevant part:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

N.Y. CONST. art. XIV, § 1. The most recent case interpreting this provision is *Protect the Adirondacks! Inc. v. N.Y. State Dep’t of Env’t Conservation*, 170 N.E.3d 424, 426–29 (N.Y. 2021).

52. *See* Laura Pulido, *Geographies of Race and Ethnicity II: Environmental Racism, Racial Capitalism and State-Sanctioned Violence*, 41 PROGRESS HUM. GEOGRAPHY 524, 529 (2017) (asserting that environmental racism is a function of racial capitalism); *see also* Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial*

of judicial notice—that environmental harms are visited disproportionately upon the dispossessed—[ ] on minority populations and poor communities.”<sup>53</sup>

In the United States, air pollution emissions have decreased 78 percent since 1970, even as the population has grown, vehicle miles traveled have doubled, and GDP has tripled.<sup>54</sup> This is good news! However, all Americans have not benefitted equally from this trend. People of color, especially Black Americans, are more than twice as likely to live in communities with unhealthy air than their white counterparts.<sup>55</sup> According to the American Lung Association, people of color make up nearly two-thirds of the population living in the nation’s most polluted counties.<sup>56</sup>

In part, this is because the industries and infrastructure responsible for emitting these pollutants are concentrated in communities of color.<sup>57</sup> In one particularly extreme example, 99 percent of the toxic air emissions in Eugene, Oregon are located in a single zip code—the same zip code with the highest percentage of non-white residents.<sup>58</sup> In Louisiana, communities of color face an order of magnitude more particulate and volatile organic compounds (VOCs) pollution than do majority white communities.<sup>59</sup> In New York City, virtually all the peaker electricity plants are in “disadvantaged communities.”<sup>60</sup> While this

*Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 148 (2022) (providing a detailed explanation of racialization and its consequences in a capitalist society).

53. *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 982 (4th Cir. 2020) (Wilkinson, J., concurring).

54. EPA, *Our Nation’s Air*, *supra* note 45. Lead has been eliminated from gasoline (except for the aviation gasoline used by small aircraft). Sulfur dioxide emissions are now 90 percent below 1990 levels, and nitrogen oxide emissions are about 70 percent below 1990 levels. *Id.*

55. AM. LUNG ASS’N, *supra* note 26, at 12–13, 32; see Ihab Mikati, Adam F. Benson, Thomas J. Luben, Jason D. Sacks & Jennifer Richmond-Bryant, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 481–82 (2018) (finding that racial disparities in exposure to particulate matters are more pronounced than disparities on the basis of economic status and poverty).

56. AM. LUNG ASS’N, *supra* note 26, at 12 (reporting that in the most polluted counties, people of color are 63 percent of the residents, despite making up 41.6 percent of the overall United States population).

57. See generally Jill Johnston & Lara Cushing, *Chemical Exposures, Health, and Environmental Justice in Communities Living on the Fenceline of Industry*, 7 CURRENT ENV’T HEALTH REPS. 48 (2020) (surveying health effects from disparate pollution exposure in environmental justice communities).

58. See ALISON GUZMAN & LISA ARKIN, ENVIRONMENTAL JUSTICE IN WEST EUGENE: FAMILIES, HEALTH, AND AIR POLLUTION 2011–2012, at 17–18 (2013). I am indebted to my friend and colleague Professor Sarah J. Adams-Schoen for this example. Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 BROOK. L. REV. 1225, 1226 (2023).

59. Kimberly A. Terrell & Gianna St. Julien, *Discriminatory Outcomes of Industrial Air Permitting in Louisiana, United States*, ENV’T CHALLENGES, Jan. 2023, at 4 (documenting stark racial disparities in pollution exposure, particularly from the chemical industry).

60. N.Y.C. MAYOR’S OFF. OF CLIMATE & ENV’T JUST., EJNYC: A STUDY OF ENVIRONMENTAL JUSTICE ISSUES IN NEW YORK CITY 7 (2024); see also Rebecca Bratspies, *Shutting Down Poletti: Human Rights Lessons from Environmental Victories*, 36 WIS. INT’L L.J. 247, 248–49 (2018) (documenting peaker plant locations). The 2019 Climate Leadership and Community Protection Act mandated that New York identify disadvantaged communities to ensure that frontline and historically underserved and overburdened communities benefit from the transition to green energy. To accomplish this, New York convened a Climate Justice Working Group tasked with identifying the criteria by which disadvantaged communities should be designated. For the criteria, along with a map of the communities designated as disadvantaged, see *Disadvantaged Communities Criteria*, N.Y.

degree of concentration may be an outlier, the overall pattern of concentrating polluting infrastructure in communities of color holds true across the country. Across the United States, data shows that white people generate the vast majority of air pollution.<sup>61</sup> Yet, their communities are exposed to the lowest levels of this pollution.<sup>62</sup> Instead, Black and brown Americans who generate far less pollution than their white counterparts live in communities overwhelmingly exposed to more of it.<sup>63</sup>

Overburdened communities, “plagued by stink and noise,”<sup>64</sup> make possible correspondingly underburdened communities free from pollution. Phrased differently, the enjoyment of clean air in a society that emits 64 million tons of air pollution per year<sup>65</sup> rests on consolidating the burdens of pollution *away* from communities deemed worthy of protection and *toward* other, less favored

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STATE: CLIMATE ACT, <https://climate.ny.gov/resources/disadvantaged-communities-criteria> (last visited Mar. 28, 2026).

61. Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PNAS 6001, 6003 (2019) (creating a pollution inequity index to document the degree to which groups disproportionately generate or bear the burdens of pollution).

62. *Id.*

63. *Id.*; see also AM. LUNG ASS’N, *supra* note 26, at 12 (reporting that people of color were 2.3 times as likely as white people to live in a county with excess particulate or ozone pollution). This pollution-exposure inequity finds global echoes in the climate justice movement, where states and individuals who have contributed the least carbon emissions to the atmosphere are suffering first and most from the myriad climate impacts driven by anthropogenic climate change, including higher temperatures, rising sea levels, and disrupted weather patterns. See EPA, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS 6 (2021) (reporting that Black Americans were 40 percent more likely than non-Black Americans to live in areas with the highest projected increases in mortality rates due to climate-driven changes in extreme temperatures).

64. Kirk Johnson, *Trash Plan Alters Mix of Winners and Losers*, N.Y. TIMES (Aug. 2, 2002), <https://www.nytimes.com/2002/08/02/nyregion/trash-plan-alters-mix-of-winners-and-losers.html> (commenting on the racialized disparity in where waste handling facilities are located). For a breakdown of how racism and classism reinforce the practice of diverting resources away from underserved communities, see Brian Purnell, “Taxation Without Sanitation Is Tyranny”: *Civil Rights Struggles over Garbage Collection in Brooklyn, New York, During the Fall of 1962*, in CIVIL RIGHTS IN NEW YORK CITY: FROM WORLD WAR II TO THE GUILLANI ERA 52, 64 (Clarence Taylor ed., 2011) (memorializing Brooklyn CORE’s Operation “Clean Sweep” protest of inadequate sanitation services).

65. *Air Quality—National Summary*, EPA (May 6, 2025), <https://www.epa.gov/air-trends/air-quality-national-summary> (including all the criteria pollutants but excluding pollution from wildfires). Alongside these dangerous pollutants, the United States emits roughly 6.4 million metric tons of carbon dioxide equivalents. EPA, EPA 430-R-24-004, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS 1990–2022, at ES-4 (2024). The good news is that measures to reduce carbon emissions also significantly reduce emission of other air pollutants (called co-pollutants). See, e.g., Joseph Aldy, Matthew Kotchen, Mary Evans, Meredith Fowlie, Arik Levinson & Karen Palmer, *Cobenefits and Regulatory Impact Analysis: Theory and Evidence from Federal Air Quality Regulations*, 2 ENV’T & ENERGY POL’Y & ECON. 117, 120 (2021); Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 420 (2019) (describing how large the health co-benefits are from reducing emissions). However, it can be very difficult to monetize these co-benefits for purposes of cost-benefit analysis. See, e.g., National Emission Standards for Hazardous Air Pollutants, 87 Fed. Reg. 7624, 7644–47 (proposed Feb. 9, 2022) (to be codified at 40 C.F.R. pt. 63) (describing in detail the difficulties of monetizing health and ecological benefits). The Trump Administration recently announced that it would no longer monetize these benefits for purposes of setting environmental standards. Maxine Joselow, *E.P.A to Stop Considering Lives Saved When Setting Rules on Air Pollution*, N.Y. TIMES (Jan. 12, 2026), <https://www.nytimes.com/2026/01/12/climate/trump-epa-air-pollution.html>.

communities.<sup>66</sup> This divide between underburdened and overburdened communities is highly racialized. At every income level, communities of color are exposed to higher pollution levels than their white counterparts.<sup>67</sup>

Existing environmental standards are currently under siege, but not because they fail to deliver environmental justice and clean breathable air to more Americans. Instead, the Trump Administration is attacking clean air regulations because, as then-head of the Department of Governmental Efficiency (DOGE), Elon Musk said, “[r]egulations [ ] should be default gone, not default there. Default gone.”<sup>68</sup> Trump’s EPA has already ordered employees *not* to conduct environmental justice assessments<sup>69</sup> and disbanded the Clean Air Science Advisory Boards, which were created by statute to provide independent advice to EPA as it sets national ambient air quality standards.<sup>70</sup> *Project 2025* makes it clear that the administration’s plans include far more drastic cuts to environmental protections.<sup>71</sup> This will be very bad for both overburdened and currently underburdened communities. However, the negative health

66. In the run-up to the 1992 Rio Conference, President George H.W. Bush famously declared, “The American way of life is not up for negotiations. Period.” Marc Hudson, *George Bush Sr Could Have Got in on the Ground Floor of Climate Action—History Would Have Thanked Him*, CONVERSATION (Dec. 5, 2018, at 23:56 ET), <https://theconversation.com/george-bush-sr-could-have-got-in-on-the-ground-floor-of-climate-action-history-would-have-thanked-him-108050>. Professor Claire Colebrook describes the fragility of a society premised on drawing its resources from and transferring its wastes to other places and peoples. Claire Colebrook, *End-Times for Humanity*, AEON (June 1, 2017), <https://aeon.co/essays/the-human-world-is-not-more-fragile-now-it-always-has-been>.

67. John K. Kodros, Michelle L. Bell, Francesca Dominici, Christian L’Orange, Krystal J. Godri Pollitt, Scott Weichenthal, Xiao Wu & John Volckens, *Unequal Airborne Exposure to Toxic Metals Associated with Race, Ethnicity, and Segregation in the USA*, NATURE COMM’NS, Nov. 2022, at 1, 2–3; Michelle L. Bell & Keita Ebusu, *Environmental Inequality in Exposures to Airborne Particulate Matter Components in the United States*, 120 ENV’T HEALTH PERSPS. 1699, 1699 (2012); Marie Lynn Miranda, Sharon E. Edwards, Martha H. Keating & Christopher J. Paul, *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 INT’L J. ENV’T RSCH. & PUB. HEALTH 1755, 1769 (2011).

68. Matt Shuham, *Elon Musk Suggests Getting Rid of All Regulations in Midnight Call*, HUFFPOST (Feb. 3, 2025, at 16:25 ET), [https://www.huffpost.com/entry/elon-musk-regulations-default-gone\\_n\\_67a12742e4b09a02376043c7](https://www.huffpost.com/entry/elon-musk-regulations-default-gone_n_67a12742e4b09a02376043c7). See generally James Goodwin, *The Administrative State in a Project 2025 World*, REGUL. REV. (Dec. 2, 2024), <https://www.theregreview.org/2024/12/02/goodwin-the-administrative-state-in-a-project-2025-world> (describing the broad deregulatory agenda).

69. Stephen Lee, *EPA Union Sees Risk to Environmental Justice Jobs as Morale Dips*, BLOOMBERG L. (Jan. 31, 2025, at 12:31 PT), <https://news.bloomberglaw.com/environment-and-energy/epa-union-sees-risk-to-environmental-justice-jobs-as-morale-dips>.

70. Zack Budryk, *EPA Dismisses Clean Air, Science Advisory Boards*, THE HILL (Jan. 30, 2025, at 13:17 ET), <https://thehill.com/policy/energy-environment/5116562-trump-administration-dismisses-epa-committees>.

71. Mandy M. Gunasekara, *Environmental Protection Agency*, in HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (2023) [hereinafter *Project 2025*]. *Project 2025* is the Heritage Foundation-produced presidential transition plan. It is a plan to:

[Consolidate power in the president by] eliminating the political insulation that independent agencies have long enjoyed and ending the Justice Department’s tradition of independence from the president . . . [eroding] constitutional checks and balances and federalism principles, including gutting congressional oversight . . . [and privatizing] essential government services, such [as] veterans’ healthcare, primary education of children, and weather forecasts and alerts.

Goodwin, *supra* note 68; James Goodwin, *Inside Project 2025*, BOS. REV., Summer 2024, at 144, 148 (“[Project 2025] can be read as an instruction manual for undermining the safeguards meant to prevent governing officials from engaging in [ ] abuses of power.”).

consequences will be felt first and foremost in already overburdened communities, most of which are communities of color.

#### A. THE HEALTH CONSEQUENCES OF BREATHING POLLUTED AIR

Breathing polluted air is bad for humans and other living things. Exposure to particulate matter pollution is associated with heart disease, even at relatively low concentrations.<sup>72</sup> There is a clear relationship between exposure to air pollution and all forms of cardiopulmonary disease.<sup>73</sup> Many studies have documented the nexus between exposure to air pollution and asthma,<sup>74</sup> stroke,<sup>75</sup> and chronic obstructive pulmonary disease.<sup>76</sup> In 2013, the International Agency for Research on Cancer unanimously classified air pollution as a human carcinogen.<sup>77</sup> Hazardous pollutants like dioxins and benzofurans cause an array of ailments, including impairment of the immune system, the developing nervous system, the endocrine system, reproductive functions, and higher rates of cancer.<sup>78</sup> Overall, there is growing evidence of the relationship between pollution exposure and excess mortality.<sup>79</sup> These health outcomes are vastly worse in overburdened communities than in the underburdened communities that they make possible.<sup>80</sup> For example, in its 1989 National Emission Standards for Hazardous Air Pollutants, EPA announced that the maximum feasible protection would expose the general public to a one in a million lifetime cancer risk from benzene, while allowing a one in ten thousand risk for those living

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72. Robert D. Brook et al., *Particulate Matter Air Pollution and Cardiovascular Disease: An Update to the Scientific Statement from the American Heart Association*, 121 *CIRCULATION* 2331, 2332 (2010).

73. Fangfang Li, Zhen An, Haibin Li, Xia Gao, Gui Wang & Weidong Wu, *Involvement of Oxidative Stress and the Epidermal Growth Factor Receptor in Diesel Exhaust Particle-Induced Expression of Inflammatory Mediators in Human Mononuclear Cells*, *MEDIATORS INFLAMMATION*, Nov. 2019, at 1, 1.

74. George D. Thurston & Mary B. Rice, *Air Pollution Exposure and Asthma Incidence in Children: Demonstrating the Value of Air Quality Standards*, 321 *JAMA* 1875, 1875 (2019).

75. Anoop S. V. Shah, Kuan Ken Lee, David A. McAllister, Amanda Hunter, Harish Nair, William Whiteley, Jeremy P. Langrish, David E. Newby & Nicholas L. Mills, *Short Term Exposure to Air Pollution and Stroke: Systematic Review and Meta-Analysis*, *BMJ*, Mar. 2015, at 1, 1.

76. Sha Liu, Yumin Zhou, Suixin Liu, Xinyu Chen, Weifeng Zou, Dongxing Zhao, Xiaochen Li, Jinding Pu, Lingmei Huang, Jinlong Chen, Bing Li, Shiliang Liu & Pixian Ran, *Association Between Exposure to Ambient Particulate Matter and Chronic Obstructive Pulmonary Disease: Results from a Cross-Sectional Study in China*, 72 *THORAX* 788, 788 (2017).

77. Loomis et al., *supra* note 27 (basing this finding on a summary and analysis of a diverse array of studies and a growing body of evidence).

78. Michael DeVito et al., *The 2022 World Health Organization Reevaluation of Human and Mammalian Toxic Equivalency Factors for Polychlorinated Dioxins, Dibenzofurans and Biphenyls*, *REGUL. TOXICOL. & PHARMACOL.*, Jan. 2024, at 1, 2.

79. Rongqi Abbie Liu, Yaguang Wei, Xinye Qiu, Anna Kosheleva & Joel D. Schwartz, *Short Term Exposure to Air Pollution and Mortality in the U.S.: A Double Negative Control Analysis*, *ENV'T HEALTH*, Sep. 2022, at 1, 1.

80. Rebecca Bratspies, *"Underburdened" Communities*, 110 *CALIF. L. REV.* 1933, 1936 (2022) (noting that the privilege embedded in this kind of environmental injustice is so invisible that underburdened is not even a word). This unequal distribution holds true at the local, national, and global levels. The World Health Organization (WHO) describes the increased health risks from exposure to air pollutants in developing countries—a combination of increased exposure and less social capital for maintaining health in the face of exposure. WHO, *supra* note 29, at v.

near a benzene emitting facility.<sup>81</sup> Considering the diverging realities between those who live near or far from these facilities, this statement amounts to an acknowledgement that there are two very different standards of protection that apply to Black versus white communities.

Children's health offers perhaps the most poignant window into the impacts of this pollution, and a compelling motivation for addressing pollution inequalities. Children are uniquely vulnerable to health harm from air pollution<sup>82</sup> because their bodies are still developing.<sup>83</sup> Unfortunately, far too many children breathe unclean air.<sup>84</sup> Childhood asthma is closely tied to pollution exposure.<sup>85</sup> Across the United States, more than 4.5 million children (6.5 percent) have asthma.<sup>86</sup> One out of six of these children will visit an emergency room because of asthma, and one in twenty will be hospitalized.<sup>87</sup> Each year, asthma is the primary cause of more than 10 million days missed from school.<sup>88</sup> This environmental disease burden is not shared equally.

Black children suffer from disproportionately high rates of asthma, a statistic tied to high pollution exposure.<sup>89</sup> In New York City, for example, a Black child is 42 percent more likely to have asthma than a white child,<sup>90</sup> six times more likely to be hospitalized for asthma,<sup>91</sup> and roughly four times more likely to have asthma-related school absences.<sup>92</sup> These racially disparate,

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81. National Emissions Standards for Hazardous Air Pollution: Benzene Emissions, 54 Fed. Reg. 38083, 38091, 38099–100 (proposed Sep. 14, 1989) (to be codified at 40 C.F.R. pt. 61) (acknowledging that ninety thousand people will be exposed to levels of risk that exceed one in a million excess lifetime cancers from each facility but not actually assessing which people would be burdened).

82. WHO, *supra* note 29, at 4; Rosser, *supra* note 25, at 531.

83. Diganta Saikia & Bandana Mahanta, *Cardiovascular and Respiratory Physiology in Children*, 63 INDIAN J. ANAESTH. 690, 690 (2019). These same physiological characteristics make children uniquely vulnerable to the impacts of climate change. EPA, EPA 430-R-23-001, CLIMATE CHANGE AND CHILDREN'S HEALTH AND WELL-BEING IN THE UNITED STATES 36 (2023).

84. WHO, *supra* note 29, at 2.

85. Matthew C. Altman et al., *Associations Between Outdoor Air Pollutants and Non-Viral Asthma Exacerbations and Airway Inflammatory Responses in Children and Adolescents Living in Urban Areas in the USA: A Retrospective Secondary Analysis*, 7 LANCET PLANET. HEALTH e33, e42–e43 (2023) (finding that exposure to increased PM<sub>2.5</sub> and ozone pollution were significantly correlated with asthma).

86. *Most Recent National Asthma Data*, CDC (May 10, 2023), [https://www.cdc.gov/asthma/most\\_recent\\_national\\_asthma\\_data.htm](https://www.cdc.gov/asthma/most_recent_national_asthma_data.htm).

87. *Controlling Childhood Asthma and Reducing Emergencies*, CDC (Apr. 15, 2024), <https://www.cdc.gov/national-asthma-control-program/php/about/ccare.html>.

88. Joy Hsu, Xiaoting Qin, Suzanne F. Beavers & Maria C. Mirabelli, *Asthma-Related School Absenteeism, Morbidity, and Modifiable Factors*, 51 AM. J. PREV. MED. 23, 23 (2016).

89. Philip J. Landrigan, Virginia A. Rauh & Maida P. Galvez, *Environmental Justice and the Health of Children*, 77 MT. SINAI J. MED. 178, 182 (2010).

90. Andrea R. Titus, Kelly Terlizzi, Sarah Conderino, Lan N. Doan, Byoungjun Kim & Lorna E. Thorpe, *Patterns and Drivers of Disparities in Pediatric Asthma Outcomes Among Medicaid-Enrolled Children Living in Subsidized Housing in NYC*, PREV. MED., Aug. 2024, at 1, 1.

91. *New York City Health Indicators by Race and Ethnicity 2021–2023*, N.Y. STATE DEP'T OF HEALTH (Feb. 2026), [https://www.health.ny.gov/community/health\\_equity/reports/county/newyorkcity.htm](https://www.health.ny.gov/community/health_equity/reports/county/newyorkcity.htm).

92. ASTHMA & ALLERGY FOUND. OF AM. & NAT'L PHARM. COUNCIL, ETHNIC DISPARITIES IN THE BURDEN AND TREATMENT OF ASTHMA 13 (2005).

asthma-related statistics hold true across New York<sup>93</sup> and nationally, with Black children suffering asthma at more than twice the rate of white children.<sup>94</sup> Black Americans of all ages have more than double the risk of dying from asthma-related complications.<sup>95</sup> There are many reasons for these disparities, but as explained below, America's complicated racial geography is a major factor in determining which communities face disproportionately high pollution exposure and which enjoy disproportionately low exposures.

Even with clear evidence that the populations endangered by air pollution are racialized minorities, there are few legal channels available to challenge this situation. Supreme Court precedent forecloses a private challenge to this disparate impact under either the Fourteenth Amendment<sup>96</sup> or Title VI of the Civil Rights Act.<sup>97</sup> The Trump Administration has signaled its hostility to environmental justice—closing settled investigations,<sup>98</sup> rolling back key regulations promulgated to protect the public,<sup>99</sup> and blocking funding for environmental justice projects.<sup>100</sup> Part of the legislative purpose behind New York's Environmental Rights Amendment was to ensure that individuals facing

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93. See ASTHMA & ALLERGY FOUND. AM., 2023 ASTHMA CAPITALS: THE MOST CHALLENGING PLACES TO LIVE WITH ASTHMA 7–9 (2023) (listing six New York cities in the top 100 for asthma prevalence); *Minorities in Buffalo Face High Asthma Rates, Air Pollution*, BUFF. TORO. PUB. MEDIA (Jan. 16, 2018, at 05:00 ET), <https://www.btpm.org/environment/2018-01-16/minorities-in-buffalo-face-high-asthma-rates-air-pollution>.

94. CDC, *supra* note 86.

95. *Id.* Unequal access to health care and medicines for disease management further compounds this dire statistic. David R. Williams & Toni D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 HEALTH CARE FIN. REV. 75, 75 (2000).

96. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (finding that actions that had a racially disproportionate impact did not violate the constitution without evidence of invidious intent).

97. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (ruling that Section 601 of Title VI of the Civil Rights Act prohibits only those racial classifications that would violate the constitution's Equal Protection Clause); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (finding no private right of action to enforce the provision in Section 602 of Title VI of the Civil Rights Act barring use of federal funds for projects with a discriminatory impact); see also *S. Camden Citizens in Action v. N.J. Dep't of Env't Prot.*, 274 F.3d 771, 790 (3d Cir. 2001) (ruling that Section 602 does not create rights enforceable under 42 U.S.C. § 1983).

98. Among the most egregious Trump actions was torpedoing the settlement in Lowndes County, Alabama, that would finally have brought sanitation services to Black residents who had been underserved and neglected by their elected officials for decades. Press Release, Off. of Pub. Affs., Department of Justice Terminates Environmental Justice Settlement Agreement, Advancing President Trump's Mandate to End Illegal DEI and Environmental Justice Policies (Apr. 11, 2025) (calling this hard-fought settlement "illegal DEI"). For a personal account of this appalling situation, see CATHERINE COLEMAN FLOWERS, *WASTE: ONE WOMAN'S FIGHT AGAINST AMERICA'S DIRTY SECRET* (2020).

99. *Federal Environmental Justice Tracker*, HARV. L. SCH.: ENV'T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/tracker-type/environmental-justice-tracker> (last visited Mar. 28, 2026) (documenting the full scope and scale of these actions); see also Oliver Milman & Dharna Noor, *Trump's EPA Aims to Cut Pollution Rules Projected to Save Nearly 200,000 Lives: 'People Will Be Hurt.'* GUARDIAN (Mar. 19, 2025, at 06:00 ET), <https://www.theguardian.com/us-news/2025/mar/19/trump-epa-pollution-regulation-cuts> (describing impacts).

100. Dylan Baddour, *New Map Shows \$29 Billion in Climate and Environment Grants Canceled or Frozen by Trump*, INSIDE CLIMATE NEWS (Sep. 17, 2025), <https://insideclimatenews.org/news/17092025/trump-stops-29-billion-in-grants-for-environment-climate-renewable-energy>.

racialized environmental injustice had access to a remedy.<sup>101</sup> As President Trump denounces environmental justice on the national stage, this role for New York's constitution becomes even more important.

#### B. ENVIRONMENTAL RACISM IS A REAL PROBLEM

Despite Trump's rhetoric dismissing environmental justice as "woke" ideology, environmental racism is a real problem. Nearly fifty years ago, the groundbreaking *Toxic Wastes and Race in the United States* study demonstrated that race is the most significant predictor of living near a toxic facility.<sup>102</sup> Little has changed in the interim. More than 1 million Black Americans live within a half-mile of a source of fossil fuel air pollution.<sup>103</sup> A 2019 study found that eighty percent of waste incinerators are sited in low-income, nonwhite communities.<sup>104</sup> In New York City and across the country, the most polluting electric-generating facilities are concentrated in low income communities, especially communities of color.<sup>105</sup> The problem is systemic—toxic and "locally undesirable" land uses are routinely sited in communities of color and poor communities,<sup>106</sup> sacrificing their health and environment in the name of benefits for the wider community.<sup>107</sup>

These stark environmental inequalities did not happen by chance; nor can they be explained away as merely a manifestation of market dynamics or individual preferences.<sup>108</sup> Instead, they are a manifestation of the patterns of environmental racism that exist across the United States.<sup>109</sup> For decades, policies implemented at every level of government have systematically underburdened white communities, particularly wealthy white communities, by transferring

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101. Lanessa Owens-Chaplin, *New York's Green Amendment: Curbing Environmental Racism* (July 22, 2022), <https://www.nyclu.org/commentary/new-yorks-green-amendment-curbing-environmental-racism>.

102. UNITED CHURCH OF CHRIST: COMM'N FOR RACIAL JUST., *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* 23 (1987).

103. *Id.* LESLEY FLEISCHMAN & MARCUS FRANKLIN, *FUMES ACROSS THE FENCELINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES* 5 (2017).

104. ANA ISABEL BAPTISTA & ADRIENNE PEROVICH, *U.S. MUNICIPAL SOLID WASTE INCINERATORS: AN INDUSTRY IN DECLINE* 4 (2019).

105. Seth Mullendore, *Mapping the Inequities of Fossil Peaker Power Plants*, CLEAN ENERGY GRP. (Apr. 21, 2022), <https://www.cleangroup.org/mapping-the-inequities-of-fossil-peaker-power-plants>.

106. Ryan Juskus, *Sacrifice Zones: A Genealogy and Analysis of an Environmental Justice Concept*, 15 ENV'T HUMANS. 1, 10–11 (2023).

107. Jasmine Anderson, *An End to Sacrifice Zoning in Chicago*, 28 LOY. PUB. INT. L. REP. 10, 11 (2022) (describing how disadvantaged communities are disproportionately contaminated in the name of capital accumulation).

108. See Jade A. Craig, "Pigs in the Parlor": *The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, 40 MISS. COLL. L. REV. 5, 36 (2022) (presenting theoretical and empirical evidence debunking claims that racialized geographies are driven primarily by individual preferences); see also Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, ENV'T RSCH. LETTERS, Nov. 2015, at 1, 16 (demonstrating that racial discrimination best explains siting inequities).

109. STEVE LERNER, *SACRIFICE ZONES: THE FRONT LINES OF TOXIC CHEMICAL EXPOSURE IN THE UNITED STATES* 2–3 (2010).

environmental burdens to communities of color.<sup>110</sup> Historically redlined neighborhoods are the clearest example of this trend.<sup>111</sup> The primary reason offered for redlining—which resulted in a governmental decision not to insure mortgages in a neighborhood on favorable terms—was the percentage of Black residents, and to a lesser extent Jews and immigrants, “infiltrating” the neighborhood.<sup>112</sup> These redlined communities suffered *de jure* governmental racialized discrimination until the practice of redlining was outlawed with the 1968 Fair Housing Act.<sup>113</sup>

Today, these same communities, which remain predominantly Black and minority, suffer from degraded housing stock and a lack of investment.<sup>114</sup> These formerly redlined neighborhoods also have markedly higher air pollution levels,<sup>115</sup> more polluting infrastructure<sup>116</sup> and less green space.<sup>117</sup> Another legacy of this housing discrimination is that Black Americans are 75 percent more likely

110. See, e.g., *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 71–72 (4th Cir. 2020) (finding that the permit for a pipeline routed largely through Black and minority communities had been improperly granted). For a detailed explanation of the phenomenon of how overburdening communities of color with environmental bads makes underburdened communities possible, see Bratspies, *supra* note 80, at 1935; AMANPOUR & CO., “*Pollution is Segregated*” Says the Father of Environmental Justice, at 11:00–11:28 (YouTube, Mar. 3, 2020), <https://www.youtube.com/watch?v=gU-D3YkOe-w>. For a broad overview of the research supporting these claims, see generally Robert Bullard, *What We Know After Three Decades of Research*, in ROBERT D. BULLARD, GLENN S. JOHNSON & ANGEL O. TORRES, ENVIRONMENTAL HEALTH AND RACIAL EQUITY IN THE UNITED STATES (2011) (explaining how and why Black communities and communities of color are disproportionately exposed to environmental hazards like lead poisoning, as well as pollution from refineries, chemical plants, power plants, incinerators, landfills, hazardous waste facilities, and vehicular traffic).

111. Decades before redlining, in 1910, many cities, including Baltimore and Louisville, introduced a zoning plan that prohibited Black homebuyers from purchasing homes in blocks where most property owners were white. George Fatheree, *A Brief History of Racial Zoning and How to Reverse the Lasting Effects of Housing Discrimination*, URB. LAND (Feb. 20, 2024), <https://urbanland.uli.org/a-brief-history-of-racial-zoning-neighborhood-associations-and-municipal-zoning>. The Supreme Court found these racial zoning practices unconstitutional in *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

112. For the maps themselves, see *Mapping Inequality: Redlining in New Deal America*, AM. PANORAMA, <https://dsl.richmond.edu/panorama/redlining> (last visited Mar. 28, 2026). For a detailed analysis of how these policies were used to segregate housing across the United States, see generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

113. ROTHSTEIN, *supra* note 112; see also Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PA. J.L. & SOC. CHANGE 281, 283 (2019) (emphasizing that racially explicit federal, state, and local government policies drove segregation, and set the stage for the concentration of polluting sites in communities of color across the country).

114. Daniel Aaronson, Daniel Hartley & Bhashkar Mazumder, *The Effects of the 1930s HOLC “Redlining” Maps*, 13 AM. ECON. J.: ECON. POL’Y 355, 357 (2021); see also Jonathan Rosenbloom, *Reducing Racial Bias Embedded in Land Use Codes*, 26 CITYLAW 50, 50 (2020) (“[I]t has long been known that zoning continues to create or increase racial and economic segregation.”).

115. Haley M. Lane, Rachel Morello-Frosch, Julian D. Marshall & Joshua S. Apte, *Historical Redlining Is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 ENV’T SCI. & TECH. LETTERS 345, 348 (2022).

116. See David J. X. Gonzalez, Anthony Nardone, Andrew V. Nguyen, Rachel Morello-Frosch & Joan A. Casey, *Historic Redlining and the Siting of Oil and Gas Wells in the United States*, 33 J. EXPO. SCI. ENVIRON. EPIDEMIOL. 76, 76, 81 (2023).

117. Dexter H. Locke, Billy Hall, J. Morgan Grove, Steward T. A. Pickett, Laura A. Ogden, Carissa Aoki, Christopher G. Boone & Jarlath P. M. O’Neil-Dunne, *Residential Housing Segregation and Urban Tree Canopy in 37 US Cities*, NPJ: URB. SUSTAINABILITY, Mar. 2021, at 1, 3.

than white Americans to live in fenceline communities—meaning communities in direct proximity to polluting infrastructure.<sup>118</sup> These communities often find themselves isolated in their battles against pollution and environmental degradation, watching their environment deteriorate even as overall environmental quality improves regionally or nationally. Zoning, which purports to protect public health, safety, and welfare, frequently facilitates this process—steering ever-more polluting activity out of certain neighborhoods and into others.<sup>119</sup>

The name for this reality is “sacrifice zones”<sup>120</sup>—a strategy of concentrating negative impacts of industrial and economic activities into small areas and onto specific *sacrificed* populations, thereby sparing the wider public from those impacts.<sup>121</sup> By concentrating the harms of polluting activities into a small handful of sacrifice zones, the burdens and benefits of resource extraction, chemical processing, and energy generation are felt in different places. The sacrifice zone bears the pollution, noise, and other burdens, while the wider community experiences the benefits in the form of energy, useful or desirable products, and economic prosperity.<sup>122</sup> These sacrifice zones are frequently naturalized as inevitable, and the systems of power that create and maintain them are invisibilized.

No community volunteers to be a sacrifice zone!<sup>123</sup> Instead, communities with little wealth or political power find themselves in the crosshairs, targeted both by private industry and by government officials eager to bring in economic

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118. FLEISCHMAN & FRANKLIN, *supra* note 103, at 6.

119. Adams-Schoen, *supra* note 58, at 1269–70 (detailing discriminatory zoning practices and explaining the significant body of research demonstrating that locally undesirable land uses—such as noxious industrial polluters and solid or hazardous waste landfills—are disproportionately concentrated in Black and brown neighborhoods).

120. The National Academy of Sciences first used the term “national sacrifice areas” in the 1970s to refer to lands so destroyed by strip mining that they could not be decontaminated and reclaimed for other uses. NAT’L ACAD. OF SCIS., REHABILITATION POTENTIAL OF WESTERN COAL LANDS: A REPORT TO THE ENERGY POLICY PROJECT OF THE FORD FOUNDATION 85 (1974). In this report, the National Academy proposed that “abandon the spoils” be the goal for these zones, while acknowledging there is no possibility of complete restoration anywhere. *Id.* at 86. This phrasing sparked an uproar of passionate opposition by people who objected to being “served up as ‘national sacrifices.’” Helena Huntington Smith, *The Wringing of the West*, WASH. POST, Feb. 16, 1975, at B4; Richard D. Lamm, *Energy Development and the Worried West*, N.Y. TIMES (Sep. 14, 1975), <https://www.nytimes.com/1975/09/14/archives/energy-development-and-the-worried-west.html?smid=url-share>. For a modern definition, see *Sacrifice Zones 101*, CLIMATE REALITY PROJECT, <https://www.climaterealityproject.org/sacrifice-zones> (last visited Mar. 28, 2026) (“Sacrifice zones are . . . populated areas with high levels of pollution and environmental hazards, thanks to . . . polluting industrial facilities.”).

121. Juskus, *supra* note 106, at 16; Anderson, *supra* note 107.

122. American Indian Movement leader Russell Means applied this concept to Indian Country, claiming that increased pollution that devastated entire Native cultures “is considered by industry, and by the white society that created this industry, to be an ‘acceptable’ price to pay . . .” RUSSELL MEANS & MARVIN J. WOLF, *WHERE WHITE MEN FEAR TO TREAD: THE AUTOBIOGRAPHY OF RUSSELL MEANS* 549 (1995) (declaring a continued indigenous resistance to having reservation lands be turned into a national sacrifice area).

123. *But see* Jonathan Rosenbloom, *Sacrifice Zones*, 24 NEV. L. REV. 891, 932–42 (2023) (proposing creating a new kind of sacrifice zone as a proactive form of climate adaptation and a solution to historic overburdening).

activity while simultaneously protecting influential constituencies from its negative impacts. Overburdened neighborhoods frequently become home to polluting infrastructure not because the choice is environmentally sound, but because these neighborhoods do not have the power to resist.<sup>124</sup> Professor Rob Nixon coined the term “slow violence” to capture the “calamitous repercussions” of this sacrifice zone strategy, which imposes “incremental and accretive” harms from pollution and environmental degradation on the same people over and over again.<sup>125</sup>

These failures of distributive justice are compounded by failures of procedural justice in the decision-making process itself. For instance, hearings for zoning changes and permit approvals are often held during the workday, when few working people can attend.<sup>126</sup> The hearing location is frequently not accessible or welcoming to the wider community. Those presiding over the hearings are generally only prepared to accept testimony in English. Similarly, the documents supporting new facilities are voluminous (often hundreds of pages long), are highly technical, and are produced only in English. By contrast, slick public relations campaigns that downplay the risks are frequently available in multiple languages.<sup>127</sup>

Overburdening racialized communities became an unspoken, unacknowledged strategy that allows some (whiter and wealthier) communities to enjoy clean air even as vast quantities of air pollution continues to be emitted.<sup>128</sup>

But these communities do not view themselves as disposable.<sup>129</sup> They reject the characterization of their communities as sacrifice zones. Indeed, the phrase “no more sacrifice zones” became a rallying cry for advocates seeking to

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124. Mohai & Saha, *supra* note 108, at 3, 5; Benjamin F. Chavis, Jr., *Foreword* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3, 3 (Robert D. Bullard ed., 1993).

125. ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 14–16 (2011).

126. *See generally* JULIE SZE, NOXIOUS NEW YORK: THE RACIAL POLITICS OF URBAN HEALTH AND ENVIRONMENTAL JUSTICE (2006) (describing these barriers); Bratspies, *supra* note 80, at 1968–69 (describing barriers to participation).

127. For example, the two-page promotional materials for the controversial Williams Constitution pipeline are available in Spanish. *Proyecto Commonwealth Energy Connector*, WILLIAMS COS., <https://www.williams.com/proyecto-commonwealth-energy-connector> (last visited Mar. 29, 2026). The permit materials are available only in English and are hundreds of pages long. *Northeast Supply Enhancement*, WILLIAMS COS., <https://www.williams.com/expansion-project/northeast-supply-enhancement> (last visited Mar. 29, 2026).

128. *See, e.g.*, ANDREA FLYNN, SUSAN HOLMBERG, DORIAN WARREN & FELICIA WONG, REWRITE THE RACIAL RULES: BUILDING AN INCLUSIVE AMERICAN ECONOMY 58 (2016) (“In [segregated Black neighborhoods], environmental exposure to toxins and air pollutants are five to 20 times higher than in white neighborhoods with comparable incomes thanks to the ‘deliberate placement’ of toxic waste sites and polluting factories.”); *see* CARL A. ZIMRING, CLEAN AND WHITE: A HISTORY OF ENVIRONMENTAL RACISM IN THE UNITED STATES 99–100 (2015) (analyzing the ways that notions of pollution and dirtiness undergird structural racism). The complaint in *Inclusive Louisiana v. St. James Parish* maps this steering and its resulting health and air quality impacts on nearby residents in graphic detail. Amended Complaint for Declaratory and Injunctive Relief at 76–78, 113–15, *Inclusive La. v. St. James Parish*, No. 23-CV-00987 (E.D. La. July 17, 2023).

129. Melissa Iachan, *Out with the Trash, In with the New: Challenges and Solutions in New York City’s Solid Waste Management System*, 30 ENV’T L. N.Y. 23, 25–26 (2019).

undo this disproportionate allocation of societal benefits and burdens.<sup>130</sup> The environmental justice movement emerged from the recognition that poverty, racism, and pollution are inextricably linked.<sup>131</sup> Trump's executive orders unintentionally highlight this nexus by lumping together diversity, equity, and inclusion initiatives with environmental justice, worker safety, and civil service job protections.

### C. ENTER ENVIRONMENTAL JUSTICE

Why the strong animus toward environmental justice exhibited by *Project 2025* and Trump's executive orders? It is because environmental justice challenges this racialized, unequal status quo that designates communities of color as sacrifice zones<sup>132</sup> by demanding a new, more equitable approach. In 1991, the First People of Color Environmental Leadership Summit defined environmental justice as requiring the following: that decisions impacting the environment be based on "mutual respect and justice for all people, free from any form of discrimination or bias";<sup>133</sup> that decision makers recognize the universal right "to participate as equal partners at every level of decision-making";<sup>134</sup> and that decision makers prioritize "a sustainable planet for humans and other living things."<sup>135</sup>

These ideas have been part of federal environmental policy for more than thirty years. In 1994, President Bill Clinton signed Executive Order 12898,

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130. Alfredo Romo, *No More Sacrifice Zones: We All Deserve Clean Air and Water*, CHI. ENV'T JUST. NETWORK (Jan. 30, 2023), <https://www.chicagoejn.org/articles/no-more-sacrifice-zones-we-all-deserve-clean-air-and-water>; *No More Sacrifice Zones!*, CTR. FOR HEALTH, ENV'T & JUST., <https://chej.org/issues/sacrifice-zones>; see also Rebecca Bratspies, Dawn Roberts-Semple, Luz Guel, Andrea Scarborough, Maida Galvez, Oster Bryan, Walter Dogan, Danielle Dubno-Hammer, Laretta Humphrey & Michael Scotland, *No Sacrifice Zones in Research Either!*, MEDIUM (June 5, 2022), <https://medium.com/spark/no-sacrifice-zones-in-research-either-e41321520f3b>. See generally LERNER, *supra* note 109 (telling stories about environmental advocacy in overburdened communities).

131. For example, most of the waste associated with cleaning up the BP oil spill was disposed of in communities of color. Krissah Thompson, *Waste from BP Oil Spill Cleanup Has Gulf Residents Near Landfills Concerned [USA]*, BUS. & HUM. RTS. CTR. (Aug. 16, 2010), [www.business-humanrights.org/en/waste-from-bp-oil-spill-cleanup-has-gulf-residents-near-landfills-concerned-usa](http://www.business-humanrights.org/en/waste-from-bp-oil-spill-cleanup-has-gulf-residents-near-landfills-concerned-usa); Daisy Hernandez, *Here's Where BP Is Dumping Its Oil Spill Waste*, COLORLINES (Aug. 4, 2010), <https://colorlines.com/articles/heres-where-bp-dumping-its-oil-spill-waste>. See generally Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, *supra* note 124, at 15, 17, 19 (discussing how "environmental racism is reinforced by government, legal, economic, political, and military institutions" and the increasing challenges to the "intended or unintended racist assumptions underlying environmental and industrial policies").

132. See Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Aug. 14, 2025), <https://www.nrdc.org/stories/environmental-justice-movement>. Vernice Miller-Travis was one of the principal authors of the Toxic Waste and Race Report and helped draft the 17 Principles of Environmental Justice adopted at the 1991 First People of Color Environmental Leadership Summit. Stacy M. Brown, *Vernice Miller-Travis, a Crusader Who Continues the Struggle to Weed Out Environmental Racism*, N.Y. AMSTERDAM NEWS (Oct. 6, 2022), <https://amsterdamnews.com/news/2022/10/06/vernice-miller-travis-a-crusader-who-continues-the-struggle-to-weed-out-environmental-racism>.

133. *Principles of Environmental Justice*, RACE, POVERTY & ENV'T, Fall 1991/Winter 1992, at 32.

134. *Id.*

135. *Id.*

which directed federal agencies to incorporate environmental justice standards into their missions.<sup>136</sup> EPA defined environmental justice as “[t]he fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, income, and educational levels with respect to the development, implementation, and enforcement of protective environmental laws, regulations, and policies.”<sup>137</sup> Fair treatment was further defined to require that “no group of people, including a racial, ethnic or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences from industrial, municipal and commercial operations or the execution of federal, state, local and tribal programs and policies.”<sup>138</sup> Clinton’s executive order remained in place through multiple Democratic and Republican presidencies alike.

In 2021, President Biden went further—making environmental justice a central principle of federal environmental policy. Within hours of his inauguration, President Biden signed an executive order directing that “the Federal Government . . . must advance environmental justice.”<sup>139</sup> On Earth Day 2023, President Biden issued an executive order refining and expanding the definition of environmental justice.<sup>140</sup> This executive order specifically directed federal agencies to advance environmental justice by integrating a wide range of related considerations, including cumulative impacts, community underinvestment, and lack of access to good schools and jobs.<sup>141</sup> This executive order also explicitly recognized that environmental injustice in the United States is rooted in overt racial discrimination.<sup>142</sup>

Trump seeks to wipe this history away, withdrawing all environmental justice related executive orders, including Clinton’s long-standing Executive Order 12898, on his first day in office. Under Trump’s direction, federal websites have been edited to remove references to environmental justice, climate change, and racial justice, as well as any gender-affirming language or even language that mentions gender.<sup>143</sup> For at least the foreseeable future, the federal government is likely to be an obstacle rather than an ally in the fight for environmental justice. This reality makes state-level initiatives much more important.

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136. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

137. *EJ 2020 Glossary*, EPA (Aug. 2, 2019), [https://19january2021snapshot.epa.gov/environmentaljustice/ej-2020-glossary\\_.html](https://19january2021snapshot.epa.gov/environmentaljustice/ej-2020-glossary_.html).

138. *Id.*

139. Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021).

140. Exec. Order No. 14,096, 88 Fed. Reg. 25251 (Apr. 21, 2023).

141. *Id.* at 25251–25252.

142. *Id.* at 25253 (including “the legacy of racism or other structural or systemic barriers” in the definition of environmental justice).

143. Kiley Price, *As Trump Administration Purges Climate Data and Web Pages, Research Groups Scramble to Save Information*, INSIDE CLIMATE NEWS (Feb. 4, 2025), <https://insideclimatenews.org/news/04022025/todays-climate-trump-climate-data-purge-archive>; April Rubin, *HIV, Transgender Care, Climate Change and Other Federal Websites Go Dark*, AXIOS (Jan. 31, 2025), <https://www.axios.com/2025/01/31/health-cdc-websites-data-removed-trump>.

### III. THE CONSTITUTIONAL RIGHT TO BREATHE CLEAN AIR

The good news is that despite Trump's moves, the right to breathe clean air remains very popular. In surveys conducted in 2020, an overwhelming majority of Americans (nearly 80 percent) either agreed or strongly agreed with the proposition that "every child—no matter whether they are white, Black, or brown—deserves to breathe clean air."<sup>144</sup> This result held true even when the question acknowledged the possibility that achieving cleaner air would mean "that companies that produce pollutants will have higher costs to meet the new standards."<sup>145</sup> Opinions from this 2020 survey mirror United States public opinion from 1972, 1976, and 1990 when Congress adopted and then amended the Clean Air Act. Even though "impacts on business" have become the third rail of environmental politics, fifty years of anti-environmental agitation has not eroded this basic fact: Americans overwhelmingly think that everyone should be able to breathe clean air. Indeed, post-2024 election surveys show that support for environmental protection and environmental justice has remained steady or grown, with 86 percent of all voters opposing Trump's attempt to weaken the EPA, and 80 percent of voters supporting increasing federal funding for communities disproportionately burdened by air and water pollution.<sup>146</sup>

This same consensus about environmental justice motivated New Yorkers to constitutionalize the right to breathe.<sup>147</sup> In fact, discussions in the legislature and across New York unambiguously tied the environmental rights enshrined in this amendment to remedying environmental injustice.<sup>148</sup> In doing so, New Yorkers embraced the growing global consensus that the right to breathe clean air is a fundamental human right.<sup>149</sup> New York joined Pennsylvania,<sup>150</sup>

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144. Rebecca Bratspies, *Memo: Struggling to Breathe—Asthma, Pollution, and the Fight for Environmental Justice*, DATA FOR PROGRESS 5 (Dec. 3, 2020), <https://www.filesforprogress.org/memos/struggling-to-breathe.pdf>.

145. *Id.*

146. *2024 Voter Priorities*, ENV'T PROT. NETWORK (Nov. 21, 2024), <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2024/11/2024-Post-Election-Poll-EPN-Questions-Deck.pdf>.

147. By this overwhelming support for environmental rights, New York has answered the question posed by environmental philosopher Lorraine Code—"Who do we think we are?" Lorraine Code, *Ecological Subjectivities, Responsibilities, and Agency*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 46 (Anna Grear & Louis J. Kotzé eds., 2015).

148. *See, e.g.*, BALLOTPEDIA, *supra* note 12 (citing Senator Robert Jackson's statements on this point).

149. *Access to a Healthy Environment, Declared a Human Right by UN Rights Council*, UN NEWS (Oct. 8, 2021), <https://news.un.org/en/story/2021/10/1102582>.

150. Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Montana,<sup>151</sup> and Hawai‘i,<sup>152</sup> in explicitly guaranteeing environmental rights as constitutional rights<sup>153</sup>—sort of.

While New York embraced constitutional environmental rights, it did so in its own unique fashion. The human rights framing adopted by the United Nations emphasized the connection between environmental rights and state duties to effectuate those rights.<sup>154</sup> Pennsylvania and Montana paired their individual constitutional environmental right with a concomitant state duty to preserve and maintain the environment.<sup>155</sup> Hawai‘i imposed state environmental duties for the benefit of current and future generations.<sup>156</sup> By contrast, the New York constitution contains no analogous provision. The New York Bill of Rights guarantees every person the right to breathe clean air, but there is no matching express state constitutional duty to deliver clean air or to protect the environment more generally. New York thus stands alone in making a naked constitutional promise of individual environmental rights.

Assessing whether this right to breathe has been upheld or breached poses different kinds of questions than those used to assess whether more familiar negative rights have been violated. For example, First Amendment free speech rights are rights to be free from governmental interference. The iconic phrase “*Congress shall make no law . . .*” shapes and limits the inquiry.<sup>157</sup> By contrast, the right to breathe clean air is a positive right—the right to have something. As

151. Article IX, Section 1 of the Montana Constitution provides, “The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations,” and imposes a duty on the legislature to enforce and administer this duty as well as provide access to effective remedies. In 2023, youth plaintiffs in Montana successfully asserting that the state’s prohibition on considering climate in energy policy decisions violated their constitutional right to a healthy environment. *Held v. State*, 560 P.3d 1235, 1243 (Mont. 2024). For a comparison of New York’s constitutional provision with Montana and Pennsylvania, see Jaelyn Spencer & Rebecca Bratspies, *Avoiding Mistakes in Implementing New York’s Green Amendment*, 43 N.Y. ENV’T LAW. 35–39 (2023).

152. Article XI, Section 1 of the Hawai‘i Constitution provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

In March 2023, the Hawai‘i Supreme Court ruled that this provision of the Hawai‘i Constitution included the right to “a life-sustaining climate system.” *In re Haw. Elec. Light Co.*, 526 P.3d 329, 336 (Haw. 2023).

153. The national constitutions of more than 100 countries recognize environmental rights in some form. JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* 2, 4 (2015); DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 47 (2012). Multiple states are currently considering similar constitutional amendments. Evan George, *States May Be Warming to Green Amendments*, LEGAL PLANET (Mar. 12, 2024), <https://legal-planet.org/2024/03/12/states-may-be-warming-to-green-amendments>; Quinn Yeagain, *Decarbonizing Constitutions*, YALE L. & POL’Y REV., 2023, at 1, 34. For information on Green Amendments and the campaign to add these amendments to state constitutions, see *Legal & Advocacy Successes*, GREEN AMENDS. FOR THE GENERATIONS, <https://forthegenerations.org/resources/legal-resources> (last visited Mar. 29, 2026).

154. G.A. Res. 76/300, at 3 (July 28, 2022).

155. PA. CONST. art. I, § 27; MONT. CONST. art. IX, § 1.

156. HAW. CONST. art. XI, § 1.

157. U.S. CONST. amend. I (emphasis added).

a result, assessing whether this right has been violated necessitates asking a different set of questions than those used to determine the level of necessity that could justify a governmental infringement. This makes it difficult to extrapolate directly from the federal jurisprudence about negative rights.

Moreover, positive rights can conflict with each other and often involve balancing—between claimants of different rights, or sometimes different claimants asserting the same right. As a result, it is frequently difficult to know when environmental rights have been achieved or violated. Many environmental standards involve judgment calls about what level of protection is “adequate,” what technical measures are “feasible” and even what level of pollution is consistent with “clean air.” These decisions are not binary.

In part because of this decision-making complexity, constitutional environmental rights are relatively uncharted territory in the United States. But now that they are part of the New York Constitution, state and local officials have a duty to exercise their existing authority consistent with environmental rights. State actors must perform their statutory duties in a fashion that fulfills the State’s affirmative constitutional obligations.<sup>158</sup> These environmental rights transform what it means to “take care that the laws are faithfully executed” in New York.<sup>159</sup> So, we need a way to assess whether these constitutional environmental rights are being violated or protected. This question has both substantive and procedural components.

First and foremost, this constitutional provision articulates substantive individual rights. An array of laws gives New York both the authority and the duty to reduce carbon emissions, reduce pollution, and focus both those efforts on the communities most affected by current and historical overburdens. The environmental rights amendment provides a yardstick by which to assess whether the state is fulfilling these obligations.

Second, in terms of process, getting the right to breathe clean air “right” means transforming every stage of environmental decision-making—how, where, and when public participation is sought, who has access to relevant information, how impacts and risks are defined, how risk assessments are conducted, and who has access to a judicial remedy to allege that their rights have been violated.<sup>160</sup> The right to clean air can also be a tool for increasing transparency, educating the public, and addressing the health impacts from pollution. The following Subparts propose an array of possible approaches for interpreting the right to breathe before offering some cautions.

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158. *In re* Haw. Elec. Light Co., 526 P.3d 329, 336 (Haw. 2023).

159. N.Y. CONST. art. IV, § 3.

160. See, e.g., Rebecca Bratspies, *This Changes Everything: New York’s Environmental Amendment*, NATURE OF CITIES (Feb. 25, 2022), <https://www.thenatureofcities.com/2022/02/25/this-changes-everything-new-yorks-environmental-amendment>; Michael B. Gerrard & Edward McTiernan, *New York’s Green Amendment: The First Decisions*, N.Y. L.J. (Mar. 8, 2023). For a less optimistic perspective, see Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123, 174–76 (2022) (critiquing constitutional environmental rights).

#### A. HOW CONSTITUTIONAL RIGHTS COULD TRANSFORM CONVENTIONAL ENVIRONMENTAL LAW

The New York constitution guarantees the right to breathe clean air to everyone, not just to those in the right zip code, with the right skin color, the right accent, the right education, or the right bank balance. It is a constitutional mandate for environmental justice with the goal of ensuring everyone has “the same degree of protection from environmental and health hazards and has equal access to the decision-making process . . . .”<sup>161</sup> This positive right can be a tool for challenging systemic practices that have historically driven the unequal distribution of environmental burdens and benefits.

Not surprisingly, living near pollution sources increases one’s exposure to pollution.<sup>162</sup> New York’s constitutional environmental rights offer overburdened communities new advocacy pathways to challenge the local zoning and land use policies that have steered pollution into their neighborhoods.<sup>163</sup> Invoking the constitutional right to breathe can be a way to assert the right to fair treatment, meaningful involvement, and equal protection<sup>164</sup> vis-à-vis environmental decisions. This right can also be used to disrupt path dependencies that disproportionately steer pollution burdens into already overburdened communities. In particular, this right can be used to advocate for zoning changes designed to prevent further compounding of environmental burdens on these communities.<sup>165</sup>

Complying with this constitutional mandate requires an approach rooted in rigorously regulating air contaminants in all communities. It invites a rebalancing of what constitutes “appropriate weight” to protection of the environment in decisions made under New York’s State Environmental Quality Review Act (SEQRA). This is particularly important when decisions would add pollution to an already overburdened community.<sup>166</sup> Specifically, SEQRA requires that “[s]ocial, economic, and environmental factors shall be considered together in reaching decisions on proposed activities,”<sup>167</sup> and that agencies must

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161. *Learn About Environmental Justice*, EPA (Sep. 24, 2020), [https://19january2021snapshot.epa.gov/environmentaljustice/learn-about-environmental-justice\\_.html](https://19january2021snapshot.epa.gov/environmentaljustice/learn-about-environmental-justice_.html).

162. Rachel Morello-Frosch, Miriam Zuk, Michael Jerrett, Bhavna Shamasunder & Amy D. Kyle, *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 HEALTH AFFS. 879, 881 (2011) (“Residents living near [polluting] facilities can be exposed to more pollutants than people who live in more affluent neighborhoods located farther from these sources of pollution.”).

163. See ANA ISABEL BAPTISTA, LOCAL POLICIES FOR ENVIRONMENTAL JUSTICE: A NATIONAL SCAN 19 (2019) (suggesting that incorporating cumulative or disparate burden analysis into environmental review can begin to address the legacy of pollution burdens borne by environmental justice communities).

164. N.Y. CONST. art. I, § 11.

165. Rosenbloom, *supra* note 123, at 930 (demonstrating how incorporating environmental justice principles into zoning can reduce pollution in overburdened communities).

166. N.Y. ENV’T CONSERVATION LAW § 8-0103(7) (McKinney 1975) (“It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.”).

167. *Id.*

issue a statement certifying that a project’s adverse environmental effects have been mitigated “to the maximum extent practicable . . . .”<sup>168</sup>

In adopting a constitutional right to breathe, New Yorkers told the state that protecting the right to breathe is now the preferred means of responsibly managing and controlling pollution. Indeed, the amendment is an unambiguous direction that state decision-making must strike a new balance—one that does not compromise the constitutional right to breathe clean air. In the face of a constitutional amendment codifying individual environmental rights, it is untenable for the state to continue implementing the various legislative acts authorizing air pollution exactly as it has done for the past half century. The job of the government is to faithfully implement the law. When the law changes as profoundly as New York’s law did when its constitution was amended, state actors must reexamine what constitutes faithful execution of that law. As the trial judge in *Fresh Air for the Eastside, Inc. v. New York* pointed out, “[c]omplying with the constitution is not optional for a state agency . . . .”<sup>169</sup> Agencies must now reinterpret their authority accordingly.

#### B. SUBSTANCE: CLEANING THE AIR BY RATCHETING UP CLEAN AIR STANDARDS

The right to breathe clean air is a substantive constitutional right. One of the clearest ways this constitutional right can protect those currently breathing polluted air is by forcing a more holistic assessment of air quality. Federal air policies regulate facility emissions one stack at a time, and one chemical at a time. But people do not breathe the air in these neat segments. In overburdened communities, breathing the air means being exposed to the cumulative and aggregate impacts from multiple pollutants at the same time. When multiple polluting facilities are clustered into these communities, the cumulative and aggregate air quality impacts can be devastating.<sup>170</sup> This seems like exactly the kind of situation that Title VI of the Civil Rights Act’s prohibition on racial discrimination was designed to address.<sup>171</sup> Since its passage in 1964, regulations promulgated under this Act purported to reach actions that have racially

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168. *Id.* § 8-0109(8) (“When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.”).

169. No. E2022000699, slip op. at 16 (N.Y. Sup. Ct. Dec. 20, 2022), *aff’d as modified by* *Fresh Air for the Eastside, Inc. v. State*, 217 N.Y.S. 3d 381 (N.Y. App. Div. 2024).

170. The legislative findings behind the New Jersey Environmental Justice laws lay this out in detail. N.J. STAT. ANN. § 13:1D-158 (West 2020). The New York Cumulative Impacts Law, as proposed, similarly reflects this reality. S. 8830, 2022 Gen. Assemb., Reg. Sess. (N.Y. 2022).

171. 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”). For an interesting history of this language, see REBECCA BRATSPIES, NAMING GOTHAM: THE VILLAINS, ROGUES & HEROES BEHIND NEW YORK’S PLACE NAMES 47 (2023) (describing N.Y. Rep. Adam Clayton Powell Jr.’s role in the amendment’s enactment).

disparate impacts as well as barring intentional acts of overt racial discrimination.<sup>172</sup> Yet, in its first, and for many years only, administrative Title VI complaint, EPA interpreted the scope of this disparate impact language extremely narrowly: Requiring specific factual evidence that a particular facility's incremental emissions are directly causing an unduly disparate impact.<sup>173</sup>

The Biden Administration made some tentative progress interpreting Title VI to reach cumulative impacts.<sup>174</sup> However, in *Louisiana v. EPA*, a federal district judge ruled that disparate impact analyses violated the Louisiana constitution and enjoined EPA from applying cumulative impacts or disparate impact analysis in Louisiana.<sup>175</sup> After this ruling, the Biden Administration abandoned settlement negotiations in multiple Title VI complaints<sup>176</sup> and Trump has withdrawn or cancelled every remaining Title VI initiative or settlement. This whipsaw left affected individuals and communities reeling. Constitutional rights may offer a way out of this political tug of war. Because constitutional rights are the constitutive parameters defining the contour of the consent of the governed, they are not subject to the same degree of executive discretion inherent in legislative delegations of administrative authority to the executive branch. Instead, constitutional rights give the executive branch the definition of what it means to ensure that the law be faithfully executed.

For example, the constitutional right to breathe clean air increases the level of protection that must be considered "requisite" to protect the public's health and welfare. It also forces a reexamination of whether the act of releasing toxic substances, itself, constitutes an adverse impact on an overburdened community.<sup>177</sup> For many key environmental decisions, including air quality standards, regulatory choices are influenced by assumptions about which kinds of risks are acceptable and for whom. These typically unstated and unexamined assumptions too often ensure that new decisions replicate existing power and

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172. 40 C.F.R. §§ 7.35(b)–(c) (1984).

173. Letter from Ann E. Goode, Dir., EPA Off. of C.R., to Father Phil Schmitter, Co-Dir., St. Francis Prayer Ctr., Sister Joanne Chiaverini, Co-Dir., St. Francis Prayer Ctr. & Russell Harding, Dir., Mich. Dep't of Env't Quality (Oct. 30, 1998) (finding that when overall air quality continues to meet NAAQS after a facility begins emitting pollutants, there can be no adverse impacts to support a disparate impact claim); *In re Select Steel Corp. of Am.*, No. PSD 98-21, 9–10 (EAB 1998) (denying review).

174. See generally CLIFFORD VILLA, NADIA B. AHMAD, REBECCA BRATSPIES, PATRICE SIMMS, CARLTON WATERHOUSE, CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA, CATHERINE O'NEILL & ROGER LIN, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (4th ed. 2025) (providing an overview of Biden-era initiatives).

175. 712 F. Supp. 3d 820, 863, 866 (W.D. La. 2024).

176. Deborah A. Sivas, *The Future of Environmental Justice Claims Under Title VI: Can the "Sleeping Giant" Finally Be Awakened?*, 21 STAN. J. C.R. & C.L. 105, 124–26 (2025) (describing what happened).

177. Talia Buford & Kristen Lombardi, *Steel Mill That Never Was 'Casts a Shadow' on EPA Office of Civil Rights*, CTR. FOR PUB. INTEGRITY (Jan. 5, 2016) (citing Marianne Engleman Lado for the proposition that emissions of toxic substances like mercury should constitute disproportionate harm under civil rights law, regardless of the levels of pollution that environmental law allows), <https://publicintegrity.org/environment/pollution/environmental-justice-denied/steel-mill-that-never-was-casts-a-shadow-on-epa-office-of-civil-rights>.

economic dynamics. The resulting environmental standards often systematically fail to protect poor and minority .

Misinformation about costs buttresses these systemic failures of risk assessment. Industry lawyers and experts routinely overestimate costs of regulatory compliance.<sup>178</sup> Moreover, because most air quality benefits accrue in the form of non-market goods, it is very difficult to calculate benefits in monetary terms. What value should we assign to bald eagles not going extinct, or to a parent not having to watch their child struggle for breath? Justifying stringent standards can be extremely difficult when health and welfare benefits are non-monetary and accrue over time, whereas short-term industry costs can be plausibly calculated to the penny.

In theory, the National Ambient Air Quality Standards are set wholly based on public health concerns informed by the best available science.<sup>179</sup> However, courts increasingly ask questions about cost, and the Supreme Court has required EPA to consider cost in deciding whether it was “appropriate and necessary” to regulate hazardous air pollutants from power plants.<sup>180</sup> These pressures take a toll on agency morale and shape how the agency views its mandate. For example, EPA has been reluctant to set ambitious air quality standards for ozone, even when the scientific evidence overwhelmingly supports such action.<sup>181</sup> Lax ozone standards leave millions breathing polluted air that harms their health, with the harms impacting overburdened environmental justice communities hardest.<sup>182</sup> Worse, the Trump Administration has already signaled that it will withdraw or weaken federal environmental standards across the board.

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178. David Roberts, *The Clean Air Act Has Been Cheaper and More Effective Than Industry Predicts, Again and Again*, GRIST (Oct. 8, 2010), <https://grist.org/article/2010-10-07-clean-air-act-cheaper-more-effective-than-industry-predicts>. EPA has also overestimated costs of its regulations. Winston Harrington, Richard Morgenstern & Peter Nelson, *How Accurate Are Regulatory Cost Estimates?*, GRIST, March 5, 2010, at 3, [https://grist.org/wp-content/uploads/2010/10/harringtonmorgensternnelson\\_regulatory\\_estimates.pdf](https://grist.org/wp-content/uploads/2010/10/harringtonmorgensternnelson_regulatory_estimates.pdf) (noting that EPA must frequently rely on industry as the source of cost estimates and pointing out that the agency often underestimates how technical advances will reduce compliance costs).

179. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 465 (2001). Even when the statute prohibits considering cost in setting standards, executive orders, including Executive Order 12,866, require EPA to provide estimates of costs and benefits for economically significant rules. See Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

180. *Michigan v. EPA*, 576 U.S. 743, 748 (2015).

181. See, e.g., Matthew Daly, *EPA to Delay Setting Air Quality Standards Despite Advisory Panel Recommendation*, PBS (Sep. 6, 2023, at 11:16 ET), <https://www.pbs.org/newshour/politics/epa-to-delay-setting-air-quality-standards-despite-advisory-panel-recommendation>; Letter from Jonathan M. Samet, Chair, Clean Air Sci. Advisory Comm., to Lisa P. Jackson, Adm'r, EPA (Mar. 30, 2011) (reiterating advisory committee opposition to the 2008 Ozone standards as not protective enough of vulnerable populations).

182. *EPA Delays New Air Quality Standards For Ozone Pollution Until After 2024 Election*, GUARDIAN (Sep. 6, 2023, at 09:30 ET), <https://www.theguardian.com/environment/2023/sep/06/epa-ozone-pollution-smog-air-quality-standards-delay>. For details on the health impacts of ozone pollution, see David M. Stieb, Mieczyslaw Szyszkowicz, Brian H. Rowe & Judith A. Leech, *Air Pollution and Emergency Department Visits for Cardiac and Respiratory Conditions: A Multi-City Time-Series Analysis*, ENV'T HEALTH, June 2009, at 1, 11; Therese F. Mar & Jane Q. Koenig, *Relationship Between Visits to Emergency Departments for Asthma and Ozone Exposure in Greater Seattle, Washington*, 103 ANN. ALLERGY, ASTHMA & IMMUNOL. 474, 477–78 (2009); Michelle L.

These federal NAAQS and MACT standards are a floor, not a ceiling.<sup>183</sup> States retain wide discretion to select the regulatory measures they include in their state implementation plans, as well as discretion to set higher (but not lower) air quality standards.<sup>184</sup> States decide which sources are burdened by what kinds of regulations,<sup>185</sup> and are free to impose additional pollution controls even when overall air quality meets the NAAQS.<sup>186</sup> That means, if the NAAQS fall short of what is necessary to satisfy the New York Constitution, New York regulators can adopt more stringent air quality standards and then translate those standards into stricter permit requirements.

But, the air quality that millions of New Yorkers breathe does not even meet the NAAQS. Since 2019, New York City has been designated a serious nonattainment zone for ozone.<sup>187</sup> Violation of the ozone NAAQS, by definition, compromises public health. Exposure to the levels of ozone New Yorkers experience causes a wide range of respiratory effects, including decreased lung function, pulmonary inflammation, and increased respiratory symptoms such as coughing and shortness of breath.<sup>188</sup> Ozone exposure also aggravates asthma and lung diseases.<sup>189</sup>

In 2019, the New York State Department of Environmental Conservation (DEC) took some steps toward reducing ozone pollution, enacting strict NO<sub>x</sub> emissions standards for peak power generating facilities. These standards, which were intended to take effect in 2025, required peaking energy generating

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Bell, Roger D. Peng & Francesca Dominici, *The Exposure-Response Curve for Ozone and Risk of Mortality and the Adequacy of Current Ozone Regulations*, 114 ENV'T HEALTH PERSPS. 532, 534 (2006).

183. *Union Elec. Co. v. EPA*, 427 U.S. 246, 265 (1976) (“States may submit implementation plans more stringent than federal law requires.”). California’s Ambient Air Quality Standards are frequently more stringent than federal standards. *California Ambient Air Quality Standards*, CAL. AIR RES. BD. <https://ww2.arb.ca.gov/resources/california-ambient-air-quality-standards> (last visited Mar. 29, 2026). However, many states by statute require their standards be no more stringent than the federal minimum. *See, e.g.*, MONT. CODE ANN. § 76-4-135 (“[T]he department may not adopt a rule to implement this chapter that is more stringent than the comparable federal regulations or guidelines that address the same circumstances.”).

184. 42 U.S.C. § 7416 provides in relevant part: “Except as otherwise provided[,] . . . nothing in this chapter shall preclude or deny the right of any [s]tate or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution,” except that the “[s]tate or political subdivision may not adopt or enforce any emission standard or limitation” that is “less stringent than the standard or limitation” set by federal law.

185. *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 64 (1975).

186. *Id.* In addition to Clean Air Act authority for this action, the Tenth Amendment recognizes New York’s retained police power authority to take this step, particularly as necessary to fulfill the constitutional rights recognized in New York. Obviously, any such measure could not conflict with federal law. *See Union Elec. Co.*, 427 U.S. at 266 (citing *Train*, 421 U.S. at 79 for the proposition that under the Clean Air Act, a State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation).

187. *Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards*, 84 Fed. Reg. 44238 (Aug. 23, 2019) (to be codified at 40 C.F.R. pts. 52, 81).

188. *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292, 65303 (Oct. 26, 2015) (to be codified at 40 C.F.R. pts. 50–53, 58).

189. *Our Nation’s Air: Status and Trends Through 2018*, EPA (2019), <https://gispub.epa.gov/air/trendsreport/2019/#home>.

facilities to meet stringent NO<sub>x</sub> emissions standards.<sup>190</sup> Because NO<sub>x</sub> emissions react with volatile organic compounds to form ground level ozone,<sup>191</sup> this regulation is a critical step toward bringing New York into compliance with the Ozone NAAQS and ensuring safe, breathable air in New York City.

Many of the peaking facilities subject to this regulation are more than seventy years old. These old, extremely polluting facilities<sup>192</sup> are clustered in a handful of overburdened environmental justice communities with much higher asthma rates than the city as a whole.<sup>193</sup> In addition to NO<sub>x</sub>, these peaking facilities also emit large quantities of particulate matter.<sup>194</sup> A growing body of evidence links these peaking plant pollutants to a range of serious health problems,<sup>195</sup> including asthma, heart attacks,<sup>196</sup> pulmonary and

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190. N.Y. COMP. CODES R. & REGS. tit. 6, § 227-3 (2020).

191. *Ground-Level Ozone Basics*, EPA (Feb. 18, 2026), <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics>.

192. Older peaker plants disproportionately contribute to the problem of ozone nonattainment. Indeed, these older plants release 94 percent of NO<sub>x</sub> when they run, despite generating only 36 percent of the energy. PEAK COAL., *THE FOSSIL FUEL END GAME* vi (2021), <https://www.cleangroup.org/wp-content/uploads/Fossil-Fuel-End-Game.pdf>. Requiring these facilities to shut or meet the more rigorous standards will dramatically improve air quality.

193. Cecilia Butini, *Asthma by the Numbers*, MEDIUM (Jan. 20, 2018), <https://medium.com/asthma-in-the-south-bronx/asthma-by-the-numbers-73553b2c9621>.

194. PEAK COAL., *DIRTY ENERGY, BIG MONEY* 5–11 (2020), <https://www.cleangroup.org/wp-content/uploads/Dirty-Energy-Big-Money.pdf>.

195. See George D. Thurston, Jiyoung Ahn, Kevin R. Cromar, Yongzhao Shao, Harmony R. Reynolds, Michael Jerrett, Chris C. Lim, Ryan Shanley, Yikyung Park & Richard B. Hayes, *Ambient Particulate Matter Air Pollution Exposure and Mortality in the NIH-AARP Diet and Health Cohort*, 124 ENV'T HEALTH PERSPS. 484, 489 (2015); *Air Quality (Outdoor)*, CDC (Feb. 12, 2024), <http://ephtracking.cdc.gov/showAirHIA.action>; NYC HEALTH, *NEW YORK CITY TRENDS IN AIR POLLUTION AND ITS HEALTH CONSEQUENCES* 1 (2013), <https://www.nyc.gov/assets/doh/downloads/pdf/environmental/air-quality-report-2013.pdf>. See generally Susan C. Anenberg, Larry W. Horowitz, Daniel Q. Tong & J. Jason West, *An Estimate of the Global Burden of Anthropogenic Ozone and Fine Particulate Matter on Premature Human Mortality Using Atmospheric Modeling*, 118 ENV'T HEALTH PERSPS. 1189 (2010) (concluding that PM<sub>2.5</sub> and O<sub>3</sub> “contribute substantially” to global premature mortality); Aaron J. Cohen, H. Ross Anderson, Bart Ostra, Kiran Dev Pandey, Michal Krzyzanowski, Nino Künzli, Kersten Gutschmidt, Arden Pope, Isabelle Romieu, Jonathan M. Samet & Kirk Smith, *The Global Burden of Disease Due to Outdoor Air Pollution*, 68 J. TOXICOLOGY & ENV'T HEALTH 1301 (2005) (estimating the burden of disease attributable to urban outdoor air pollution); Aaron J. Cohen, H. Ross Anderson, Bart Ostra, Kiran Dev Pandey, Michal Krzyzanowski, Nino Künzli, Kersten Gutschmidt, Arden Pope III, Isabelle Romieu, Jonathan M. Samet & Kirk Smith, *Urban Air Pollution, in COMPARATIVE QUANTIFICATION OF HEALTH RISKS: GLOBAL AND REGIONAL BURDEN OF DISEASE DUE TO SELECTED MAJOR RISK FACTORS* 1353 (Majid Ezzati, Alan D. Lopez, Anthony Rodgers & Christopher J.L. Murray eds., 2004) (discussing the impact of urban air pollution on the burden of disease).

196. See, e.g., Diane R. Gold, Augusto Litonjua, Joel Schwartz, Eric Lovett, Andrew Larson, Bruce Nearing, George Allen, Monique Verrier, Rebecca Cherry & Richard Verrier, *Ambient Pollution and Heart Rate Variability*, 101 CIRCULATION 1267, 1271–73 (2000).

cardiovascular disease,<sup>197</sup> cancer,<sup>198</sup> chronic bronchitis, and premature mortality.<sup>199</sup>

By shutting down or cleaning up these facilities, this regulation advances the right to breathe clean air for some of the City's most overburdened residents. However, in 2023, the New York Independent System Operator (NYISO) countermanded this regulation by directing that peaking plants unable to comply with the new standards must nevertheless remain open to ensure grid reliability.<sup>200</sup> One of the major drivers of peak power demand is air conditioning in hot summer months.<sup>201</sup> New Yorkers living near the peaking plants are the least likely to have access to the air conditioning these plants provide.<sup>202</sup> Yet, they bear all of the pollution burden. Keeping these plants running to provide electricity for air conditioning in other neighborhoods is "consigning the community to a health crisis."<sup>203</sup> Once again, the air quality in overburdened communities is being sacrificed for "the greater good."

This seems like a ripe area for New Yorkers to press for state action to vindicate the right to breathe clean air. Invoking the constitutional right gives concerned citizens a way to push back against moves to relax this standard—

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197. See Suresh. H. Moolgavkar, *Air Pollution and Hospital Admissions for Chronic Obstructive Pulmonary Disease in Three Metropolitan Areas in the United States*, 12 *INHALATION TOXICOLOGY* 75, 79–89 (2000); C. Arden Pope III & Douglas W. Dockery, *Acute Health Effects of PM-10 Pollution on Symptomatic and Asymptomatic Children*, 145 *AM. REV. RESPIR. DIS.* 1123, 1123 (1992); Joel Schwartz, Douglas W. Dockery, Lucas M. Neas, David Wypij, James H. Ware, John D. Spengler, Petros Koutrakis, Frank E. Speizer & Benjamin G. Ferris Jr., *Acute Effects of Summer Air Pollution on Respiratory Symptom Reporting in Children*, 150 *AM. J. RESPIR. CRIT. CARE MED.* 1234, 1234–35 (1994).

198. Aaron J. Cohen & C. Arden Pope III, *Lung Cancer and Pollution*, 103 *ENV'T HEALTH PERSPS.* 219, 223 (1995).

199. Neal Fann, Amy D. Lamson, Susan C. Anenberg, Karen Wesson, David Risley & Bryan J. Hubbell, *Estimating the National Public Health Burden Associated with Exposure to Ambient PM<sub>2.5</sub> and Ozone*, 32 *RISK ANALYSIS* 81, 87–93 (2012) (asserting that 10 percent of deaths in Los Angeles are attributable to ozone and PM<sub>2.5</sub>). See generally DEBORAH SHPRENTZ, *BREATH TAKING: PREMATURE MORTALITY DUE TO PARTICULATE AIR POLLUTION IN 239 AMERICAN CITIES* (1996).

200. N.Y. INDEP. SYS. OPERATOR, *SHORT-TERM RELIABILITY PROCESS REPORT: 2025 NEAR-TERM RELIABILITY NEED 6* (2023), <https://www.nyiso.com/documents/20142/39103148/2023-Q2-Short-Term-Reliability-Process-Report.pdf>.

201. SCOTTMADDEN MGMT. CONSULTANTS, *INFORMING THE TRANSMISSION DISCUSSION* 71–89 (2020). New York experienced its all-time peak load of 33,956 MWs in the summer of 2013 at the end of a week-long heat wave. *Id.* at 72. The NYISO predicts that electricity demand will fall through the next decade. *New York Power Grid Expects Demand to Decline Through 2028*, *REUTERS* (May 3, 2018, at 12:15 PT), <https://www.reuters.com/article/new-york-power-demand/new-york-power-grid-expects-demand-to-decline-through-2028-idUSL1N1SA1MV>. Though these estimates predate the growth of AI data centers with their near insatiable energy demands. Samantha Maldonado, *With Power Guzzling Data Centers on the Way, New York Moves to Control Costs*, *THE CITY* (Mar. 20, 2026).

202. PEAK COAL., *supra* note 194, at 6; Sarah Gonzalez, *Without AC, Public Housing Residents Swelter Through the Summer*, *WNYC* (July 28, 2016), <https://www.wnyc.org/story/life-new-york-public-housing-no-air-conditioning>.

203. Greta Moran, *Could Rikers Island Rehabilitate New York City's Dirty Energy Grid?*, *GRIST* (Feb. 25, 2019) (quoting Eddie Bautista, executive director of the NYC Environmental Justice Alliance), <https://grist.org/article/could-rikers-island-rehabilitate-new-york-citys-dirty-energy-grid>. For a discussion of the Renewable Rikers proposal, see Rebecca Bratspies, *Renewable Rikers: A Plan for Restorative Environmental Justice*, 66 *LOYOLA L. REV.* 371 (2020) (describing the proposal).

both in court and in agency proceedings. The decision nominally benefits the “greater good” by ensuring supply reliability, but only at the price of the breathing rights of already overburdened communities. Make no mistake: Every day that these plants continue to run is a day that nearby residents will breathe dangerous levels of ozone, NO<sub>x</sub> and particulates. The pollution emitted to provide air conditioning in other neighborhoods will keep air quality in overburdened communities out of compliance with national ambient air quality standards.

### C. PROCESS: DUE PROCESS AND THE RIGHT TO BREATHE CLEAN AIR

The right to breathe clean air is also a procedural right. More than a century ago, in *Bi-Metallic Investment Co. v. State Board of Equalization*, Justice Holmes famously divided governmental decisions into two broad categories: those to which due process rights attach, and those to which due process rights do not attach.<sup>204</sup> He reserved the latter category for decisions where “all stand alike” and framed the due process dividing line as involving “a matter . . . in which all are equally concerned.”<sup>205</sup> Justice Holmes treats these questions as political, explaining that such “rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”<sup>206</sup> Importantly, Justice Holmes rests this result on an express assumption about the legitimacy of the decision-making process and an emphasis on the common nature of the general concern. By contrast, he noted the continuing validity of *Londoner v. Denver*, a case finding that governments must provide constitutional due process when “[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds . . . .”<sup>207</sup>

While not a perfect analogy, many environmental justice concerns arguably fall on the *Londoner* side of this dichotomy: they involve harms that are concentrated on specific communities for the benefit of the wider society. These communities are uniquely and exceptionally affected by excess pollution burdens. Moreover, overburdened communities often face unique barriers to taking advantage of Justice Holmes’ suggestion that they exercise their power at the ballot box. Their lack of political power creates the possibility of their overburdening in the first place, frequently due to gerrymandering, voter suppression, structural racism, and felon disenfranchisement.

This is not to say that mere demonstrating that minority communities are disproportionately likely to face environmental burdens should create a due process right. Rather, advocates must still show that a *particular* minority community is facing unacceptably heightened burdens from a *specific* proposed

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204. 239 U.S. 441, 445 (1915).

205. *Id.*

206. *Id.*

207. *Id.* at 446 (characterizing *Londoner v. Denver*, 210 U.S. 373 (1908)).

regulatory action. Indeed, New York courts are already beginning to develop this principle. Two New York courts have already decided that, for purposes of standing to bring a claim under the constitutional amendment, those living near polluting infrastructure suffer injuries that, because of their proximity, are different from generalized grievances held by the public at large.<sup>208</sup>

By giving them both standing and a claim to due process, Article 19 provides a constitutional basis for individuals in historically overburdened communities to demand that their environmental rights be respected. However, respecting these rights does not mean that all pollution must end immediately. Critics claim that the right to breathe clean air, drink clean water and live in a healthful environment it is too vague to require any specific state actions.<sup>209</sup> This is surely an overstatement. This constitutional protection enables individuals and communities to challenge and seek redress for the unequal distribution of environmental harms. It could be a tool to mediate a new balance—one that does not treat overburdened communities as disposable.

In *Cleveland Board of Education v. Loudermill*, the Supreme Court ruled that, once a state created a property right, a rights holder was entitled to due process before being deprived of that right.<sup>210</sup> Writing for the 8-1 majority, Justice White explained: “the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.”<sup>211</sup> This same reasoning applied to liberty interests when the Supreme Court found that students facing deprivation of their liberty rights through suspension from school<sup>212</sup> or in-school corporal punishment<sup>213</sup> were entitled to pre-deprivation due process.

The Supreme Court has been clear that the “liberty” the Constitution protects includes more than the absence of physical restraint. Thus, a long line of decisions found that the “liberty” protected by the Due Process Clause

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208. *Clean Air Coal. of W.N.Y., Inc. v. N.Y. State Pub. Serv. Comm’n*, 207 N.Y.S. 3d 221, 227 (N.Y. App. Div. 2024) (“[B]y virtue of petitioners’ members’ proximity to the facilities, the proposed increase in use of those facilities will affect them differently than other members of the public . . .”); *Riders All. v. Hochul*, No. 156711/2024, slip op. at 3 (N.Y. Sup. Ct. Sep. 30, 2024).

209. See, e.g., *The Business Council Opposes Proposition 2—Environmental Rights Amendment*, N.Y. BUS. COUNCIL (Oct. 27, 2021), <https://www.bcnys.org/news/business-council-opposes-proposition-2-environmental-rights-amendment>. Unfortunately, this is the position New York’s Attorney General took in the first case brought under the environmental rights amendment. *Fresh Air for the Eastside v. State*, 217 N.Y.S. 3d 381 (N.Y. App. Div. 2024); see Peter Mantius, *In New York, a Legal Debate over the State’s New Green Amendment*, INSIDE CLIMATE NEWS (Feb. 27, 2024), <https://insideclimatenews.org/news/27022024/new-york-legal-debate-over-states-new-green-amendment>.

210. 470 U.S. 532, 541 (1985).

211. *Id.* Right now, this Article intentionally does not consider whether the right to breathe creates a substantive due process right, focusing only on procedural due process.

212. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

213. *Ingraham v. Wright*, 430 U.S. 651, 683 (1977).

included the right to travel,<sup>214</sup> to marry,<sup>215</sup> to have and raise children,<sup>216</sup> and to marital and sexual privacy.<sup>217</sup> Until very recently, this same liberty interest rationale protected a woman's right to reproductive autonomy,<sup>218</sup> but the Supreme Court recently upended this approach to constitutional interpretation. In overturning the long-standing principle under *Roe v. Wade* that due process protects a woman's liberty to make reproductive health decisions, the *Dobbs v. Jackson Women's Health Organization* decision deployed an extremely narrow interpretation of what constitutes "deeply rooted in history." The *Dobbs* court justified this the decision by emphasizing the role of states and their elected representatives in identifying liberty interests.<sup>219</sup>

Here both the people of New York and their elected representatives have done precisely what the *Dobbs* majority described as necessary to create a liberty interest—they have made an explicit choice to recognize an express right. Following the constitutionally prescribed procedure for amending the state constitution,<sup>220</sup> two separate sessions of the New York legislature voted to present the Environmental Rights Amendment to the citizens of the state.<sup>221</sup> In the ensuing ballot initiative, the voters of New York voted by a three-to-one margin to add this right to the state constitution. The Supreme Court has repeatedly held that states may create liberty interests.<sup>222</sup> While States cannot use their constitutions to deprive individuals of the minimum federally guaranteed rights, they may add additional or expanded rights. Once a state has done so, it must provide due process before depriving anyone of this constitutional right. I discuss what that due process might encompass in the context of the right to breathe below.

#### IV. "PROPERTIZING" ENVIRONMENTAL RIGHTS

In addition to framing the right to breathe clean air as a liberty interest entitled to due process, property rights may prove to be a rich resource for

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214. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958) (finding the right to travel to be a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment).

215. *Loving v. Virginia*, 388 U.S. 1, 12 (1966).

216. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1926).

217. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481–84 (1965).

218. *Roe v. Wade*, 410 U.S. 113, 164 (1972) (finding that the right to privacy, which included reproductive autonomy, was a liberty interest protected by the Fourteenth Amendment).

219. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241–42 (2022).

220. N.Y. CONST. art. XIX.

221. The process takes two consecutive legislative sessions. The first bill passed in 2019, the second in 2021, thereby presenting the amendment as a ballot issue in the Fall 2021 election. Both houses of the state legislature twice voted overwhelmingly in favor of the amendment on a bipartisan basis. The second vote was 48 to 14 in the New York Senate, and 124 to 25 in the Assembly. *BALLOTPEDIA*, *supra* note 12

222. *Vitek v. Jones*, 445 U.S. 480, 481 (1980) (finding that transfer of inmate to mental institution without due process was an unconstitutional deprivation of liberty).

understanding what the substantive content of the right to breathe clean air might entail. Property rights are traditionally characterized by their focus on individual autonomy, as well as on protection against disproportionate state-imposed burdens. Scholar Nick Blomley has described the state-sanctioned benefits that flow from property ownership as a “well-armoured exoskeleton” that protects private entitlements.<sup>223</sup> Writing about the Canadian experience, he rightly points out that “[t]o gain entrance into the world of private property is to acquire a remarkable array of rights and entitlements”<sup>224</sup> conferred and sustained by the state. Similarly, by recognizing an individual constitutional right to breathe clean air, Article 19 creates an entitlement to be free from excessive environmental harms.

An analogy between treatment of constitutional environmental rights and constitutional property rights is worth exploring. What would that well-armored exoskeleton look like in the context of environmental rights? One need not seek to convert environmental rights into a Blackstonian vision of “sole and despotic dominion . . . in total exclusion of the right of any other individual” to see the utility of analogizing environmental rights to property rights. The analogy has salience both for overburdened communities and their residents seeking to vindicate their environmental rights and for regulators tasked with implementing and enforcing laws within the scope of constitutional parameters.<sup>225</sup>

#### A. LESSONS FROM PROPERTY FOR ENVIRONMENTAL RIGHTS

There is an argument that Article 19 introduces a concept akin to property rights into the realm of environmental law. In many ways, the recognition of the right to breathe clean air is a decision to cease treating the air as *terra nullus*—an empty place of no rights that can be used as a cost-free repository for varying amounts of pollution.<sup>226</sup> Instead, air becomes what Henri Lefebvre called *space*, meaning both a physical place and social locus of relations and practices.<sup>227</sup> Thought of in this fashion, the right to breathe clean air recognizes the airshed as a place where constitutional rights are exercised, rather than empty: the mere absence of land or property.

The Federal Constitution guarantees a right to property that includes the right to pre-deprivation due process, and a right to just compensation if private

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223. Nick Blomley, *Homelessness and the Delusions of Property*, 31 TRANSACTIONS INST. BRIT. GEOGRAPHERS 3, 3 (2006). He did not mean that as a compliment.

224. *Id.*

225. *Fresh Air for the Eastside, Inc. v. State*, No. E202200069, slip op. at 16 (N.Y. Sup. Ct. Dec. 20, 2022) (“Complying with the Constitution is not optional for a state agency . . .”).

226. Despite the fact that the North American continent was inhabited at the time of European “discovery” the idea that the United States was *terra nullus*—an unowned space of no rights—was famously embraced by the Supreme Court in *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823). Our current treatment of the airshed as an empty place available for pollution disposal is arguably an extension of that vision. *See also* *United States v. Causby*, 328 U.S. 256 (1946) (finding navigable airspace to be part of the public domain).

227. HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 10–14 (1992).

property is taken for public use.<sup>228</sup> The New York Constitution similarly guarantees that “[p]rivate property shall not be taken for public use without just compensation,”<sup>229</sup> and “[n]o person shall be deprived of life, liberty or property without due process of law.”<sup>230</sup> Notably, these rights are also contained in Section 1 of the New York Constitution—the same fundamental rights Section in which the right to clean air is enshrined.

One theory behind these restrictions on unfettered government action vis-à-vis private property is to “prevent[ ] the public from loading upon one individual more than his just share of the burdens of government.”<sup>231</sup> The Fifth Amendment’s prohibition on taking private property for public use without just compensation prevents the government “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>232</sup> To that end, courts have interpreted these property protections to require that “when [a property owner] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”<sup>233</sup> In other words, the just compensation provision is intended to prevent the government from turning the property of one or a few private property owners into sacrifice zones.

There are striking parallels to the way the right to breathe is intended to prevent and redress the creation of environmental sacrifice zones. In the absence of constitutional breathing rights, the government has overused the airsheds of vulnerable communities as a pollution sink, thereby concentrating on a small group the harms that should be borne by the society as a whole. Indeed, fifty years of evidence documents the reality that environmentally polluting activities are concentrated in communities whose air, water, and land become sacrifice zones, while benefits and profits flow elsewhere.

This part of the property framework therefore seems ripe for adaptation to the right to breathe, ensuring that no individual or community bears an undue share of environmental burdens that should be borne by the public at large. Confronting what that would mean requires translating the “dense landscape of prohibition, exclusion, and security”<sup>234</sup> that comprises the bundle of sticks we call property to this new constitutional context. The analogy is far from perfect—the right to just compensation attached to property rights in the New York and Federal Constitution does not have an obvious analogue for the right

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228. U.S. CONST. amend. V.

229. N.Y. CONST. art. 1, § 7.

230. N.Y. CONST. art. 1, § 6.

231. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

232. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This has come to be known as the Armstrong Principle. See Jeffrey M. Gaba, *Taking “Justice and Fairness” Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 570 (2007) (pointing out that, despite disagreement about what constitutes a burden on property, there is broad agreement with the Armstrong principle as rooted in historic notions of fairness and justice).

233. *Monongahela Navigation*, 148 U.S. at 325.

234. Blomley, *supra* note 223.

to breathe clean air. Nevertheless, as a way of understanding what the right to breathe is trying to accomplish, the analogy between sacrifice zones and takings can be revelatory for those not steeped in environmental justice information.

One thing the Environmental Rights Amendment clearly does, is change the calculus for what constitutes a concrete injury sufficient to establish standing. The Supreme Court has frequently used standing as a legal hurdle to prevent environmental petitioners from being able to bring claims aiming to protect the environment.<sup>235</sup> New Yorkers claiming that their right to breathe clean air has been infringed should easily satisfy this standing threshold because they are asserting injury to a fundamental constitutional right.

#### B. SOME CAUTIONS ABOUT THIS ANALOGY

Environmental rights are a new tool that overburdened communities can use to advocate for change. For example, invoking these rights might support a demand that regulators conduct a cumulative impacts analysis before granting permits. Disproportionate negative community health impacts might be grounds for demanding that regulators revoke existing permits and permissions.<sup>236</sup> However, environmental rights are not a “one-way ratchet.”<sup>237</sup> These rights belong to everyone and can be invoked by everyone. Indeed, white suburbs in Syracuse already tried to invoke environmental rights in their attempt to block a highway redesign.<sup>238</sup> Never mind that the redesign itself was a remedy for past environmental racism that steered the highway through a historically Black community to facilitate the suburban commutes necessitated by white flight from the city.<sup>239</sup> Similarly, a decade earlier, one of most underburdened communities on New York City’s Upper East Side unironically claimed to be an environmental justice community in their attempts to block the siting of a waste transfer station in their neighborhood. There, neighborhood supporters packed City Council’s first ever Environmental Justice hearing in 2016. They claimed to be the victims of environmental injustice, even though that transfer station decision was a remedy for past environmental injustice that had steered environmental burdens of waste handling away from the neighborhood to other, Blacker neighborhoods in New York.<sup>240</sup>

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235. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

236. David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 *COLO. L. REV.* 335, 379 (2006) (pointing out that while in theory cost-benefit analysis could be used to weaken or strengthen regulation, the empirical evidence shows that it has consistently been used as a “one-way ratchet” to weaken regulation).

237. *Id.*

238. Renew 81 for All v. N.Y. State Dep’t of Transp., CA 23-00388, slip op. at 2–3 (N.Y. App. Div. Feb. 2, 2024) (rejecting inter alia invocation of the environmental rights amendment).

239. Jay A. Fernandez, *Racism by Design: The Building of Interstate 81*, ACLU (Aug. 10, 2023), <https://www.aclu.org/news/racial-justice/racism-by-design-the-building-of-interstate-81>; see NYCLU, BUILDING A BETTER FUTURE: THE STRUCTURAL RACISM BUILT INTO I-81, AND HOW TO TEAR IT DOWN 31 (2020) (making this case).

240. Bratspies, *supra* note 80, at 1960–62 (describing the hearing).

While neither the Syracuse nor Upper East Side attempts were successful, they are a potent reminder that laws, even constitutional amendments, are merely a tool, not an outcome. Moreover, taking the right to breathe seriously means confronting the many unresolved questions about who the rights holders are, how to define the contours of the right, and who bears duties under Article 19.

### 1. The Undefined Contours of the Right to Breathe Clean Air

There may be an argument that air meeting the Clean Air Act standards designated as “protective of public health” fulfills the constitutional right to breathe.<sup>241</sup> However, for many overburdened communities, air quality falls far short of this standard, and the failure to meet this standard is attributable in whole or in part to conduct licensed by the state.

A fundamental aspect of due process is the right to be heard.<sup>242</sup> Before infringing on the right to breathe clean air by authorizing additional pollution in an already overburdened community, procedural due process requires that New York provide an opportunity to participate “at a meaningful time and in a meaningful manner.”<sup>243</sup> Thus, rights holders can assert that they are entitled to pre-deprivation due process before their right to breathe is infringed. What would that look like?

Many existing permitting procedures—by which New York conveys a right to pollute to a private party despite its impact on the constitutional right to breathe—probably fall far short of what due process requires. Upon receiving a completed application for an air pollution permit, the New York Department of Conservation may either hold a public comment period or refer the application for an adjudicatory hearing.<sup>244</sup> In practice, this means that most permits are issued after a public comment period.

The permitting process is currently designed to ensure that the applicant is afforded all appropriate process, rather than to protect the due process rights of those whose constitutional breathing rights may be impacted by the permit. This will need to change. For example, the applicant may request an adjudicatory hearing if the department intends to deny, modify, or impose significant additional conditions on a permit.<sup>245</sup> The New York Department of Environmental Conservation (DEC) may decide on its own to hold an adjudicatory hearing when the Department decides that the permit involves

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241. As indicated earlier, this point was debatable even before Trump’s rollbacks. The NAAQS are frequently set at levels that do not protect the most vulnerable. And, EPA has barely scratched the surface of its Section 112(f) duty to reduce residual risk below the threshold considered an “ample margin of safety to protect public health.” 42 U.S.C. § 7412(f)(2).

242. *Grannis v. Ordean*, 234 U.S. 385, 385 (1916).

243. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

244. N.Y. COMP. CODES R. & REGS. tit. 6, § 621.8 (2024).

245. *Id.* §§ 624.1(a)(2), 624.1(a)(4)–(5). This adjudicatory hearing, as opposed to a public hearing, allows parties to present evidence on issues of fact, and make arguments on issues of law and fact prior to a decision on the merits. *Id.* § 624.2(a).

“substantive and significant issues.”<sup>246</sup> But there is currently no provision extending the right to request an adjudicatory hearing to those whose right to breathe clean air is impacted. Instead, such individuals are treated as part of the general public that may submit comments during a comment period. Because New York has constitutionalized the right to breathe clean air, this structure must change.

Impacts on the constitutional right to breathe clean air should definitely qualify as the kind of substantive and significant issue requiring an adjudicatory hearing. Moreover, the necessary parties for such a hearing must reflect the scope of the constitutional right. At a minimum, state practices must recognize that the constitution gives rights that must be respected in environmental decision-making to those burdened by pollution. Individuals seeking to invoke their individual constitutional right to breathe clean air are very differently situated from those seeking to vindicate environmental interests on behalf of the undifferentiated public.<sup>247</sup>

While everyone breathes, not all are equally concerned with impacts on air quality from a pollution source. Proximity to polluting sources is highly racialized and air quality decreases with proximity.<sup>248</sup> The most impacted overburdened communities are breathing very different air from the clean air available to the least impacted underburdened communities. Due process may require that those whose right to breathe is jeopardized by a permit be able to request an adjudicatory hearing, be designated parties in the hearing process, and have full participation rights in the decisional process.

The scope of implementing due process in conjunction with the constitutional right to breathe clean air is daunting. In accordance with its responsibilities under the Clean Air Act, New York has issued 305 Title V permits to major air pollution sources,<sup>249</sup> and 677 state facility permits to

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246. *Id.* § 624.1(a)(1).

247. *Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972) (rejecting Sierra Club’s claim of standing based on the organization’s “special interest” in environmental issues that was unsupported by allegations of individualized injury to its members).

248. The 1986 Toxic Wastes and Race study referenced in note 102 first documented this disparity. UNITED CHURCH OF CHRIST: COMM’N FOR RACIAL JUST., *supra* note 102, at 38. This finding has been supported over and over in subsequent studies. For a particularly compelling analysis, see generally BUNYAN BRYANT & PAUL MOHAI, RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS (1992) (collecting essays from leaders in the field of environmental justice); Paul Mohai, Paula M. Lantz, Jeffrey Morenoff, James S. House & Richard P. Mero, *Racial and Socioeconomic Disparities in Residential Proximity to Polluting Industrial Facilities: Evidence from the Americans’ Changing Lives Study*, 99 AM. J. PUB. HEALTH S649, S649 (2011) (using spatial analysis to document environmental injustice). For a recent analysis of environmental justice in New York City, see N.Y.C. MAYOR’S OFF. OF CLIMATE & ENV’T JUST., *supra* note 60, at 74.

249. *Issued Title V Permits*, N.Y. DEP’T OF ENV’T CONSERVATION, [https://extapps.dec.ny.gov/data/dar/afs/issued\\_atv.html](https://extapps.dec.ny.gov/data/dar/afs/issued_atv.html) (last visited Mar. 30, 2026). Title V permits are issued to major sources of air pollution, which is defined as “a stationary source, source, or facility that directly emits or has the potential to emit, 100 tons per year (tpy) or more of any air pollutant or air contaminant regulated under the act . . . .” N.Y. COMP. CODES R. & REGS. tit. 6, § 201-2.1(21)(i) (2022). For hazardous air pollutants, the threshold is ten tons per year. *Id.* § 201-2.1(21)(ii) (2022).

smaller, but still significant pollution sources.<sup>250</sup> According to the 2020 census, there are more than 20 million New Yorkers.<sup>251</sup> Even with the caveat that not every person in the state will be able to plausibly claim their right to breathe clean air is impacted by every permitting decision, just invoking those numbers displays the problem. Providing formal, trial-type proceedings cannot be the method for all individuals impacted by a permitting decision to vindicate their right to breathe clean air in regulatory decisions. The world of class actions and multi-district litigation offers an obvious strategy to resolve this numbers quandary. Appointing class representatives to act for those whose constitutional right to breathe clean air is in jeopardy, or consolidating multiple permit challenges into a single administrative proceeding would draw on familiar, well-established legal processes to make providing appropriate due process manageable.

## 2. Who Are the Duty Bearers?

The right to effective remedies is core to constitutional jurisprudence.<sup>252</sup> This leads to another immediate critique of deploying constitutional rights in the environmental context—the actual activities that infringe on the right to breathe are rarely perpetrated directly by the government.<sup>253</sup> Instead, it is the activities of private parties—particularly industrial facilities operating under government licenses or permits—that emit the pollution that rights holders will want to target. Yet, the constitutional right to breathe clean air is held as a right against the government—it can influence the decision whether to issue the permit itself, but probably does not, itself, create a cause of action against that third party.<sup>254</sup> Thus, while the right will empower communities seeking judicial relief against government decisionmakers, it will probably not create a new cause of action against industrial polluters directly.<sup>255</sup>

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250. *Issued State Facility Permits*, N.Y. DEP'T OF ENV'T CONSERVATION, [https://extapps.dec.ny.gov/data/dar/afs/issued\\_asf.html](https://extapps.dec.ny.gov/data/dar/afs/issued_asf.html) (last visited Mar. 30, 2026). A facility with the potential to emit a volume of pollutants that would require a Title V permit, and actually emits more than half the major source threshold amount, must obtain a state facility permit. N.Y. COMP. CODES R. & REGS. tit. 6, § 201-5.1(a) (2022). A facility that emits less than half the major source threshold amount, can obtain a minor source facility permit. *Id.* § 201-4.5 (2022).

251. *New York*, U.S. CENSUS BUREAU, [https://data.census.gov/profile/New\\_York?g=040XX00US36](https://data.census.gov/profile/New_York?g=040XX00US36) (last visited Mar. 30, 2026).

252. This principle holds true for human rights as well. The Universal Declaration of Human Rights provides that “[e]veryone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law.” A Universal Declaration of Human Rights, G.A. Res. 217 (III) (Dec. 10, 1948). So does the International Covenant on Civil and Political Rights art. 41(1)(c), Dec. 16, 1966, 999 U.N.T.S. 171.

253. According to the Supreme Court, the “touchstone” of due process is “the protection of the individual against arbitrary action of government. *See* *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (making it clear that due process protects liberty interests created by state statute).

254. *See infra* note 259 and accompanying text.

255. By contrast, the Hawai‘i Constitution specifically provides for a right of action against private parties. In relevant part, the Hawai‘i Constitution reads: “Each person has the right to a clean and healthful environment

In New York, affected communities and individuals have already brought suits claiming that facility operations in violation of permit terms have deprived them of the constitutional right to breathe clean air. This is where things get complicated. Most commenters, including the first courts to consider this issue, do not interpret the Environmental Rights Amendment as creating rights claimable against non-state actors.<sup>256</sup>

If not properly managed, this limit on environmental rights to claims against the government can misalign expectations. Communities eager to use the right to obtain relief from industrial pollution may feel betrayed by their inability to invoke their right to breathe in this context. This mismatch can lead to public cynicism, and is frequently offered, along with hyper-individualism, as a critique of “rights talk” more generally.<sup>257</sup> For this reason, the educational initiative described below will be vital to successful implementation of the right.

While the right to breathe clean air probably cannot be claimed directly against private actors, it should be part of how state actors decide whether to issue, renew, or revoke a permit. It also figures into the kinds of activities that constitute a public or private nuisance. As such, environmental rights should redefine the scope of the boiler plate “permit shield” provision included in permits issued by the DEC.<sup>258</sup> This permit shield defines compliance with permit terms as compliance with the law.<sup>259</sup> These permit shield provisions purport to insulate permitted facilities from challenges by communities and individuals objecting to the pollution emitted by those facilities. However, with the constitutional amendment, the law now guarantees every person the right to breathe clean air. Pollution emitted in overburdened communities, where poor air quality puts the health of community members at risk, violates this constitutional right, even if it complies with a permit. Moreover, many of these facilities are operating under long-expired permits, some as long as two decades.<sup>260</sup> The constitutional right may offer a pathway for vitiating the permit

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[as defined by law]. Any person may enforce this right against any party, public or private, through appropriate legal proceedings . . . .” HAW. CONST. art. XI, § 9.

256. *Fresh Air for the Eastside, Inc. v. State*, No. E202200069, slip op. at 11 (N.Y. Sup. Ct. Dec. 20, 2022) (dismissing claims against Waste Management on the grounds that the rights in Article I, Section 19 do not create a cause of action against private parties).

257. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF PUBLIC DISCOURSE* x (criticizing what she called “rights talk” as having “become the principal language that we use in public settings to discuss weighty questions of right and wrong, but time and again it proves inadequate, or leads to a standoff of one right against another”).

258. Item J of the standard Title V Major Source permit is titled “Permit Shield,” and provides in relevant part: “All permittees granted a Title V facility permit shall be covered under the protection of a permit shield, except as provided under 6 NYCRR Subpart 201-6. Compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance . . . .” *Permit Under the Environmental Conservation Law*, N.Y. DEP’T OF ENV’T CONSERVATION, [https://extapps.dec.ny.gov/data/dar/afs/permits/261010038100005\\_r1\\_0.pdf](https://extapps.dec.ny.gov/data/dar/afs/permits/261010038100005_r1_0.pdf) (last visited Mar. 30, 2026). Item K of these permits includes a re-opener provision that allows the DEC to modify the permit when new legal requirements become applicable. *Id.*

259. *Id.*

260. N.Y. DEP’T OF ENV’T CONSERVATION, *supra* note 249.

shield defense to suits in public and private nuisance, negligence, and trespass, at least for these long-expired permits.

Importantly, the Clean Air Act does not preempt state common law claims.<sup>261</sup> It is therefore fruitful to consider how the principles of trespass and/or quiet enjoyment might be transformed by constitutional environmental rights. The analogy takes a little work. Air is not amenable to the staking out of individual *airsteads* (akin to homesteads) out of the common airshed. This is a profound difference between air and land—much of which became private property through the Homestead Acts.<sup>262</sup> While much of the country was settled via the Homestead Act, there is unlikely to be an *Airstead Act*. In *United States v. Causby*, the Supreme Court found that low altitude flights over privately-owned land amounted to a taking under the Fifth Amendment.<sup>263</sup> The noise burden this conduct imposed on the property was deemed an inverse condemnation of an easement. However, the court constrained the common law doctrine of trespass to exclude private claims to the airspace as having “no place in the modern world.”<sup>264</sup>

The property analogy that makes more sense in this context is to a commons—property held equally by all members of a community. Yet, even without private ownership claims to the airshed, odors and pollution can be grounds for both public and private nuisance claims alleging an unreasonable interference with a right common to the general public, and/or interference with quiet enjoyment of land.<sup>265</sup> A constitutional right to breathe clean air can be the basis under which neighbors of a polluting facility can assert an interest distinct from the general public. Indeed, at least one New York court has already used the environmental amendment to reach this conclusion.<sup>266</sup> Moreover, the constitution strengthens claims from affected individuals about what kinds of conduct are unreasonable and therefore tortious.

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261. See *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013). Interpreting identical language in the Clean Water Act, the Supreme Court found that state law tort suits were not preempted. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

262. The Homestead Acts specified the conditions under which individuals could claim public lands. But given the indigenous dispossession at the heart of this Act, it is not a model to replicate. *Homestead Act*, Pub. L. No. 37-64, 12 Stat. 392 (1862).

263. 328 U.S. 256, 266 (1946).

264. *Id.* at 261.

265. *Phila. Elec. Co. v. Hercules*, 762 F.2d 303, 316 (3d Cir. 1985).

266. *Riders All. v. Hochul*, No. 156711/2024, slip op. at 5 (N.Y. Sup. Ct. 2024).

## V. DISTINGUISHING THE RIGHT TO BREATHE FROM RIGHTS OF NATURE AND THE PUBLIC TRUST DOCTRINE

Advocates and theorists looking to challenge the frames of existing environmental law have tried multiple different “turn[s] to rights.”<sup>267</sup> Environmental constitutionalism is one of a trio of theories that emerged in response to the failure of environmental laws to protect vulnerable communities and ecosystems from pollution or to respond effectively to climate change. The other two are the resurgent public trust doctrine and claims about rights of nature. Although frequently mentioned together, these are very different theoretical framings of the problem. While all three share the starting point that existing legal understanding of nature are “unsuited to perceiving or observing ecological limits,”<sup>268</sup> the trio of ideas are rooted in different visions of how law might be deployed to respond to vexing environmental conundrums.

Rights of nature claims draw on indigenous worldviews, as well as *in rem* and corporate law, for the proposition that the environment (or a river or a lake) can be legal rightsholders. The rights of nature movement is a fast-growing legal theory.<sup>269</sup> Much like the way claims against a ship are defended by its owner, and claims against a corporation by its board, rights of nature theories treat the environment as a juridical person. This approach solves the Article III standing problem created by the Supreme Court’s refusal to recognize members of the public as have standing to assert general concerns for protecting nature.<sup>270</sup> By contrast, constitutional environmental rights are held, not by juridical persons, but by human beings. These are thus much more familiar—the right to breathe belongs to the same legal actors who hold property, free speech, and due process rights. Moreover, unlike rights of nature, which are constitutionalized in just a handful of countries<sup>271</sup> (and none of the United States) environmental rights are included in more than one hundred national constitutions, and multiple state constitutions within the United States.

The public trust argument takes a different approach. It posits a fiduciary relationship between the state government actor and the population *vis-à-vis* protecting the natural environment.<sup>272</sup> In some ways, this argument tracks environmental rights—particularly in states that pair constitutional environmental rights with a state duty to protect those rights. However, this argument runs rapidly into the problem that state actors must balance multiple competing priorities when making decisions on behalf of the public. There is no

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267. See also Peel & Osofsky, *supra* note 16, at 38.

268. Usha Natarajan & Kishan Khoday, *Locating Nature: Making and Unmaking International Law*, 27 LEIDEN J. INT’L L. 573, 573 (2014).

269. A good source for information about rights of nature theories is the Earth Law Center. *Giving Nature a Voice in the Legal System*, EARTH L. CTR., <https://www.earthlawcenter.org> (last visited Mar. 30, 2026).

270. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

271. CONST. OF ECUADOR, arts. 71–74; CONST. OF BOLIVIA, art. 389.

272. While there are a handful of states in which this argument has a constitutional basis (particularly Pennsylvania, Hawaii, and Montana), this argument draws heavily on the common law notion of the public trust.

particular reason flowing from the public trust doctrine that governmental actors, acting on behalf of the public, must prioritize clean air, clean water or a healthful environment over competing social values, particularly economic growth. *Julianna v. United States* tried unsuccessfully to solve this problem by rooting public trust claims in substantive due process under the Fifth and Fourteenth Amendments.<sup>273</sup> Public trust claims have been vulnerable to skepticism from the judiciary, as well as attacks from the critical or racial capitalism perspective, which identify the state as an actor perpetuating environmental injustice rather than an ally in the fight against extraction, pollution, and inequality. Environmental rights, by contrast, are unambiguously present and personal fundamental rights. The phrasing in New York's constitution that "each person shall have," is echoed in the positive rights criminal defendants hold under the Sixth Amendment.<sup>274</sup>

In New York, affected communities and individuals have already brought suits claiming that facility operations that violate permit terms have deprived them of constitutional right to breathe clean air. This is where things get complicated. Most commenters, including the first courts to consider the issue, do not interpret the environmental rights amendment as creating rights against non-state actors.<sup>275</sup>

Perhaps this is a point of convergence between the constitutional rights theory and the public trust theory—where the state, acting as trustee, makes decisions in the best interest of "the people." Yet, that sounds like a recipe for more of the same—after all, the state already claims to be balancing environmental, economic, and social interests as it makes permitting decisions under the existing environmental laws. If that were the goal, there would have been no need for the state legislature to twice vote in favor of the Environmental Rights Amendment, and then bring the question to the voters of New York. The complicated constitutional amendment process, and the overwhelming support the Environmental Rights Amendment received from both houses of the legislature, as well as from the voters, indicates that the amendment is intended to change business as usual. Moreover, such an approach potentially negates the individual nature of the constitutional right.

Another approach might treat permits allowing pollution to overburdened airsheds as a regulatory taking—akin to the use of eminent domain to take the

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273. 947 F.3d 1159, 1171 (9th Cir. 2020).

274. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

275. *Fresh Air for the Eastside, Inc. v. State*, No. E2022000699, slip op. at 11 (N.Y. Sup. Ct. Dec. 20, 2022) (dismissing claims against Waste Management on the ground that the rights in Article I, Section 19 do not create a cause of action against private parties).

airshed. This would trigger both due process and potentially just compensation requirements before governments could make this choice.<sup>276</sup>

#### CONCLUSION: EDUCATION IS KEY

On the morning of November 6, 2024, the first headline I read said: “Trump Win Assures Halt to Biden’s Enviro Priorities.”<sup>277</sup> The country had just elected the candidate whose platform included rolling back environmental protections, curtailing public participation, and decentering environmental justice.<sup>278</sup> This prediction has been borne out in practice. This administration has driven a metaphorical truck through the federal government—firing workers indiscriminately, dismantling entire agencies, and repealing slews of critical regulations. The full ramifications of these actions are still unfolding, but it is clear that the federal government will not be responding to climate disasters, developing more ambitious or proactive environmental standards, or even enforcing the laws that currently exist.

In this context, it really matters that few New Yorkers have given any thought to what environmental rights might mean for their lives. This is as true of regulators as of ordinary citizens. If environmental rights are going to become a tool for mediating, whether between polluters and communities, between overburdened and underburdened communities, or between the economic logic of capitalist extraction and the reality that we are transgressing planetary boundaries, then education will be key. Environmental decisionmakers need to understand the full scope of their constitutional obligations, and environmental rights holders need to understand what they can and ought to demand.

#### A. EDUCATING ENVIRONMENTAL DECISIONMAKERS

Few environmental decisionmakers know about environmental rights. Professor Sonya Ziaja recently completed an empirical study examining the role that constitutional environmental rights play in agency decision-making in Hawai’i and Montana.<sup>279</sup> In this project, she interviewed state employees responsible for making environmental permitting and enforcement decisions. Ziaja demonstrated that constitutional environmental rights are rarely explicitly considered during agency decision-making.<sup>280</sup> This result is not particularly

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276. There is a clear parallel to the urban renewal era where land and other resources was taken from Black communities, thereby transferring wealth, capital, and land from these communities to large business interests and developers. Brent Cebul, *Tearing Down Black America*, BOS. REV. (July 22, 2020), <https://www.bostonreview.net/articles/brent-cebul-tearing-down-black-america>.

277. Juan-Carlos Rodriguez, *Trump Win Assures Halt to Biden’s Enviro Priorities*, LAW360 (Nov. 6, 2024, at 05:31 ET), <https://www.law360.com/articles/2254207/trump-win-assures-halt-to-biden-s-enviro-priorities>.

278. See Project 2025, *supra* note 71, at 417, 420.

279. Sonya Ziaja, *Why Constitutional Rights Do Not Matter* (Univ. Balt. Sch. L. Legal Studies Rsch. Paper, Apr. 8, 2026), <https://ssrn.com/abstract=6556164>.

280. *Id.* at 1.

surprising—most permitting and enforcement decisions do not rest on the unfettered constitutional judgments of individual employees.

Environmental regulation is a bureaucracy—for good and for ill. There are endless guidance documents, policy handbooks, and checklists that codify and standardize processes and procedures. Agencies produce these tools and decision-making procedures to codify knowledge and expertise, to reduce errors, and to speed decision-making. Indeed, standardized decision matrices are the heart of bureaucratic administration. Every environmental checklist or decision tree includes built-in assumptions about what risks are acceptable, what level of precaution is appropriate, and how to manage uncertainty. As regulators adapt their decision tools to apply and interpret constitutional phrases like “clean air” and “clean water” into the context of their daily work, they will give depth and specificity to these constitutional mandates. It is through reformulating the content of these mundane decision-making tools that constitutional environmental rights will be translated into state policy.

The contours of the right to breathe clean air will take shape in day-to-day, on-the-ground, regulatory, permit, siting and enforcement decisions. Most of these decisions will never see judicial review. Yet each is a site of legal decision-making where nonjudicial actors make a myriad of daily decisions with the force of law.<sup>281</sup> Reshaping the nitty-gritty of these decisional processes to protect constitutional environmental rights should be a state priority.

I have elsewhere written about how the Attorney General’s office is uniquely positioned to lead in this process.<sup>282</sup> Employee training sessions and new decision-making materials are an essential part of this transition. New York’s Attorney General Letitia James has been a vocal proponent of addressing environmental racism, touting inter alia New York’s Environmental Rights Amendment.<sup>283</sup> Yet, in practice, James’s office has been slow to embrace the transformative potential of environmental rights. That could and should change.

## B. EDUCATING ENVIRONMENTAL CITIZENS

Over the past five decades, environmental laws have unquestionably modulated many environmental problems and prevented many deaths and illnesses. However, most of these laws have not been transformative. They

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281. Indeed, the recognition that actors other than judges make influential decisions about law, and that decisionmakers are guided by community preferences in exercising their decision-making authority, dates all the way back to the New Haven School. See, e.g., Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 373 (1971); Rebecca M. Bratspies, *Rethinking Decision-Making in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, 32 YALE J. INT’L L. 363, 369 (2007). One of the New Haven School’s most notable contributions to legal discourse was the recognition of “authoritative decision,” meaning decisions that embody both power and authority, emerge from a wide range of decisionmakers in contexts beyond court decisions, legislation, and treaties. *Id.* at 371.

282. Rebecca Bratspies, *Administering Environmental Justice: How New York’s Environmental Rights Amendment Could Transform Business as Usual*, 118 41 PACE ENV’T. L. REV. 100, 118 (2024).

283. Response to Petition for Rulemaking Filed by the State of Florida and 22 Other States Regarding EPA’s Discriminatory Effect Regulations (U.S. Env’t Prot. Agency Sep. 5, 2024).

largely start with the assumption of business as usual and then graft on reductions in the environmental impacts. Clean air and water are reduced to economic goods, subject to consumer preferences.<sup>284</sup> Environmental protection dwindles into a search for “efficient” levels of pollution. This is where constitutional rights come in. When everyone is entitled to breathe clean air, there is no way to avoid asking what level of environmental quality meets that standard. Nor can decision-makers ignore the profound pollution imbalances that leave communities of color breathing air that does not meet this standard.

But, environmental rights must be claimed to have meaning.<sup>285</sup> That involves robust civic education about rights in general and environmental rights in particular. The good news is that New York’s Attorney General Letitia James is attuned to the importance of an educated citizenry in environmental decision-making. Indeed, she recently wrote the forward for an important community-based report about excess heat in which she stated:

Knowledge is power, and supporting communities to gather information central to their health and welfare empowers these communities to define problems they face and forge solutions tailored to their needs.<sup>286</sup>

To help New Yorkers understand the ramifications of environmental rights, New York should develop a learning curriculum. The environmental justice curriculum built around the Earth Justice Chronicles Book 1: *Mayah’s Lot* might be a model for what that curriculum might look like.<sup>287</sup> This education will be an important precursor for the kinds of robust public participation needed to implement environmental rights.

While New York has been constitutionalizing environmental rights, the Supreme Court has been busy upending a half century of legal and regulatory practices that impact environmental law.<sup>288</sup> There is clearly more change to federal environmental law coming. The Court is likely to continue dismantling

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284. For a thorough analysis of this point, see Amy Sinden, *The ‘Preference for Pollution’ and Other Fallacies, or Why Free Trade Isn’t ‘Progress,’* in *PROGRESS IN INTERNATIONAL LAW* 771–92 (Russell A. Miller & Rebecca M. Bratspies eds., 2009).

285. Rebecca Bratspies, *Claimed Not Granted: Finding a Human Right to a Healthy Environment*, 26 *TRANSNAT’L L. & CONTEMP. PROBS.* 263, 272 (2017).

286. Letitia James, *Foreword* to *HEAT RELATED RISKS, AIR POLLUTION, AND SOCIAL VULNERABILITY IN NEW YORK CITY* 5 (2024).

287. REBECCA BRATSPIES & CHARLES LA GRECA, *MAYAH’S LOT* (2017). For a description of its impact, see Rebecca Bratspies, *Mayah’s Lot: Teaching Environmental Justice with Comic Books* 505, in *THE MEDIA METHOD: TEACHING LAW WITH POP CULTURE* (Christine A. Corcos ed., 2019). For examples of how the book can be used in classrooms, see MATT HOLMES, SHERMAN DEAN, MARIA BRODINE & ANN-MARIE MITROFF, *LEARNERS TO LEADERS: ENVIRONMENTAL JUSTICE LITERACY CURRICULUM* (Aug. 10, 2018), [https://groundworkusa.org/wp-content/uploads/2018/08/GWUSA-Learners-to-Leaders-Environmental-Justice-Literacy\\_Curriculum\\_08.10.18.pdf](https://groundworkusa.org/wp-content/uploads/2018/08/GWUSA-Learners-to-Leaders-Environmental-Justice-Literacy_Curriculum_08.10.18.pdf); U.S. ENV’T PROT. AGENCY, NO. 440B23001, *CAPACITY BUILDING THROUGH EFFECTIVE MEANINGFUL ENGAGEMENT: A TOOL FOR STATE AND LOCAL GOVERNMENTS* 8 (2023).

288. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2269–70 (2024); *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 U.S. 2440, 2458 (2024); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022); *SEC v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024).

the regulatory edifice upon which modern American life has been built.<sup>289</sup> Yet, as the old saying goes, every crisis is an opportunity. A new legal terrain forces us to reimagine environmental law (and administrative law more generally). We need new approaches and new laws better able to meet the demands of this particular political, social, and climate moment. One way forward is New York's constitutional approach—starting from the proposition that every person has the right to breathe clean air.<sup>290</sup>

To date, most scholars assessing constitutional environmental rights focus on how courts will define or limit the scope of this new constitutional provision.<sup>291</sup> Undoubtedly, much hinges on judicial interpretation of these rights. However, there are other sites of legal decision-making besides courts.<sup>292</sup> This Article emphasizes the central importance of these other, nonjudicial actors who make a myriad of daily decisions with the force of law. It demonstrated that it is through these mundane, nitty-gritty regulatory decisions, most of which never see judicial review, that the contours of the right to breathe clean air will emerge. This remains true, even in the face of federal intransigence.

If regulators take a holistic view of environmental rights, one rooted in a vision of environmental equality, New York's Environmental Rights Amendment might serve as a model for the nation. If New York can align environmental rights with the kinds of protections accorded property rights, the right to breathe could become a powerful tool allowing historically overburdened communities to finally obtain environmental justice. If, on the other hand, those actors try to minimize the impact of the constitutional amendment, they could blunt the momentum of communities seeking to use these rights to advance environmental justice. Time will ultimately tell. Much will depend on how regulators conceive of their authority under the law, and whether courts interpret environmental rights broadly or narrowly.

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289. For example, the Separation of Powers Restoration Act, H.R. 288, would rewrite the Administrative Procedures Act to require that courts review agency statutory interpretation *de novo*. The Act passed the House on a party line vote in 2024. Separation of Powers Restoration Act of 2023, H.R. 288, 118th Cong. (2023).

290. As this Article goes to press in May 2026, this seems improbable on a national level for the foreseeable future. Yet, the proposition is not that far-fetched. For many years, Congress has considered (though failed to enact) an analogous statutory provision in the proposed Environmental Justice for All Act, which would guarantee all people “the right to breathe clean air, drink clean water, live free of dangerous levels of toxic pollution, and share the benefits of a prosperous and vibrant pollution-free economy.” *See, e.g.*, Environmental Justice for All Act, H.R. 5986, 116th Cong. § 2(b)(5) (2023). Section 2(b)(5) of this proposed law provides: “It is the policy of Congress that each Federal agency should recognize the right of all people to clean air, safe and affordable drinking water, protection from climate hazards, and the sustainable preservation of the ecological integrity and aesthetic, scientific, cultural, and historical values of the natural environment.” Though outside the scope of this Article, it is worth noting that under *Loudermill*, the due process considerations surrounding constitutional environmental rights might apply with equal force to statutory environmental rights. *Loudermill v. Clev. Bd. of Educ.*, 470 U.S. 532, 541 (1985) (finding that once the legislature creates a property right under state law, a rights holder cannot be deprived of their right without constitutional due process of law). Although specifically analyzing a property right (in public employment), the Court makes it clear the reasoning applies to “life, liberty, and property.” *Id.*

291. *See, e.g.*, Gerard & McTierman, *supra* note 160; Polk, *supra* note 160, at 175–76.

292. *See supra* note 281.