

“Underburdened” Communities

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Waste is built into the American way of life. Yet the problem of what to do with waste remains largely unresolved. Indeed, our entire way of life hinges on overburdening with waste some communities, so that other communities may be underburdened, and thereby enjoy the benefits of clean air, water, and land.

Perhaps the most striking thing about the relationship between overburdened communities and underburdened communities is that underburdened is not even an English word. By its very absence, the word underburdened encapsulates the way that environmental privilege is invisible, unproblematized, and unconsidered. This Article draws back the curtain and shows how communities are systematically either overburdened or underburdened, largely along racial and socio-economic lines. By making visible the way that polluted neighborhoods subsidize clean air and water elsewhere, this Article offers suggestions for the kinds of structural changes that will be needed to achieve environmental justice.

DOI: <https://doi.org/10.15779/Z384746S53>

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* Professor, CUNY School of Law, Director of the Center for Urban Environmental Reform. This Article benefited from a workshop at the University of Indiana Ostrom Colloquium series, and workshops with the Environmental Law Profs network, the Rocky Mountain Mineral Law Foundation, and from feedback at the Mount Sinai Community Outreach quarterly meeting, as well as the Fall 2021 Stanford Environmental Justice seminar. I am particularly grateful to Buzz Thompson, Amber Polk, and their Stanford Law students for the close attention they gave my work, and to my law school classmate turned professor Kenneth Richard for his suggestions on structure. Thank you to my CUNY Law colleagues Jill Sifah Sigman, Megan Carr, Andrea McArdle, and Sarah Lamdan who generously read multiple drafts. Thanks also go to Professors Carmen Gonzalez and Sonya Ziaga for their valuable feedback, Kathy Williams for her ability to get me hard-to-find sources, Megan Carr for research assistance, Melissa Iachan for her willingness to share her expertise, and Edan Rotenberg for representing our community partners. This project would never have happened without community leader Andrea Scarborough and Mount Sinai Community Engagement Coordinator Luz Guel. And finally, a profound thank you to the many community members I have had the opportunity to work alongside in the quest for waste justice and environmental justice in New York City and beyond.

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“Trash . . . manifests our complete lack of grace, a despairing forfeiture of our receptive service to Being.”¹

INTRODUCTION

Waste is built into modern culture. We buy things designed for temporary use, usually shrink-wrapped in plastic packaging.² All of it is intended to be thrown away—the packaging immediately, the product in due course. On a daily or weekly basis, we fill bags with our trash and leave them by the curb. Collectors come, load the bags onto trucks in the early morning, and take them *away*.³ Problem solved. That is where most people’s knowledge of and interest in waste management ends.⁴ But there is always the next batch of waste . . . and the next . . . and the next.

1. GREG KENNEDY, AN ONTOLOGY OF TRASH 182 (2007).

2. As Professor Carmen Gonzalez reminds us, this participation is not equal. The wealthiest 20 percent of the world’s population consumes the lion’s share of global resources and generates 90 percent of the waste. Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT’L L. 151, 154 (2015). For example, the average United States resident generates 2.58 kg of municipal solid waste each day, more than double the average Chinese resident and seven and a half times more than the average Indian. *Daily Municipal Solid Waste Generation Per Capita Worldwide in 2018*, STATISTA (2020), <https://www.statista.com/statistics/689809/per-capital-msw-generation-by-country-worldwide/> [<https://perma.cc/R357-YNEC>].

3. See *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1275–76 (2d Cir. 1999) (recognizing this kind of garbage collection and disposal as a core function of local government in the United States).

4. For example, at an online event discussing waste handling in New York City, one of the organizers stated, “[A]fter the garbage leaves our house, I don’t think too much about it. I think I am

The whole system depends on *away*, which is both that mythical space where we put all the waste and the process by which that happens. But there is a problem with this strategy. There is no *away*. There are only places. As Barry Commoner pointed out half a century ago, everything must go somewhere.⁵

So, we create *away* as a social imaginary,⁶ an organizing principle that both enables and makes sense of our wasteful waste handling practices.⁷ *Away* becomes the repository for all the unwanted detritus of our disposable society. An *away* tactic is to make certain communities disposable, and therefore the *away* strategy depends on some communities mattering more than others.

As a result, some neighborhoods are "plagued by stink and noise," while others "see only clean streets, with the clanking machinery of transport and disposal all but invisible."⁸ It is only by transferring the burdens of waste *away* from certain communities—usually Whiter and wealthier—and onto others that our over-consumptive way of life becomes possible.⁹ An over-consumptive way of life overburdens some communities so that others reap the benefits of clean air, water, and land.

Obviously the "we" creating this *away* is highly contested. Designating a community "disposable" requires first excluding that community from the "we" making the designation.¹⁰ Despite elaborate philosophical theories positing that

like a lot of people." Online Event with Eastern Queens Alliance, Discussion on Film "Racing to Zero" (Sept. 29, 2021) (per personal recollection of Author). Scholars have noted this phenomenon too. See Anne Barnard, *Taming the 'Wild West' of New York's Dangerous Private Trash Trucks*, N.Y. TIMES (Feb. 16, 2020), <https://www.nytimes.com/2020/02/15/nyregion/nyc-garbage.html> [https://perma.cc/52VY-L6VD] (quoting anthropologist Robin Nagle).

5. BARRY COMMONER, *THE CLOSING CIRCLE: NATURE, MAN & TECHNOLOGY* 36 (Dover Publications 2020) (1971).

6. CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 1–6 (2004) (defining a social imaginary as a broad understanding of the way a society imagines its collective social life).

7. *Id.* at 2.

8. 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> [https://perma.cc/EV9Y-9E52]. For a breakdown of how racism and classism reinforce the practice of diverting resources away from underserved communities, see Brian Pumell, *Taxation Without Sanitation Is Tyranny*, 31 *AFRO-AMERICANS IN NEW YORK LIFE AND HISTORY* 61, 64 (July 2007) (memorializing Brooklyn CORE's Operation "Clean Sweep" protesting inadequate sanitation services).

9. 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 [sic] Could Have Got in on the Ground Floor of Climate Action – History Would Have Thanked Him*, CONVERSATION (Dec. 5, 2018), <https://theconversation.com/george-bush-sr-could-have-got-in-on-the-ground-floor-of-climate-action-history-would-have-thanked-him-108050> [https://perma.cc/2UTD-HZQD]. Professor Claire Colebrook describes the fragility of a society premised on drawing its resources from and transferring its wastes to other places and peoples. See 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> [https://perma.cc/JTS4-3FKM].

10. See Zygmunt Bauman, *Disposable Life: Zygmunt Bauman*, OPEN TRANSCRIPT (Mar. 11, 2014), <http://opentranscripts.org/transcript/disposable-life-zygmunt-bauman/> [https://perma.cc/6KAA-HNQL]. Pope Francis's *Laudato Si'* repeatedly connects exclusion, poverty, and environmental degradation. See ENCYCLICAL LETTER *LAUDATO SI'* OF THE HOLY FATHER FRANCIS ON CARE FOR OUR COMMON HOME ¶¶ 22, 49 (2015),

society rests on a web of reciprocal rights and obligations connecting social actors,¹¹ *away* is a solution that rests on and requires exclusion.¹² Certain segments of society are first excluded from that social web.¹³ With regard to these excluded groups, the theoretical commitment to social equality gives way to a racialized and gendered hierarchy of value.

Perhaps the most striking thing about the relationship between overburdened communities, and the underburdened communities they enable, is that underburdened is not even an English word.¹⁴ By its very absence, the word underburdened encapsulates the way that environmental privilege is invisible, unproblematized, and unconsidered.¹⁵ This Article draws back the curtain and shows how communities are systematically either overburdened or

https://www.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf [<https://perma.cc/67UC-F22T>] (calling for the integration of justice into debates on the environment “so as to hear *both the cry of the earth and the cry of the poor*”).

11. Professor Claire Colebrook trenchantly points out that when Rousseau “argued in *The Social Contract* (1762) that ‘man is born free, and everywhere he is in chains’, he was certainly *not* most concerned about those who were literally in chains.” Colebrook, *supra* note 9.

12. Susan Opatow writes that we all have deeply held—if not always consciously realized—beliefs about who is within our scope of justice and therefore deserving of considerations of fairness. See Susan Opatow, *Moral Exclusion and Injustice: An Introduction*, 46 J. SOC. ISSUES 1, 1–20 (1990). The wellbeing of individuals or groups excluded from the scope of justice does not fall within the boundaries of our moral commitment. Therefore, harms directed at those individuals or groups may fail to elicit the concern or response that would attend similar harms directed at those within our scope of justice. See SUSAN OPOTOW, PROMOTING PEACE VIA INCLUSIONARY JUSTICE 5–6 (2021). Instead, such harms are recast as “the way things are”—normal, acceptable, or inevitable outcomes rather than harms. *Id.* at 6. As an illustration, Representative Henry Hyde opened the 1993 House Hearings on Environmental Justice by questioning whether environmental racism existed, noting that “[h]azardous waste sites, factories, and landfills are more likely to be located on cheaper land, where more minorities and low-income Americans reside.” *Environmental Justice: Hearing Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 103d Cong. 2 (1993) (statement of Rep. Hyde, Member, H. Comm. on the Judiciary). To be fair, Rep. Hyde followed up by noting that the Federal Government had a duty to protect everyone from exposure to life-threatening environmental hazards regardless of what drove disparate exposures. *Id.*

13. Philosopher David Sibley asserts that all of Western society is built on this kind of exclusion. See generally DAVID SIBLEY, GEOGRAPHIES OF EXCLUSION: SOCIETY AND DIFFERENCE IN THE WEST (1995).

14. That underburdened is not a word is thus a tangible manifestation of the wider social tendency in our highly racialized society to treat Whiteness as “the unmarked category against which difference is constructed.” George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the “White” Problem in American Studies*, 47 AM. Q. 369, 369 (1995). Indeed, some have characterized being unmarked as the “hallmark of whiteness.” Julie Netherland, *The War on Drugs That Wasn’t: Wasted Whiteness, “Dirty Doctors,” and Race in Media Coverage of Prescription Opioid Misuse*, 40 CULTURE, MED. & PSYCHIATRY 644, 667 (2016). In a system embedded in White supremacy, much of the power of Whiteness is “never [having] to speak its name, never [having] to acknowledge its role as an organizing principle in social and cultural relations.” Lipsitz, at 369.

15. For a discussion of environmental privilege, see Lisa Sun-Hee Park & David Naguib Pellow, *The Case of the Missing Mountain: Migration and the Power of Place*, in COMMUNITIES, NEIGHBORHOODS, AND HEALTH 111, 121–24 (Linda M. Burton, Susan P. Kemp, ManChui Leung, Stephen A. Matthews & David T. Takeuchi eds., 2011).

underburdened, largely along racial and socio-economic lines.¹⁶ By making visible the way that polluted neighborhoods subsidize clean air and water elsewhere, this Article offers suggestions for the kinds of structural changes needed to achieve environmental justice.

Across the United States and around the world, the communities overburdened with waste reject this distribution of pain and gain. They refuse to be relegated to the status of *away*. Instead, these communities use principles of equality to demand justice,¹⁷ and in the process, they offer a transformed vision for how society should approach the process of waste generation, waste disposal, and waste management. This Article shows both how structural racism drives which communities become *away* and the resistance those communities have mounted to that status. It suggests that urban commons theory can be used to disrupt and transform the social imaginary that relegates certain communities to *away* status by articulating an alternative social vision in which a city’s residents all share a common stake in their community and have an equal claim to resources and services.

Indeed, this Article posits urban commons theory as an antithesis to the *away* process. In a commons, there is no *away*. Urban commons theory recasts the city, including its urban infrastructure and the social networks that make neighborhoods vibrant, as the collective, commonly-owned resources of the city’s residents.¹⁸ From this starting point, it becomes possible to envision alternatives to the existing, market-driven urban policies that create and demand *away*.¹⁹ An urban commons framing offers new ways to allocate both social goods and social bads by considering equity, fairness, and sustainability across the whole community. Embracing the city as a commons²⁰ thus offers a useful reframing for communities fighting for environmental justice.

The urban commons approach begins with the proposition that much of a city’s value emerges from human activity and social networks that exist there.²¹

16. Indeed, more than two decades ago, Robert Bullard explicitly called out “public policies and industry practices [that] provide *benefits* for whites while shifting *costs* to people of colour.” Robert D. Bullard, *Dismantling Environmental Racism in the USA*, 4 LOC. ENV’T: INT’L J. JUST. & SUSTAINABILITY 5, 6 (1999).

17. Amartya Sen proposed that justice is never absolute—there is no binary on–off switch for whether justice exists or not. Instead, he argues that justice is incremental, and accrues over time, necessitating a comparative approach to such questions. See generally AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

18. See Christian Iaione & Elena DeNictolis, *The City as a Commons Reloaded*, in *THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH INNOVATIONS* 124, 125 (Sheila R. Foster & Chrystie F. Swiney eds., 2021).

19. See Peter Marcuse, *Whose Right(s) to What City?*, in *CITIES FOR PEOPLE, NOT FOR PROFIT: CRITICAL URBAN THEORY AND THE RIGHT TO THE CITY* 33, 41–46 (Neil Brenner, Peter Marcuse & Margit Mayer eds., 2011).

20. Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 *YALE L. & POL’Y REV.* 281, 288 (2016) (characterizing the city as “a shared resource that belongs to all its inhabitants”).

21. Douglas Kelbaugh, *The Environmental Paradox of the City, Landscape Urbanism, and New Urbanism*, 13 *CONSILIENCE: J. SUSTAINABLE DEV.* 1, 11 (2014).

It asks: “what kind of cit[ies do] we want[?]”²² where the “we” includes all inhabitants regardless of citizenship, race, ethnicity, age, or income. Asking this question changes the scale of thinking about urban problems because it starts from the recognition that cities are created—they are shaped by specific choices. Where conventional urban policy allows, or even encourages, private actors to enclose and extract value as part of a top-down process,²³ the urban commons model relies on a more bottom-up participatory process. It reaches far beyond current decision-making approaches that amplify the voices of property owners and investors as the natural constituents of urban decision-making. As commoners, residents share the right to shape the city, to design its infrastructure, and to benefit from those choices.²⁴

To that end, this Article applies the City as Commons to the problem of waste handling. Specifically, it suggests that when decisionmakers recognize residents as commoners, they begin to see the problems of waste handling differently, opening a space for new solutions rooted in community solidarity and equity. Part One offers a brief overview of the distributive justice concerns embedded in current waste handling practices. Part Two focuses on waste handling in New York City and lays out the injustices²⁵ at the core of the City’s practices. Focusing in even more, Part Three contrasts two waste handling facilities in New York City and shows how racialized inequality drives whose voices currently matter in community discussions about waste management. This Part also offers a window into how much better things can be when community concerns are taken seriously. Part Four shows how commons theory can offer transformational possibilities for participatory and substantive environmental justice for this community and for urban neighborhoods more generally. Finally, Part Five concludes with lessons on restorative environmental justice drawn in part from New York City’s experience with the intertwined problems of COVID-19, pollution, and waste.

I.

THE PROBLEM OF WASTE: SOCIAL IMAGINARY OF AWAY

What to do with the detritus, garbage, and waste from our disposable, consumerist lifestyle is a common problem. Not a *commons* problem, but a

22. David Harvey, *The Right to the City*, 53 *NEW LEFT REV.* 23, 23 (2018).

23. Christian Borch & Martin Kornberger, *Introduction* to *URBAN COMMONS: RETHINKING THE CITY* 6–7 (Christian Borch & Martin Kornberger eds., 2015).

24. See *Mission, History & Platform*, *RIGHT TO THE CITY ALL.*, <https://righttothecity.org/about/mission-history/> [<https://perma.cc/S9DL-YZSU>].

25. As Dr. Farhana Sultana reminded us, justice is a contested idea, and justice claims must be examined in historical social, political, and spatial context in which they arise. See Farhana Sultana, *Justice*, in *THE WILEY BLACKWELL COMPANION TO POLITICAL GEOGRAPHY* 127, 127 (John Agnew, Virginie Mamadouh, Anna J. Secor & Joanne Sharp eds., 2015).

common problem—a communal one. We all create it together.²⁶ The scope of this problem is immense and growing.²⁷ In 2016, human beings generated 2.02 billion tons of municipal solid waste.²⁸ By 2050, that figure is expected to increase by roughly 70 percent to 3.4 billion metric tons per year.²⁹

That is a staggering figure. For perspective, it is roughly as much as 100 Empire State Buildings,³⁰ 3.4 million blue whales, or 100 million elephants³¹ every year! Indeed, the recognition that our collective waste problem threatens human wellbeing on a global scale prompted the United Nations (UN) to include “ensur[ing] sustainable consumption and production patterns” as Goal 12 in the Sustainable Development Goals (SDGs)³² adopted as part of the 2030 Agenda for Sustainable Development.³³

26. Again, insights from climate justice and environmental justice remind us that the “we” in this sentence is overly inclusive. Not every person or every state contributed equally to the problem. See Sumudu A. Atapattu, Carmen G. Gonzalez & Sara L. Seck, *Intersections of Environmental Justice and Sustainable Development: Framing the Issues*, in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 1, 2 (Sumudu A. Atapattu, Carmen G. Gonzalez & Sara L. Seck eds., 2020). Indeed, there is a disconcerting overlap between who is and is not part of the “we” creating the waste problem, and the “we” identifying *away* to which the waste will go.

27. In 2019, the UN reported that the Global Material Footprint has increased 113 percent since 1990, while population has increased by 48 percent. *Responsible Consumption and Production Patterns*, UNITED NATIONS STAT. DIV. (2019), <https://unstats.un.org/sdgs/report/2019/goal-12/> [<https://perma.cc/Z5TQ-PQL8>]. That means that the amount of raw material including fossil fuels, biomass and metal and non-metal ore, extracted to meet total consumption demand increased more than twice the rate of population growth. See *id.* Without intervention, that rate of consumption is projected to more than double by 2060. *Id.*

28. *Projected Generation of Municipal Solid Waste Worldwide from 2016 to 2050*, STATISTA (2022), <https://www.statista.com/statistics/916625/global-generation-of-municipal-solid-waste-forecast/> [<https://perma.cc/DN4A-YNWA>]. Municipal solid waste—also called trash—is the waste generated by ordinary people in their daily lives. It “consists of everyday items such as product packaging, yard trimmings, furniture, clothing, bottles and cans, food, newspapers, appliances, electronics and batteries.” *Quantity of Municipal Solid Waste Generated and Managed*, U.S. ENV’T PROT. AGENCY, <https://cfpub.epa.gov/roe/indicator.cfm?i=53> [<https://perma.cc/CAW7-Y9RV>]. Municipal solid waste is distinct from industrial waste, hazardous waste, or construction and demolition (C&D) waste.

29. *Projected Generation of Municipal Solid Waste Worldwide*, *supra* note 28.

30. EMPIRE STATE BUILDING FACT SHEET, EMPIRE STATE REALTY TRUST, https://www.esbnyc.com/sites/default/files/esb_fact_sheet_4_9_14_4.pdf [<https://perma.cc/949U-2E8L>].

31. Melissa Breyer, *11 Facts About Blue Whales, the Largest Animals Ever on Earth*, TREEHUGGER (Nov. 9, 2020), <https://www.treehugger.com/facts-about-blue-whales-largest-animals-ever-known-earth-4858813> [<https://perma.cc/3UJ3-T3UR>].

32. *Goal 12: Ensure Sustainable Consumption and Production Patterns*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <https://www.un.org/sustainabledevelopment/sustainable-consumption-production/> [<https://perma.cc/568X-9JEX>]. As Carmen Gonzalez points out, the SDGs are “themselves deeply problematic” because they “replicate the consumption driven economic model based on planned obsolescence that generates ever-increasing mounds of waste.” Personal communication from Carmen Gonzalez, Morris I. Leibman Professor of L., to Author (on file with Author). For more on this theme, see Carmen G. Gonzalez, *SDG 2: End Hunger, Achieve Food Security and Improved Nutrition and Promote Sustainable Agriculture*, in THE CAMBRIDGE HANDBOOK ON THE SUSTAINABLE DEVELOPMENT GOALS AND INTERNATIONAL LAW 72, 75–76 (Jonas Ebbesson & Ellen Hey eds., 2022).

33. U.N. GAOR, 70th Sess., 1st plen. Mtg. at 1, U.N. Doc. A/70/L.1 (Oct. 21, 2015).

This growing waste problem dovetails with another global trend—urbanization. From 1950 to 2018, the share of the global population living in urban areas quintupled, with urban population growing at a much faster rate than overall population growth.³⁴ As a result, more than half the world’s population currently lives in cities,³⁵ with an additional three million people moving to cities every week.³⁶ By 2050, the UN estimates that just over two-thirds of the world’s population will live in cities,³⁷ and the cities they live in are growing larger.³⁸ Urbanization is even more pronounced in the United States where 80 percent of the population lives in urban areas,³⁹ and the largest cities generate nearly 85 percent of the nation’s GDP.⁴⁰ There are clear reasons for this trend. Cities tend to be hubs of innovation and economic growth, cultural diversity, and opportunity.⁴¹

However, issues of waste handling are particularly pressing in cities, where dense living and limited space make the issue highly visible. Even though, on a per capita basis, urban dwellers consume fewer resources and generate less waste than their suburban counterparts, the sheer size of urban populations guarantees that cities consume enormous quantities of resources and produce prodigious amounts of pollution and waste. Thus, Sustainable Development Goal 11 of “mak[ing] cities inclusive, safe, resilient and sustainable”⁴² is intimately entwined with achieving the sustainable consumption and production patterns identified as Goal 12.

34. United Nations Dep’t of Econ. & Soc. Affs., *World Urbanization Prospects: The 2018 Revision*, at 9, U.N. Doc. ST/ESA/SER.A/42 (2019), <https://population.un.org/wup/Publications/Files/WUP2018-Report.pdf> [<https://perma.cc/3Q7F-6QDC>].

35. *Id.* at 1.

36. INT’L ORG. FOR MIGRATION, *WORLD MIGRATION REPORT 2015*, at 1 (2015).

37. United Nations Dep’t of Econ. & Soc. Affs., *supra* note 34, at 1. Almost all the growth in global population over the next few decades is expected to take place in urban centers, particularly in Africa and Asia. INT’L ORG. FOR MIGRATION, *supra* note 36, at 2–3.

38. There are currently 33 megacities with populations of over 10 million, up from 3 such cities in 1970. United Nations Dep’t of Econ. & Soc. Affs., *supra* note 34, at 57–60. An additional 515 cities have a population greater than 1 million. *Id.* at 59. More than half of urban dwellers live in cities with more than 500,000 inhabitants. *Id.*

39. *Urban Area Facts*, U.S. CENSUS BUREAU (Oct. 8, 2021), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html> [<https://perma.cc/S2CS-SFF6>].

40. JAMES MANYIKA, JAANA REMES, RICHARD DOBBS, JAVIER ORELLANA & FABIAN SCHAER, MCKINSEY GLOB. INST., *URBAN AMERICA: US CITIES IN THE GLOBAL ECONOMY 2* (2012), https://www.mckinsey.com/~media/mckinsey/featured%20insights/urbanization/us%20cities%20in%20the%20global%20economy/mgi_urban_america_full_report.pdf [<https://perma.cc/JW5J-5MUG>].

41. INT’L ORG. FOR MIGRATION, *supra* note 36, at 4–5.

42. *Goal 11: Sustainable Cities and Communities*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <https://www.un.org/sustainabledevelopment/cities/> [<https://perma.cc/4L9K-PYN2>].

There is huge profit in making waste go *away*.⁴³ Globally, the so-called waste management industry is valued at more than two trillion dollars,⁴⁴ and is expected to more than double by 2026.⁴⁵ In 2019, Waste Management, the self-proclaimed “leading provider of comprehensive waste management” services,⁴⁶ reported revenues of \$15.46 billion and profits of \$4.28 billion.⁴⁷ Other massive waste companies in the United States and around the world are similarly profitable.⁴⁸

The environmental justice movement⁴⁹ has spent decades documenting how racialized waste handling policies dump most of the burdens associated with urban waste on Black and Brown communities. These areas become designated as *away*—as sacrifice zones.⁵⁰ However, cities are also a place where targeted intervention might have an outsized impact on the scope and scale of this waste problem,⁵¹ as well as its attendant environmental injustices. After all, as urban planner Jarrett Walker pointed out, cities function for residents only when they function for almost everyone.⁵² While this might be true about society more generally, in the city it is “so brutally obvious as to be unavoidable.”⁵³

43. As the Supreme Court noted in *C&A Carbone v. Town of Clarkstown*, “what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.” 511 U.S. 383, 390–91 (1994).

44. Ty Haqqi, *10 Biggest Waste Management Companies in the World*, YAHOO FINANCE (Jan. 6, 2021), <https://www.yahoo.com/video/10-biggest-waste-management-companies-110348641.html> [<https://perma.cc/Y2ME-AS7E>].

45. *Top 10 Companies in Smart Waste Management Market*, METICULOUS BLOG (Jan. 4, 2022), <https://meticulousblog.org/top-10-companies-in-smart-waste-management-market/> [<https://perma.cc/VG6T-BSU3>].

46. *WM 101*, WASTE MGMT., <http://investors.wm.com/why-invest/wm-101> [<https://perma.cc/UL6N-B9DW>].

47. *Waste Management Announces Fourth Quarter and Full-Year 2019 Earnings*, BUSINESSWIRE (Feb. 13, 2000), <https://www.businesswire.com/news/home/20200213005408/en/> [<https://perma.cc/ZXD5-BQ8M>].

48. Suez Environment generated \$20.17 billion in revenues in 2019. *Id.*

49. For a thorough discussion of the environmental justice critique in the United States, see Jedidiah Purdy, *The Long Environmental Justice Movement*, 44 *ECOL. L.Q.* 809, 812 (2018) (outlining the relative indifference to distributive questions, its attachment to a narrow conception of “the environment,” and its comfort with elite and professionalized forms of advocacy as the core critiques of “mainstream” environmental law from the environmental justice perspective).

50. Marcelo Lopes de Souza, *‘Sacrifice Zone’: The Environment–Territory–Place of Disposable Lives*, 56 *CMTY. DEV. J.* 220, 220 (2021) (defining a sacrifice zone as a space where “the physical and mental health and the quality of life of human beings are compromised in the name of ‘economic development’ or ‘progress’ – but ultimately for the sake of capitalist interests”).

51. Due to inherent efficiencies, the consumption rates of cities grow in a sub-linear fashion. The rate of consumption and waste generation grows more slowly than the rate at which cities increase in size.

52. Jarrett Walker, *The Dangers of Elite Projection*, *HUM. TRANSIT* 3 (July 31, 2017), <https://humantransit.org/2017/07/the-dangers-of-elite-projection.html> [<https://perma.cc/3DFN-GVL5>].

53. *Id.*

A. *Waste Handling Raises Profound Issues of Distributive Justice.*

In the United States, and around the world, the communities singled out as *away* are overwhelmingly Black and Brown. Three decades ago, former World Bank chief economist Lawrence Summers raised a furor with an infamous memo suggesting that the Bank should promote the migration of dirty industries to less developed countries and that the “economic logic” of dumping toxic waste there was “impeccable.”⁵⁴ The clear subtext of this memo was that “[t]hey are like garbage; so, if someone has to live amidst garbage (and pollution etc.), let *them* be, of course.”⁵⁵ This kind of thinking exists between countries,⁵⁶ and within them.⁵⁷ The *away* strategy both depends on and drives this kind of thinking, with the excluded “they” most often being Black and Brown communities.⁵⁸

In the early 1980s, two parallel struggles against the improper disposal of toxic chemicals cast the consequences of *away* into sharp relief. In Upstate New York, working class White residents discovered that some 22,000 barrels of discarded, half-forgotten toxic waste had contaminated the soil and water supply of their neighborhoods.⁵⁹ New York declared the site a public health time bomb because of the multiple carcinogens that were seeping into basements and off-

54. Memorandum from Lawrence H. Summers, Chief Economist, World Bank, to Distribution, World Bank (Dec. 12, 1991) (suggesting we should face up to the impeccable economic logic behind dumping a load of toxic waste in the lowest wage country), <http://www.whirledbank.org/ourwords/summers.html> [<https://perma.cc/QKF3-6N58>]. Summers first claimed that the memo was meant to be sarcastic. *Furor on Memo at World Bank*, N.Y. TIMES (Feb. 7, 1992), <https://www.nytimes.com/1992/02/07/business/furor-on-memo-at-world-bank.html> [<https://perma.cc/U8LG-3528>]. He then later said that the memo was actually written by someone else. JMG, *Summers Receives [sic] Flack for His Tactless Pollution-Control Memo as VP of World Bank in 1991*, GRIST (Nov. 25, 2008), <https://grist.org/article/logical-but-totally-insane/> [<https://perma.cc/UDN4-TGPM>] (naming Lant Pritchett as the actual author).

55. Lopes de Souza, *supra* note 50, at 222.

56. See generally Rebecca Bratspies, *Corrupt at Its Core: How Law Failed the Victims of Waste Dumping in Côte d’Ivoire*, 42 COLUM. J. ENV’T L. 417 (2018) (using Trafigura’s dumping of toxic waste in Abidjan to explore this point); JENNIFER CLAPP, TOXIC EXPORTS: THE TRANSFER OF HAZARDOUS WASTES FROM RICH TO POOR COUNTRIES (2001) (dissecting this practice and rooting it in a globalized reach of capitalism in the form of trans-national corporations).

57. See generally Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENV’T RSCH. LETTERS, no. 115008 (2015) (documenting disparate siting of noxious uses in communities of color). For a detailed examination of how racial capitalism drives this phenomenon, see Carmen Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 164–67 (2022).

58. In 1913, University of Chicago Settlement House founder Mary McDowell decried the notion that “in every great city there must be a part of that city that is segregated for unpleasant things,” and more particularly the accompanying sentiment that “people in that part of town are generally not sensitive.” CARL A. ZIMRING, CLEAN AND WHITE: A HISTORY OF ENVIRONMENTAL RACISM IN THE UNITED STATES 138 (2015) (quoting McDowell’s remarks to the City Club of Chicago as reported in Fred Heuchling, *Chicago’s Garbage Problem*, CITY CLUB BULLETIN (Dec. 20, 1913)).

59. *U.S. v. Hooker Chem. and Plastics Corp.*, 680 F. Supp. 546, 549 (1988).

gassing into the air.⁶⁰ Fierce community advocacy from young White mother Lois Gibbs and her Love Canal neighbors helped spur passage of the Superfund legislation in 1980.⁶¹ In Warren County, North Carolina, Black residents organized and argued, and even laid down across the roads and used their bodies in an unsuccessful attempt to block disposal of 60,000 tons of PCB contaminated soil in their community.⁶² These wastes were generated when Ward Transformer Company illegally dumped 31,000 gallons of PCB contaminated oil along 240 miles of state roads, rather than disposing of it lawfully in an approved facility.⁶³ With virtually no consultation, the state elected to dispose of the hazardous waste in overwhelmingly Black Warren County.⁶⁴

Both the Warren County protests over North Carolina's siting decision and the Love Canal results from Hooker Chemical's past disposal practices garnered national attention.⁶⁵ These two situations crystalized public fears about the environmental and public health consequences of industrial practices that continually claimed new territory as *away*. They also exposed the racial and class

60. OFF. OF PUB. HEALTH, GOVERNOR'S LOVE CANAL INTER-AGENCY TASK FORCE, N.Y. STATE DEP'T OF HEALTH, LOVE CANAL: PUBLIC HEALTH TIME BOMB 6 (Sept. 1978), https://www.health.ny.gov/environmental/investigations/love_canal/docs/lctimbmb.pdf [<https://perma.cc/Q448-7HBH>]. For a full timeline, see Colin Dabkowski, *A History of the Love Canal Disaster, 1893 to 1988*, BUFFALO NEWS (Aug. 4, 2018), https://buffalonews.com/news/local/history/a-history-of-the-love-canal-disaster-1893-to-1998/article_5df93af9-e5fe-5ae4-be74-efed7dbf43ed.html [<https://perma.cc/K4FY-QPAT>].

61. OFF. OF PUB. HEALTH ET AL., *supra* note 60, at 10. The statute colloquially called Superfund is officially called the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. CERCLA's legislative history highlighted the Love Canal situation as one of the motivations for the legislation. See H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17 at 6121, in 1980 U.S.C.A.N. 6119, 6121 (declaring as the first Congressional Finding that: "Hooker Chemical's three disposal sites in the Niagara Falls, New York, area contain an estimated 352 million pounds of industrial chemical waste, including TCP (which is often contaminated with one of the most toxic substances known to man, dioxin) and lindane, a highly toxic pesticide product").

62. *55 Arrested in Protest at Toxic Dump in Carolina*, N.Y. TIMES (Sept. 16, 1982), <https://www.nytimes.com/1982/09/16/us/55-arrested-in-protest-at-a-toxic-dump-in-carolina.html> [<https://perma.cc/88MB-FDMA>]. Among those arrested at the ensuing protests were Reverend Benjamin Chavis of the United Church of Christ, who later oversaw production of the first national report about environmental racism. COMM'N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES 2 (1987), <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf> [<https://perma.cc/6HTD-6TUF>].

63. *Carolinians Angry over PCB Landfill*, N.Y. TIMES (Aug. 11, 1982), <https://www.nytimes.com/1982/08/11/us/carolinians-angry-over-pcb-landfill.html> [<https://perma.cc/3Z5Q-D2GD>].

64. Dollie Burwell & Luke Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE ENV'T L.J. 9, 14 (2007) (providing a combined scholarly and first-hand account).

65. See Robert D. McFadden, *Love Canal: A Look Back*, N.Y. TIMES (Oct 30, 1984), <https://www.nytimes.com/1984/10/30/nyregion/love-canal-a-look-back.html> [<https://perma.cc/R7LD-NGKQ>]; Dale Russakoff, *As in the '60s, Protesters Rally*, WASH. POST (Oct. 11, 1982), <https://www.washingtonpost.com/archive/politics/1982/10/11/as-in-the-60s-protesters-rally/47e2d0e3-8556-4d9f-8a77-8a78ab51ca61/> [<https://perma.cc/UF9K-BCWR>].

inequity in how the burdens flowing from these industrial practices were distributed.⁶⁶

Five years later, the United Church of Christ's groundbreaking *Report on Toxic Waste and Race* documented that the race of a surrounding community was the most significant variable predicting the location of hazardous waste facilities.⁶⁷ *Toxic Waste and Race* documented that three out of every five Black and Latinx Americans lived in communities with uncontrolled toxic waste sites.⁶⁸ This was neither by accident nor by choice. The United States' complicated racial geography of largely segregated neighborhoods grew out of generations of redlining⁶⁹ and housing discrimination.⁷⁰ Reverend Benjamin Chavis emphasized that Black and Brown communities were selected to house these facilities "not because it was an environmentally sound choice, but because it seemed powerless to resist."⁷¹ He called this phenomenon environmental racism.⁷²

Not much has changed in the ensuing decades. There are currently over 2,400 landfills and more than seventy-three incinerators in the United States.⁷³ Studies have continued to show that Black and Brown Americans are more likely

66. *Dumping on the Poor*, WASH. POST (Oct. 12, 1982), <https://www.washingtonpost.com/archive/politics/1982/10/12/dumping-on-the-poor/bb5c9b8c-528a-45b0-bd10-874da288cd59/> [<https://perma.cc/3VX7-VW2P>] (proclaiming Warren County to be "the marriage of civil rights activism with environmental concerns").

67. COMM'N FOR RACIAL JUST. ET AL., *supra* note 62, at xiii.

68. *Id.* at xiv.

69. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (documenting how racial segregation is the direct result of federal, state, and local government policies). Sociologist Douglas Massay called this racialized residential segregation the "spatial glue" that maintains, reproduces, and strengthens inequality. Douglas Massay, *Still the Linchpin: Segregation and Stratification in the USA*, 12 RACE & SOC. PROBS. 1, 1 (2020).

70. Massay, *supra* note 69, at 1; Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 797 (2008). This is not to suggest that racial segregation is wholly a legacy of the past. Instead, active current discrimination maintains these patterns today. Eva Rosen, Philip M. E. Garboden & Jennifer E. Cossyleon, *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits to Screen Tenants*, 86 AM. SOC. REV. 787, 787 (2021).

71. Benjamin F. Chavis, Jr., *Foreward* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3 (Robert D. Bullard ed., 1993).

72. *Id.*; see also *Environmental Justice: Hearing Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, *supra* note 12, at 2 (testimony of Rep. Hyde, Dr. Benjamin F. Chavis, Jr., Executive Director, United Church of Christ Commission for Racial Justice) (defining the term). Sociologist Dr. Sacoby Wilson speaks regularly about issues of environmental racism. See *Environmental Racism and Slavery in 21st Century Jim Crow America: Dr. Sacoby Wilson*, YOUTUBE (Oct. 24, 2019), <https://www.youtube.com/watch?v=Z-8T9NB4wcI> [<https://perma.cc/JK6M-WDAR>].

73. *Energy Projects and Candidate Landfills*, U.S. ENV'T PROT. AGENCY (2015), <http://web.archive.org/web/20150901190242/http://www.epa.gov/lmop/projects-candidates/index.html>; ANA ISABEL BAPTISTA & ADRIENNE PEROVICH, TISHMAN ENV'T & DESIGN CTR., U.S. MUNICIPAL SOLID WASTE INCINERATORS: AN INDUSTRY IN DECLINE 4, 8 (May 2019), https://grist.org/wp-content/uploads/2020/07/1ad71-cr_gaiareportfinal_05.21.pdf [<https://perma.cc/M7DH-A7T9>] (reporting that 79 percent of incinerators are in environmental justice communities).

to live near a waste disposal facility,⁷⁴ and 70 percent of the sites on the National Priorities List are within one mile of federally subsidized housing facilities that are largely home to residents of color.⁷⁵ These communities bear the burdens of *away*—disproportionate pollution burdens and the elevated environmental health risks that pollution creates. They experience noxious odors, toxic leachate, and heavy truck traffic on a regular basis.⁷⁶

Environmental justice communities became *away* because of discriminatory decisions rooted in racism⁷⁷ and unequal power.⁷⁸ Their *away* status in turn justifies the further allocation of environmental burdens to these communities, this time under the seemingly-neutral guise of “efficiency” or “appropriateness.”⁷⁹ For example, the proponents of the Byhalia Pipeline, which cuts across the low income, overwhelmingly Black South Memphis neighborhood of Boxtown,⁸⁰ described the route as “the path of least resistance.”⁸¹ Critics counter that this language is code for the path of “most

74. BAPTISTA ET AL., *supra* note 73, at 13–16. One staggering study from highly segregated Houston, Texas, documented that 100 percent of city owned garbage dumps and three-quarters of municipal incinerators were located in Black neighborhoods even though Black residents only made up a quarter of the city’s population and the city does not have zoning. JOHN R. LOGAN & HARVEY MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 113 (1987).

75. EMILY COFFEY, KATE WALZ, DEBBIE CHIZEWER, EMILY A. BENFER, MARK N. TEMPLETON & ROBERT WEINSTOCK, SHRIVER CENTER ON POVERTY LAW, EARTHJUSTICE, *POISONOUS HOMES 2–3* (June 2020), https://www.povertylaw.org/wp-content/uploads/2020/06/environmental_justice_report_final-rev2.pdf [<https://perma.cc/7PE5-7BZJ>]. Section 105(a)(8)(B) of CERCLA (Superfund) requires that EPA use a hazard ranking system to compile the National Priorities List—ranking sites with known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. 42 U.S.C. § 9605.

76. This phenomenon of environmental racism is not unique to waste handling. Rural Black communities have been fighting against Concentrated Animal Feed Operations (CAFOs) that similarly burden their communities with noxious odors, pollution, and truck traffic to benefit consumers elsewhere. *See* Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENV’T HEALTH PERSPS. A182, A186–87 (2013). Another clear example is the devastating practices of clearcutting forests and polluting Black communities in the American South to provide wood pellets to be burned as “biomass” in the European Union. DOGWOOD ALL., *THE WOOD PELLET INDUSTRY IS AN ENVIRONMENTAL INJUSTICE*, <https://www.dogwoodalliance.org/wp-content/uploads/2018/10/Wood-Pellet-Environmental-Justice-Fact-Sheet.pdf> [<https://perma.cc/FNB8-S2TB>].

77. *See* ZIMRING, *supra* note 58, at 189–191.

78. *See generally* JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980) (theorizing the social and political ramifications of power disparities).

79. For an example of how this endless cycle of environmental injustice self-perpetuates, *see* Rebecca Bratspies, *Shutting Down Poletti: Human Rights Lessons from Environmental Victories*, 36 WISC. INT’L L.J. 247, 268–269 (2019) (noting that utility justified locating yet another power plant in overburdened neighborhood because they were “consistent with the nature of the surrounding area”).

80. Boxtown is a historic Black neighborhood that was originally built by freed slaves, where many properties are still owned by descendants of the original families; the neighborhood was underserved—remaining without electrical and plumbing services well into the 1960s. R. Eugene Moore, *Boxtown: A Forgotten Piece of Memphis History*, MEMPHIS MIRROR (Apr. 28, 2021), <https://web.archive.org/web/20210627204314/https://memphismirror.com/boxtown-a-forgotten-piece-of-memphis-history/>.

81. Lucas Finton, *Proposed Byhalia Connection Pipeline Finds Resistance down So-Called “Path of Least Resistance,”* DAILY HELMSMAN (Mar. 24, 2021),

pigmentation.”⁸² Indeed, Byhalia’s spokesperson blithely stated that the pipeline “had to go through South Memphis to connect to the refinery.”⁸³ When community residents asked about alternatives to routing the pipeline through their community, the company responded that residents “just need[ed] to get used to the fact that [the pipeline was] going to be here.”⁸⁴

Away becomes an unending, self-perpetuating prophecy of disadvantage. Environmental justice scholar and advocate Luke Cole described it as a “truism” that poor communities have more hazardous environments than wealthier communities, and “people of color are exposed to more environmental dangers than white people.”⁸⁵ Environmental injustice exists in the relationship between those places burdened with waste facilities and those using *away* strategies to liberate themselves from such burdens. Remedying those environmental injustices begins with recognizing that reality. While solutions must prioritize cleaning up overburdened communities, systemic change requires that we pull the lens back and examine those overburdened communities alongside the communities doing that overburdening. Otherwise, any changes will be cosmetic and will not address the core injustices embedded in every aspect of current waste handling and disposal practices. When the *away* strategy no longer frees underburdened communities from responsibility for their waste, those communities suddenly have a compelling incentive to adopt changes that reduce their waste generation.⁸⁶

https://www.dailyhelmsman.com/news/proposed-byhalia-connection-pipeline-finds-resistance-down-so-called-path-of-least-resistance/article_c158e514-8c04-11eb-a06e-bbad7b0393d6.html [https://perma.cc/3WS5-U5R8] (quoting a pipeline spokesperson). For a scholarly exploration of how Black communities so often emerge as the path of least resistance, see Bob Edwards & Anthony E. Ladd, *Race, Class, Political Capacity and the Spatial Distribution of Swine Waste in North Carolina, 1982-1997*, 9 N.C. GEOGRAPHER 51, 55 (2001); Robert Bullard & Beverly Hendrix Wright, *Environmentalism and the Politics of Equity: Emergent Trends in the Black Community*, 12 MID-AM. REV. SOCIO. 21, 28–29 (1987).

82. Deborah Archer & Ronald Newman, *Why Memphis’ Black and Brown Communities Have the Most to Lose from Byhalia Pipeline*, COM. APPEAL (June 17, 2021), <https://www.commercialappeal.com/story/opinion/2021/06/17/byhalia-pipeline-significant-threat-black-and-brown-communities/7719034002/> [https://perma.cc/4AYW-3EDB].

83. Finton, *supra* note 81. The pipeline would connect two refineries owned by Valero, a Fortune 500 company. R. Eugene Moore, *‘They Want to Destroy Memphis’ Most Sacred Grounds’: Byhalia Connection Pipeline and the Community in Its Way*, MEMPHIS MIRROR (Mar. 15, 2021).

84. Moore, *supra* note 83. In a rare victory for environmental justice, the broad coalition of protestors managed to pose enough hurdles that the developers abandoned the plan. See *‘Sometimes the Good Guys Win’: Byhalia Connection Pipeline Cancelled*, ECOWATCH (July 13, 2021), <https://www.ecowatch.com/byhalia-connection-pipeline-cancelled-2653766878.html> [https://perma.cc/6QTN-LV8T].

85. Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 621, 624 (1992).

86. See discussion of 91st Street Waste Transfer Station, *infra* Part III.A.

B. Enter Environmental Justice

Toxic Waste and Race galvanized a national conversation about environmental injustice and environmental racism. It was also a major impetus behind the First National People of Color Environmental Leadership Summit held in 1991.⁸⁷ This Summit recognized *inter alia* that “cities sorely need a vision of sustainability and equity.”⁸⁸ It offered a vision of “the environment” that extended beyond forests and wildlands to include “where we live, where we work, where we play, and where we learn.”⁸⁹ It also posited that “[e]nvironmental justice, defined and articulated from a truly multiracial and multicultural perspective, may well be that vision for the 21st Century.”⁹⁰

The terms “environmental racism”⁹¹ and “environmental injustice” describe disproportionate siting of polluting infrastructure and other undesirable land uses in Black and Brown communities,⁹² their disparately high exposure to pollution and other environmental hazards,⁹³ and the resulting adverse effects on human health and the environment.⁹⁴ The terms also encompass the uneven environmental protection provided these communities under environmental laws and regulations,⁹⁵ and the barriers to their full participation in environmental decision-making.⁹⁶

87. Benjamin F. Chavis, Jr., *Preface* to Proceedings of the First National People of Color Environmental Leadership Summit, at i (1992) [hereinafter Summit Proceedings].

88. *Id.*

89. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 16 (2001). Luke Cole was the architect of the Inuit Petition to the InterAmerican Commission on Human Rights before his untimely death in 2009. Sheila Foster is one of the leading scholars of the urban commons.

90. Summit Proceedings at i.

91. Dr. Benjamin Chavis defined environmental racism as “racial discrimination in environmental policy making and the enforcement of regulation and laws, the deliberate targeting of people of color communities for toxic waste facilities, the official sanctioning of a life-threatening presence of poisons and pollutants in our communities, and the history of excluding people of color from the leadership of the environmental movement.” Benjamin F. Chavis, Jr., *Statement of Benjamin F. Chavis, Jr.*, in Summit Proceedings, *supra* note 87, at 2.

92. Robert D. Bullard & Beverly Hendrix Wright, *The Politics of Pollution: Implications for the Black Community*, 47 *PHYLON* 71, 76–78 (1986).

93. Y.S. LIN, A. COUSTASSE, W.C. HO, K.P. SINGH & A.A. ARIF, RACIAL/ETHNIC DIFFERENCES IN EXPOSURE TO ENVIRONMENTAL VOLATILE ORGANIC COMPOUNDS IN THE U.S. GENERAL POPULATION: THE NATIONAL HEALTH AND NUTRITION EXAMINATION SURVEY 1990-2000 (2018), https://mds.marshall.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1136&context=mgmt_faculty [https://perma.cc/MR78-H3UJ]; Vy Kim Nguyen, Adam Kahana, Julien Heidt, Katelyn Polemi, Jacob Kvasnicka, Olivier Jolliet & Justin A. Colacino, *A Comprehensive Analysis of Racial Disparities in Chemical Biomarker Concentrations in United States Women, 1999-2014*, 137 *ENV'T INT'L*, no. 105496 (2020).

94. Juliana Maantay, *Mapping Environmental Injustices: Pitfalls and Potential of Geographic Information Systems in Assessing Environmental Health and Equity*, 110 *ENV'T HEALTH PERSPS.* 161, 161 (2002).

95. BUNYAN BRYANT, ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 5–6 (1995).

96. *Id.*

Environmental justice is the movement that grew up in response to environmental racism and environmental injustice. Invoking core social imaginary ideas of equality and dignity,⁹⁷ environmental justice advocates demand sweeping changes. Advocates call for transparency as to how a wide swath of decisions are made, including where polluting facilities are sited, how environmental laws are enforced, and who is consulted as decisions are being made. By making the harms of environmental racism legible, environmental justice offers a tool for understanding current reality, while simultaneously offering the prescriptive standards for creating a better, more equitable society. Equality is asserted both as a ground norm and the measuring stick by which we assess whether that ground norm has been realized.⁹⁸

But for a Supreme Court determined to limit the scope of equality jurisprudence, U.S. law might have offered a path for rapidly resolving questions of racialized environmental inequality. The Equal Protection Clause of the 14th Amendment provides that “no state shall . . . deny any person equal protection of the law.” Environmental injustice frequently manifests as stark inequality in who is exposed to pollution and whether environmental law violations are rigorously pursued. By its plain terms, the Equal Protection Clause *should* guarantee equal protection under environmental laws designed to protect human health and the environment. However, the Supreme Court has interpreted the 14th Amendment narrowly, concluding that only acts of intentional and invidious racial discrimination violate the constitutional prohibition against unequal protection.⁹⁹ Subjective invidious intent is notoriously difficult to prove. Even vastly discriminatory environmental impacts have been found to provide insufficient evidence of intent to discriminate.¹⁰⁰

97. TAYLOR, *supra* note 6, at 6. Taylor explained that ideas of order, of equality, and of dignity are integral to our social imaginary—to the way we imagine the societies we inhabit and sustain. *Id.* They are at the same time, a component feature, goal, and evaluative device. *Id.*

98. In its dual role, equality functions much like the notion of justice—a social and political imaginary of a universalized ideal that both sets a destination for society and provides a tool for analysis and critique of existing practices. Sultana, *supra* note 25, at 128. Of course, there are myriad ways to measure or resolve injustice, making reaching agreement in the context of any particular situation extremely challenging.

99. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

100. *See, e.g., Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 680 (S.D. Tex. 1979) (finding decision to grant yet another waste permit in a Black neighborhood “unfortunate and insensitive” but did not meet threshold that it was “motivated by purposeful racial discrimination”); *R.I.S.E. v. Kay*, 768 F. Supp. 1141, 1144 (E.D. Va. 1991) (finding no equal protection violation despite evidence that every landfill in the county was located in a Black community, and that Commissioners tasked with approving landfill permits had made overtly racist comments); *East-Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb Cnty. Plan. & Zoning Comm’n*, 706 F. Supp. 880, 885 (M.D. Ga.), *aff’d* 896 F.2d 1264 (11th Cir. 1989) (siting yet another landfill in majority Black community did not establish a “clear pattern of racially motivated decisions”).

Title VI of the Civil Rights Act of 1964 has been similarly defanged as a tool for advancing environmental justice.¹⁰¹ Section 601 provides that “no person in the United States” may be “subjected to discrimination” by a “program or activity” that receives federal financial assistance based on their “race, color, or national origin.”¹⁰² While this language unambiguously bars racial “discrimination” in all federally funded programs, it does not define what constitutes discrimination.¹⁰³ In *Alexander v. Sandoval*, the Supreme Court used this ambiguity to narrow what might otherwise have been read as sweeping equality language, finding that Section 601 only prohibited intentional invidious discrimination and did not bar decisions that had a discriminatory effect.¹⁰⁴ Thus, after *Sandoval*, discrimination claims under Section 601 were limited solely to discrete, hostile acts taken with provably malicious intent.¹⁰⁵ This narrow definition of discrimination blunted Section 601’s scope. It excluded what Justice John Paul Stevens characterized as the subtler form of intentional discrimination—when actors adopted “ostensibly race-neutral” policies with “the predictable and perhaps intended consequence of materially benefitting some races at the expense of others.”¹⁰⁶ Although this cramped interpretation of intentional discrimination has been criticized as “strain[ing] logic,”¹⁰⁷ it nonetheless remains the law of the land.

Section 602 of the Civil Rights Act received similar treatment. This section directs agencies to promulgate regulations “to effectuate” the antidiscrimination prohibition of Section 601 “consistent with achievement of the objectives of the statute.”¹⁰⁸ Section 602 thus provides federal agencies with both a source of regulatory authority and a substantive equality goal toward which that authority should be exercised. Yet, once again, the Supreme Court greatly limited this

101. EPA has been “spectacularly unsuccessful” in enforcing Title VI. Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PENN. J.L. & SOC. CHANGE 281, 306 (2019). Indeed, the EPA has never made a formal finding of discrimination under Civil Rights Act Title VI that led to denying or withdrawing financial assistance to a funding recipient.

102. 42 U.S.C. § 2000d.

103. *Guardians Ass’n v. Civ. Serv. Comm’n*, 463 U.S. 582, 592 (1983) (finding that “[t]he language of Title VI on its face is ambiguous; the word ‘discrimination’ is inherently so”).

104. *Alexander v. Sandoval*, 532 U.S. 275, 279, 285 (2001).

105. See, e.g., Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1396 (1993) (asserting that evidence of disproportionate siting of undesirable uses in minority communities “does not establish that the siting process had a disproportionate effect upon minorities or the poor”).

106. *Alexander*, 532 U.S. at 306 (Stevens, J., dissenting). For a fuller description of how structural racism works and why the narrow focus on bad intent misses structural racism, see generally Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). See also Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 ANNALS OF THE ASS’N AM. GEO. 12, 16–18 (2000) (tracing the interrelationship between residential suburbs and industrial zones, and highlighting the role of White privilege in creating contemporary patterns of environmental racism).

107. *Id.* at 13.

108. 42 U.S.C. § 2000d-1.

authority. First, the Court found that there was no private right of action to enforce a disparate impact regulation promulgated under Section 602.¹⁰⁹ More recently, the Supreme Court advised that racial imbalances alone do not establish disparate impact, expressing a concern about protecting not the public from discrimination, but “defendants from being held liable for racial disparities they did not create.”¹¹⁰ The Supreme Court’s cramped readings of the sweeping language of both the Constitution and the Civil Rights Act stifled the possibility that these laws might become a public advocacy tool for transforming our collective imagining about the relationship between law, justice, and equality.

However, even without private enforcement, federal actors *could* have zealously enforced Title VI to remedy environmental injustice and racism.¹¹¹ Unfortunately, the Environmental Protection Agency (EPA) and other federal agencies failed to live up to their duties.¹¹² Severe and longstanding deficiencies in civil rights enforcement and oversight abound.¹¹³ Combined with a hostile Court, *laissez-faire* agencies hollowed out what should have been a powerful

109. *Alexander*, 532 U.S. at 278.

110. *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

111. Lado, *supra* note 101, at 290–93.

112. U.S. ENV’T PROT. AGENCY OFF. OF THE INSPECTOR GEN., REPORT NO. 20-E-0333: IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS’ TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION (2020) [hereinafter EPA Report NO. 20-E-0333], https://www.epa.gov/sites/default/files/2020-09/documents/_epaig_20200928-20-e-0333.pdf [https://perma.cc/88CP-E3KL] (finding that proactive compliance reviews and improved oversight of Title VI programs “could prevent discrimination”). This may be changing, at least for now. On September 20, 2021, EPA announced its intention to issue guidance clarifying expectations around compliance with Title VI, including how cumulative impacts are considered in permitting. See *Final Report—“Improved EPA Oversight of Funding Recipients’ Title VI Programs Could Prevent Discrimination”—Project No. OA&E-FY19-0357*, Letter from Renee McGhee-Lenart, Acting Director, Off. of Audit & Evaluation, U.S. Env’t Prot. Agency Off. of the Inspector General, to Melissa Hoffer, Acting General Couns., U.S. Env’t Prot. Agency, and Marianne Engelman-Lado, Deputy General Couns. for Env’t Initiatives, U.S. Env’t Prot. Agency. (Sept. 20, 2021), https://www.epa.gov/system/files/documents/2021-10/_epaig_20-e-0333_agency_response2.pdf [https://perma.cc/46CK-96C2]. Since then, EPA has begun scrutinizing state permitting programs for Civil Rights Act compliance. Jeremy Bernstein, *EPA Ramps up Title VI Scrutiny of State Permit Programs amid Policy Review*, INSIDE EPA (Apr. 15, 2022). In April 2022, EPA announced an investigation of whether Louisiana state agencies were violating Title VI in their regulation of hazardous air emissions from chemical plants in the area dubbed “cancer alley.” Victoria St. Martin, *EPA Opens Civil Rights Investigation into ‘Louisiana’s Cancer Alley,’* INSIDE CLIMATE NEWS (Apr. 25, 2022), <https://insideclimatenews.org/news/25042022/epa-louisiana-cancer-alley/> [https://perma.cc/P9UA-5VH2].

113. Throughout its entire history, the EPA has only made one formal finding of discrimination under Title VI. Talia Buford, *Rare Discrimination Finding by EPA Civil Rights Office*, CTR. FOR PUB. INTEGRITY (Jan. 25, 2017), <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/> [https://perma.cc/98W6-V7EG] (finding that the Michigan Department of Environmental Quality had discriminated against Black residents during the permitting of the Genesee Power Station in Flint). That finding, which came almost thirty years after the complaint was filed, merely resulted in an order that Michigan create better public participation processes going forward, and did nothing to remedy the discrimination. *Id.*

statutory tool for justice, turning it into a “tiger without teeth.”¹¹⁴ State officials routinely ignore Title VI in their environmental permitting processes and the EPA has never used its power to withhold or delay funding to ensure civil rights compliance.¹¹⁵

Congress did nothing to rectify this situation. In 1992, Representative John Lewis and Senator (now former Vice-President) Al Gore introduced an Environmental Justice Act which would have, among other things, imposed a moratorium on siting toxic facilities in overburdened communities.¹¹⁶ The Act, which avoided any direct mention of race, died in committee. The next session, with Senator Gore, Representative Lewis reintroduced this Act.¹¹⁷ It again died in committee. For the past thirty years, an Environmental Justice Act has been reintroduced over and over, but has yet to be enacted.¹¹⁸ While the Supreme Court narrowed the scope of nondiscrimination law, Congress failed to encode environmental justice into law. At the same time, executive branch agencies neglected their civil rights enforcement duties.

Yet, the idea of environmental justice nevertheless gained traction as a tangible measure of equality under federal law. In 1994, President Clinton issued Executive Order 12,898, which called upon all federal agencies to make achieving environmental justice part of their mission.¹¹⁹ The EPA subsequently defined environmental justice as “the fair treatment and meaningful involvement

114. See *Environmental Justice: Draft Revised Civil Rights Guidance Clarifies Definitions, Addresses State Issues*, 31 ENV'T REP. 1331 (June 23, 2000) (quoting Russell Hardin, then Director of Michigan's Department of Environmental Quality).

115. Environmental justice advocacy groups have spent more than two decades documenting this lack of enforcement and urging the EPA to fulfill its civil rights obligations. *Enforcement of Civil Rights and Environmental Justice*, Letter from Civil Rights Groups to EPA Administrator Regan (Nov. 24, 2021) (including prior letters as attachments) (on file with author.) For a detailed scope of this problem, see, e.g., EPA Report NO. 20-E-0333, *supra* note 112; U.S. COMM'N ON C.R., ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898, at 1–2 (Sept. 2016), https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf [<https://perma.cc/UDS3-F3XL>] (criticizing EPA's handling of Title VI); Kristen Lombardi, Talia Buford & Ronnie Greene, *Environmental Racism Persists, and the EPA Is One Reason Why*, CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), <https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-reason-why/> [<https://perma.cc/P797-JJG3>] (characterizing EPA's Office of Civil Rights as “more ceremonial than meaningful”); DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 1–2 (Mar. 21, 2011), https://archive.epa.gov/epahome/ocr-statement/web/pdf/epa-ocr_20110321_finalreport.pdf [<https://perma.cc/7VR6-GH2J>] (noting EPA's failure to “adequately adjudicate[]” Title VI complaints).

116. H.R. 5326, 102d Cong. (1992).

117. H.R. 2105, 103d Cong. (1993).

118. The most recent incarnation was introduced by Rep. Raul Ruiz and Sen. Cory Booker. It no longer contains a siting moratorium but instead focuses on requiring federal agencies to create an environmental justice strategy. See H.R. 2343, 117th Cong. (2021); S. 2630, 117th Cong. (2021).

119. Exec. Order No. 12898, 7 C.F.R. 5001.207 (1994). All federal agencies were told to do this by “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of . . . programs, policies, and activities on minority populations and low-income populations . . .” *Id.*

of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹²⁰

Having identified “fair treatment” and “meaningful involvement” as the cornerstones of environmental justice, the EPA built a framework for defining both terms. The EPA recognized that “fair treatment” had substantive components, meaning “no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.”¹²¹ The EPA also fleshed out “meaningful involvement” to mean not only that people have an opportunity to participate in decisions that affect them, but also that the public’s concerns are considered in the decision making process, and can influence the regulatory outcomes.¹²² Rather than a positive definition of what environmental justice is, these two concepts offer a kind of metric for surfacing and evaluating its absence. Thus, we can say with some confidence that any decision involving a lack of meaningful involvement or resulting in a lack of fair treatment is environmental injustice. Yet, this developing body of agency wisdom about environmental justice remains siloed from the agency’s enforcement authority under Title VI.

II.

NEW YORK CITY WASTE HANDLING: A BRIEF INTRODUCTION

Waste handling has been a fraught issue in New York City seemingly forever.¹²³ Following the continually evolving political landscape, communities

120. *Environmental Justice*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/Z2YS-MLHC>]; see also Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469, 470 (2020) (proposing a new definition for environmental justice rooted in vulnerability theory). On the first day of his Administration, President Biden issued Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis emphasizing that the Federal Government must both advance and emphasize environmental justice. Exec. Order No. 13990, 86 C.F.R. 7037 (2021). New York imported this federal definition for environmental justice nearly word for word into the 2019 New York Environmental Justice law. See N.Y. ENV’T CONSERV. LAW § 48-0103(3) (defining environmental justice to mean that “the fair treatment and meaningful involvement of all people regardless of race, color, religion, national origin or income with respect to the development, implementation and enforcement of laws, regulations and policies affecting the quality of the environment”). The New York Environmental Justice Law was enacted in conjunction with the Climate Leadership and Community Protection Act. See Climate Leadership and Community Protection Act, 2019 N.Y. Laws 106. At this writing, it remains to be seen whether New York will also import the EPA’s definitions for fair treatment and meaningful involvement.

121. *Learn About Environmental Justice*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> [<https://perma.cc/W5NF-8W8A>].

122. *Id.*

123. See generally MARTIN V. MELOSI, *FRESH KILLS: A HISTORY OF CONSUMING AND DISCARDING IN NEW YORK CITY* (2020) (describing Fresh Kills landfill’s contentious history); BENJAMIN MILLER, *FAT OF THE LAND: GARBAGE OF NEW YORK - THE LAST 200 YEARS* (2000) (describing waste handling controversies across two centuries of New York City history).

designated as *away* have shifted over time. *Away* was once Rikers Island,¹²⁴ but it was also the New York Harbor,¹²⁵ and for many years it was the Fresh Kills Landfill on Staten Island.¹²⁶ At its peak, Fresh Kills was the largest landfill in the world¹²⁷ and one of the largest human-engineered structures on the planet.¹²⁸ From its opening in 1948 until its final closure in 2001, Fresh Kills Landfill processed virtually all of New York City’s residential waste—some 29,000 tons per day at peak operation.¹²⁹

When Fresh Kills closed in 2001, New York became a national leader in exporting waste.¹³⁰ In the Supreme Court’s inimitable language, New York

124. Rikers Island was originally 87.1 acres. However, New York City used barge loads of waste from Manhattan to provide fill to expand the island by “reclaim[ing]” its shoals. *Riker’s [sic] Island Harbor Line: No Opposition to the Plan of Dumping Refuse There*, N.Y. TIMES (Jan. 17, 1893), https://timesmachine.nytimes.com/timesmachine/1893/01/17/106859628.pdf?pdf_redirect=true&ip=0 [https://perma.cc/3B6Y-JTZP]. The Department of Corrections forced inmates to do the hard labor necessary to expand the island to its current size of 416.5 acres. Jarrod Shanahan & Jayne Mooney, *New York City’s Captive Work Force: Remembering the Prisoners Who Built Rikers Island*, 56 INT’L J.L., CRIME & JUST. 13, 15–19 (2019). The health hazards from this practice became evident almost immediately. *Fumes a Problem at Jail: Board Finds Rikers Island Penitentiary Will Not Be Habitable if Dump Fires Continue*, N.Y. TIMES (Oct. 29, 1931), <https://www.nytimes.com/1931/10/29/archives/copeland-urges-wider-smoke-drive-senator-says-public-must-be.html> [https://perma.cc/366D-SYHQ]. The waste had an unfortunate tendency to catch fire and emit “obnoxious smoke.” *Id.*; see *Riker’s [sic] Island Use as Dump Denounced: State Correction Board Raises Variety of Objections*, N.Y. TIMES (Nov. 27, 1938), https://timesmachine.nytimes.com/timesmachine/1938/11/27/99570997.pdf?pdf_redirect=true&ip=0 [https://perma.cc/QS6A-ACK7]; *Riker’s [sic] Island Dumping Nuisance*, N.Y. TIMES (July 8, 1894), https://timesmachine.nytimes.com/timesmachine/1894/07/08/106911752.pdf?pdf_redirect=true&ip=0 [https://perma.cc/8PGC-ZDMQ]; see also Chelsia Rose Marcius, ‘Filthy Mess’: How Robert Moses Tried to Deal with Rikers’ Methane Gas Problem, DAILY NEWS (Dec. 22, 2019), <https://www.nydailynews.com/new-york/ny-rikers-island-history-environment-methane-gas-20191223-aalt4jqcvbc5gvwag6sjhmorm-story.html> [https://perma.cc/XYT7-SEEX] (connecting current environmental issues at Rikers Island with the Moses era).

125. T.J. ACHREN, INTERSTATE ELECTRONICS CORP. OCEANICS, OCEAN WASTE DISPOSAL IN THE NEW YORK BIGHT, at 1-6 to 1-9 (1973) <https://nepis.epa.gov/Exe/ZyPDF.cgi/94004F6H.PDF?Dockey=94004F6H.PDF> [https://perma.cc/37WQ-49WY] (describing the practices during 85 years of dumping waste into the New York Harbor); *New Jersey v. City of New York*, 283 U.S. 473, 482–83 (1931) (finding New York’s practice of dumping garbage in the harbor to be an abatable nuisance).

126. See generally MARTIN V. MELOSI, FRESH KILLS: A HISTORY OF CONSUMING AND DISCARDING IN NEW YORK CITY (2020) (detailing the history of the Fresh Kills Landfill).

127. JOSEPH BORELLI, LANDFILL REPORT TO CITY COUNCIL 3, <http://council.nyc.gov/joseph-borelli/wp-content/uploads/sites/52/2017/05/Landfill-Report-FINAL.pdf> [https://perma.cc/F6TK-4BRB]. This report documented the adverse health effects Staten Island residents suffered from exposure to the Fresh Kills Landfill. *Id.*

128. MELOSI, *supra* note 126, at 1.

129. *Id.* In the two decades since its closure, Fresh Kills Landfill has been rebranded as Fresh Kills, a vast urban park that is scheduled to open in Spring 2021. Robert Sullivan, *How the World’s Largest Dump Evolved into a Green Oasis*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/nyregion/freshkills-garbage-dump-nyc.html> [https://perma.cc/J3MM-CVCM].

130. In one memorable incident, a barge of trash originating in Islip, New York, was turned away at ports in North Carolina, Louisiana, Mexico, and finally, the nation of Belize in South America. Dick Sheridan, *Trash Fight: The Long Voyage of New York’s Unwanted Garbage Barge*, DAILY NEWS (Aug.

“found] it expedient or necessary” to send its waste to New Jersey.¹³¹ New York was not alone in this, Philadelphia also chose New Jersey as its *away*. Objecting to this status, New Jersey responded by enacting a solid waste management law that banned importation of out-of-state waste.¹³² Many Pennsylvania counties adopted similar bans under the guise of flow control.¹³³ These refusals to become someone else’s *away* threatened the stability of the U.S. consumption-based economic system.¹³⁴ They could not go unchallenged. Cases made their way through state courts and finally arrived before the highest court in the land.¹³⁵ The specific question, though not phrased as such, was whether, the various States, upon joining the Union, nevertheless retained the power to refuse to be *away* for other States. The Supreme Court first had to determine whether the Constitution spoke at all to this issue. After all, it was “settled law that garbage collection and disposal is a core function of local governments,” and thus was potentially a matter left to the state’s police powers.¹³⁶

Concluding that waste was an article of commerce despite being valueless,¹³⁷ the Supreme Court invoked the dormant commerce clause to prevent these kinds of State actions.¹³⁸ Soon after, in *C&A Carbone, Inc. v. Town of Clarkstown*, the Supreme Court reaffirmed and expanded this holding, finding that municipal flow control ordinances unconstitutionally burdened interstate commerce by “hoard[ing] solid waste, and the demand to get rid of it.”¹³⁹ The

14, 2017), <https://www.nydailynews.com/new-york/trash-fight-long-voyage-new-york-unwanted-garbage-barge-article-1.812895> [<https://perma.cc/7S9S-34NM>]. The same problem exists on a global scale. The Basal Ban is an attempt to prevent Europe and the United States from turning most of Africa, South America, and parts of Asia into *away* for their toxic wastes. The *Probo Koala*’s catastrophic dumping in Cote d’Ivoire shows just how much more needs to be done. See Bratspies, *supra* note 56, at 442–43; Zada Lipman, *Trade in Hazardous Waste*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 256 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez & Jona Razzaque eds., 2015).

131. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978).

132. New Jersey Waste Control Act, N.J. Stat. § 13:11 (1974).

133. *Interstate Waste and Flow Control: Hearing Before the S. Comm. on Env’t & Pub. Works*, 107th Cong. 4 (2002) (Pennsylvania Senator Arlen Specter describing the need for local ability to ban out-of-state waste shipments as “a much-needed relief”); *Empire Sanitary Landfill, Inc. v. Com., Dept. of Env’t Res.*, 546 Pa. 315 *passim* (1996).

134. China’s decision to shut its doors to recycled waste imports sent shockwaves through the global waste industry. Cheryl Katz, *Piling Up: How China’s Ban on Importing Waste Has Stalled Global Recycling*, YALE ENV’T 360 (Mar. 7, 2019), <https://e360.yale.edu/features/piling-up-how-chinas-ban-on-importing-waste-has-stalled-global-recycling> [<https://perma.cc/URM6-QQJ7>].

135. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978).

136. *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2nd Cir. 1995).

137. *City of Philadelphia v. New Jersey*, 437 U.S. at 622–23. In a later case, the Court noted that “what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it.” *C&A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 390–91 (1994).

138. *City of Philadelphia v. New Jersey*, 437 U.S. at 625–28 (“The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. . . . [It is an] attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.”).

139. 511 U.S. 383, 392 (1994). In this case, the Court ruled that the article of commerce was not the waste itself, but the service of processing and disposing of it. *Id.*

Court similarly struck down attempts to impose surcharges on waste generated out-of-state, another anti-*away* strategy, finding that higher fees for disposal of waste from other states impermissibly burdened interstate commerce.¹⁴⁰

Embracing the Supreme Court's endorsement of *away* as a waste-handling strategy, New York City rapidly became a massive waste exporter, sending 12,000 tons of waste each day¹⁴¹ to landfills in South Carolina, Virginia, Pennsylvania, Indiana, and Ohio.¹⁴² *Away* became other states, places that "New York [paid] to make its trash go away."¹⁴³ As part of this shift, New York City largely turned to the private sector to fill the infrastructure gaps left by the closure of Fresh Kills. It is a dirty little fact that trash and other waste do not effortlessly whisk themselves from our homes to the place we have designated *away*. Trash is first collected then sorted, grouped, loaded, and transported. Waste transfer stations, where the city's waste is shifted from collection vehicles to long-haul trucks for transport across state lines, loom large as a site of contestation. These waste transfer stations are the intermediaries between individual rubbish bins and the out-of-state landfills that are the ultimate destination of New York City's waste. As such, these facilities are a crucial mid-life stage of the so-called "cradle to grave" waste handling system.¹⁴⁴ Like so many other mid-life crises, the

140. See *Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 99 (1994) (municipal solid waste); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (hazardous waste). Writing in dissent, Justice Rehnquist explicitly recognized that the true issue in *Oregon Waste Systems* was whether actors had an unfettered right to impose their waste on their neighbors. *Or. Waste Sys.*, 511 U.S. at 109 (Rehnquist, J., dissenting).

141. *Environmental Initiatives*, CUNY, <https://www.baruch.cuny.edu/nycdata/environmental/recycling-waste.htm#:~:text=NYC%20residents%20produce%2012%2C000%20tons,of%20NYC's%20landfills%20are%20filled> [https://perma.cc/C8ZU-NTHG].

142. Senator Chafee opened the 1999 *Hearing on Interstate Waste Transportation* with the observation that Pennsylvania, Ohio, Virginia, and Indiana did not want to become the dumping grounds for New York waste. *Interstate Transportation of Municipal Solid Waste: Hearing Before the S. Comm. on Env't & Pub. Works*, 106th Cong. 1 (1999) (statement of Sen. Chafee, Chairman, S. Comm. on Env't & Pub. Works). Yet, in the three decades since that hearing, New York and other major urban centers came to rely more and more on long-haul trucking to transport their waste large distances for disposal. Abby Narishkin, Steve Cameron, Victoria Barranco, Dylan Bank, Dylan Barth & Kaitlyn Wang, *What Happens to NYC's 3.2 Million Tons of Trash*, INSIDER (May 5, 2021), <https://www.businessinsider.com/what-happens-to-new-york-city-trash-2021-3#:~:text=But%20none%20of%20its%20trash,year%20E2%80%94%20to%20get%20it%20there.> [https://perma.cc/WF5Y-99UL]. This reliance means that in addition to the soil and groundwater contamination odors, methane emissions, and other unpleasant consequences at the sites of disposal themselves, our current form of waste handling is also intimately entwined with the additional environmental harms of greenhouse gas emissions, particulate pollution, and other negative impacts from the long-haul trucks themselves.

143. Kirk Johnson, *Council Approves a Long-Term Plan for City Garbage*, N.Y. TIMES (Nov. 30, 2000), <https://www.nytimes.com/2000/11/30/nyregion/council-approves-a-long-term-plan-for-city-garbage.html> [https://perma.cc/A2RP-8FNP] (quoting Queens Councilmember John D. Sabini).

144. Congress enacted the Resource Conservation and Recovery Act (RCRA) as a sweeping statute intended to regulate solid waste from cradle to grave. 42 U.S.C. § 6941, et seq. In Subtitle D, RCRA specified federal standards for the management of solid waste. *Id.*

location of waste transfer stations has long been “a fiercely emotional issue that touches on other urban fault lines, like fairness, class, and race.”¹⁴⁵

New York City’s Charter requires that the City site and manage its facilities according to criteria “designed to further the fair distribution among communities of the burdens and benefits associated with city facilities.”¹⁴⁶ However, this “Fair Share” policy framework applied only to City facilities, and the new waste transfer stations were privately owned.¹⁴⁷ This allowed then-Mayors Giuliani and Bloomberg to turn their backs on equity in siting these new waste transfer stations.¹⁴⁸ Instead of applying a fair share lens, the City turned siting decisions over to a private urban development machine that is largely indifferent to creating an equitable or inclusive city.¹⁴⁹

With no countervailing governmental pressures toward equity, existing social and market forces drove the siting of new waste transfer facilities. It was entirely predictable that active and implicit discrimination,¹⁵⁰ coupled with low land values resulting from the past discrimination¹⁵¹—sometimes referred to as the sedimentation of racial inequality¹⁵²—would steer the overwhelming majority of these waste processing facilities into New York City’s Black and Brown communities.¹⁵³ North Brooklyn, the South Bronx, and Southeast Queens bore the brunt of this process. By ceding control of critical infrastructure siting

145. Kirk Johnson, *To City’s Burden, Add 11,000 Tons of Daily Trash*, N.Y. TIMES (Feb. 28, 2002), <https://www.nytimes.com/2002/02/28/nyregion/to-city-s-burden-add-11000-tons-of-daily-trash.html> [<https://perma.cc/G3DV-5KQV>].

146. N.Y.C. Charter §§ 203–204 (added in 1989).

147. N.Y.C. COUNCIL, DOING OUR FAIR SHARE, GETTING OUR FAIR SHARE 6, 11–12 (Feb. 2017), <https://council.nyc.gov/wp-content/uploads/2017/02/2017-Fair-Share-Report.pdf> [<https://perma.cc/782C-5JGV>].

148. Bloomberg used the City’s financial downturn as justification for renegeing on a commitment that each borough would handle its own wastes post-Fresh Kills. Johnson, *supra* note 145.

149. See generally Orly Linovski, *Shifting Agendas: Private Consultants and Public Planning Policy*, 55 URB. AFFS. REV. 1666 (2018) (showing how private consultants give developers an outsized voice in public land use decisions and help limit the array of options considered).

150. Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV’T L. REV. 363, 364–72 (2019) (demonstrating the ongoing role of racial discrimination in siting locally-undesirable land uses).

151. See Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM 101, 101 (Charles M. Haar & Jerold S. Kayden eds., 1989) (describing how zoning permits, and sometimes even promotes, the siting of disruptive, incompatible uses in Black neighborhoods). Through a process Rabin calls “expulsive zoning” minority neighborhoods become dumping grounds for undesirable land uses steered there in lieu of siting in whiter, more politically powerful neighborhoods. *Id.* These uses diminish quality of life and undermine the stability of the neighborhood. *Id.*

152. MELVIN L. OLIVER & THOMAS SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 5 (1995).

153. See Rabin, *supra* note 151 (describing how zoning permits, even promotes, siting of disruptive, incompatible uses that diminish the quality and undermine the stability of Black neighborhoods). As Professor Sumudu Atapattu reminded us, “Environmental injustices have causes elsewhere. We need to adopt a more holistic approach to address them.” Sumudu Atapattu, Remarks at the Global Network for Human Rights and the Environment Book Launch (May 18, 2021).

decisions to private corporate governance,¹⁵⁴ the City locked inequality into its waste handling infrastructure. Two decades later, New York City was left with a system in which twenty-six of New York City’s thirty-eight private waste transfer stations were located in four communities of color.¹⁵⁵ Collectively, these communities processed 73 percent of the City’s average daily waste.¹⁵⁶

To say that waste transfer stations tend not to be desirable neighbors is a serious understatement. These facilities have an enormous environmental footprint, with thousands of loud, dangerous, heavy diesel trucks crisscrossing host communities at all hours of the day and night, spewing particulates, nitrous oxides, and other pollutants into the air. Just as landfills have invariably been located in environmental justice communities that the broader society has agreed to identify as disposable, so too are waste transfer stations, which can be thought of as *away*’s way stations.¹⁵⁷ Most of the waste processed in these facilities comes from outside the host communities. These facilities are integrated into a regional waste stream that serves the economic needs of the region and the waste industry at the expense of the neighborhoods designated *away*. An endless stream of trucks funnels the entire City’s waste into a handful of communities, thereby concentrating burdens onto these communities.¹⁵⁸ The result is degraded air quality, excess noise and traffic, and other negative health and environmental conditions in these *away* communities. The disproportionate concentration of waste handling activities depresses property values for existing residents, displacing other, more desirable economic activity, and inhibiting community revitalization plans. It also simultaneously liberates other, typically wealthier and Whiter, communities from bearing any share of those burdens.

New York City’s overburdened communities did not, and do not, view themselves as disposable.¹⁵⁹ They reject the characterization of their

154. See MILLER, *supra* note 123, at 246–247.

155. According to City Council, the vast majority of the City’s private waste transfer stations are located in Bronx Community Districts 1 and 2, Brooklyn Community District 1 and Queens Community District 12. N.Y.C. Council, Int. 0157-2018-C, at 3 (2022), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3331918&GUID=B730F207-D5EF-45B3-9F9E-9F356EFC58C0> [<https://perma.cc/C7EL-7FMQ>]. The waste transfer stations that this project considers are in Queens Community District 12.

156. *Id.* at 4 (citing information provided by the New York City Department of Sanitation (DSNY)).

157. Charles Mills theorized that the way that Black neighborhoods and spaces are characterized by White power structures as waste spaces supports this disparity: “Since these are already waste spaces, it is only appropriate that the waste products of industrialization should be directed toward them.” Charles W. Mills, *Black Trash*, in *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE* 73, 89 (Laura Westra & Bill E. Lawson eds., 2d ed. 2001).

158. Purnell, *supra* note 8, at 61 (discussing the perceived relationship between dirty streets and low status, and describing the City’s failure to provide adequate sanitation service as adding “a racial insult to an already odiferous injury”).

159. 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, 24 (2019).

communities as waste spaces¹⁶⁰ and have continuously fought against administrative and private decisions that co-opt them into being *away* for the rest of the City. Through fierce and persistent public advocacy, they convinced the New York City Department of Sanitation (DSNY) to enact a new Solid Waste Management Plan in 2006. This Plan, known as the Waste Equity Plan, began to tackle the glaring racial disparities between the communities burdened with waste transfer stations and the communities that used these facilities.¹⁶¹ The Plan's central commitment was that "responsibility for the City's waste management system should be allocated equitably throughout the City, in each of the five boroughs."¹⁶² This commitment was a critical first step toward dismantling the system that routinely transferred environmental burdens away from underburdened communities. It created the possibility of an internalization process that would force underburdened communities to shoulder a portion of the burdens they create—to have some skin in the game of waste management.

Community leaders from overburdened communities continued to pressure for change under the banner of the *Transform Don't Trash Coalition*.¹⁶³ In 2018, City Council responded by enacting Local Law 152, the Waste Equity Law, which required that DSNY dramatically reduce permitted capacity at waste transfer stations in the four overburdened community districts.¹⁶⁴ This law grew from an explicit recognition that these neighborhoods had unfairly been turned into dumping grounds for the City's waste.¹⁶⁵ These same community leaders later promoted an additional City Council enactment, Local Law 199, which radically overhauled the City's commercial waste program.¹⁶⁶ This Local Law,

160. For a detailed analysis of the way that ideas of pollution and dirtiness undergird structural racism in the United States, see generally ZIMRING, *supra* note 58.

161. One of the leading forces behind this Waste Equity Plan, the New York City Environmental Justice Alliance, characterized the 2006 plan as a "long-term vision to mitigate the inequity, pollution and public health impacts from years of sending more than three-quarters of the City's garbage—and hundreds of diesel trucks each day—to just three neighborhoods where residents are predominantly people of color." Brief for New York City Environmental Justice Alliance et al. as Proposed Amici Curiae Supporting Respondents, *Nat'l Waste & Recycling Ass'n v. City of New York*, No. 101686/2018, 2019 N.Y. Misc. LEXIS 5312, at *2–*3 (Sup. Ct. N.Y. Cnty. Oct. 3, 2019), <https://nylpi.org/wp-content/uploads/2019/04/Amicus-Executed-PDFA.pdf> [<https://perma.cc/XK4X-P5K3>].

162. N.Y.C. DEP'T OF SANITATION, FINAL COMPREHENSIVE SOLID WASTE MANAGEMENT PLAN: EXECUTIVE SUMMARY 2 (Sept. 2006), https://dsny.cityofnewyork.us/wp-content/uploads/2017/12/about_swmp_exec_summary_0815.pdf [<https://perma.cc/H5FU-CM2T>].

163. TRANSFORM DON'T TRASH NYC, <http://transformdonttrashnyc.org/> [<https://perma.cc/6DYY-KQ55>].

164. Local Law 152 reduced permit capacity by 50 percent in Brooklyn's Community District 1, and by 33 percent in the Bronx Community Districts 1 and 2, and Queens Community District 12. *See* N.Y.C. Admin. Code § 16-498.

165. *See Mayor de Blasio and Speaker Johnson Celebrate Signing of Waste Equity Legislation*, CITY OF N.Y. (Aug. 16, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/417-18/mayor-de-blasio-speaker-johnson-celebrate-signing-waste-equity-legislation> [<https://perma.cc/N88Z-YWP5>].

166. N.Y.C. Local Law 199 (Nov. 20, 2019), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3963901&GUID=6D5F166D-1834->

which is still in the implementation phase, is intended to “bring[] much needed reform to an industry known for dangerous, unhealthy, and unsustainable conditions.”¹⁶⁷ By dividing the City into zones for commercial waste processing, with only a few carters operating per zone, this law is expected to halve the heavy-duty truck miles associated with collecting and transporting this waste. This in turn will reduce the pollution, noise, and safety burdens on the communities that house waste transfer stations.¹⁶⁸

These local laws show that communities can successfully organize for change. Yet, each victory is precarious and partial. Recently, the City Councilmember for one of these districts, Daneek Miller, introduced a bill¹⁶⁹ that would have undermined the 2018 Waste Equity Bill by allowing increased waste imports to two facilities in his District.¹⁷⁰ Using a series of unusual procedural maneuvers that limited public participation,¹⁷¹ Miller sought to fast-track this bill through City Council. He was nearly successful. It was only after corruption allegations surfaced at the last minute that City Council pulled the bill just before the final vote was to occur.¹⁷²

4EDD-BF64-DA5D1DD88C61&Options=ID%7Ctext%7C&Search=1574 [https://perma.cc/WL36-M664].

167. *Mayor de Blasio Signs Landmark Legislation to Reform Commercial Waste Collection Industry*, CITY OF N.Y. (Nov. 20, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/556-19/mayor-de-blasio-signs-landmark-legislation-reform-commercial-waste-collection-industry> [https://perma.cc/5TXU-Y7YU].

168. The Jamaica community was recently dismayed to learn that the waste transfer stations were proposing an expansion, relying on a loophole in the law for stations that convert from long-haul trucks to rail as the means of out-of-state transport. Christine Chung, *Council Fast-Tracks Exceptions from Landmark Waste Equity Law, Enraging Queens Residents*, CITY (July 28, 2021), <https://www.thecity.nyc/environment/2021/7/28/22599204/council-waste-equity-law-exceptions-queens> [https://perma.cc/4ACT-DDYG].

169. N.Y.C. Council, Int. 2349-2021-A, Increasing Transfer Station Permitted Capacity for Export by Rail (June 17, 2021), <https://nyc.legistar.com/LegislationDetail.aspx?ID=4985169&GUID=2DA959ED-1EB6-440A-B695-9A7B192B0718&Options=ID%7Ctext%7C&Search=2349> [https://perma.cc/SP2Z-793S].

170. Danielle Muoio Dunn, *‘Slicing a Big Hole’: Residents, Environmentalists Decry Effort to Roll Back Waste Equity Law*, POLITICO (July 27, 2021), <https://www.politico.com/states/new-york/city-hall/story/2021/07/27/slicing-a-big-hole-residents-environmentalists-decry-effort-to-roll-back-waste-equity-law-1389009> [https://perma.cc/PUU3-AHWE].

171. Testimony of Rebecca Bratspies on behalf of the Ctr. for Urb. Env’t Reform Before the N.Y.C. Council Comm. on Sanitation & Solid Waste (June 24, 2021); N.Y. LAWS FOR THE PUB. INT., MEMO IN OPPOSITION: PROPOSED INT. NO. 2349-A (2021), <https://www.nylpi.org/wp-content/uploads/2021/07/Memo-of-Opposition-Intro-2349A-NYC-EJA-NYLPI-NRDC.pdf> [https://perma.cc/22HA-6GXT]. For details of what happened, see *infra* notes 231–235 and accompanying text.

172. Nolan Hicks, *Corey Johnson Pulls Bill He Fast-Track for Queens Ally After Questions*, N.Y. POST (July 29, 2021), <https://nypost.com/2021/07/29/council-speaker-corey-johnson-fast-tracks-carting-bill-for-ally/> [https://perma.cc/WTQ5-C5BD].

III.

TWO WASTE TRANSFER STATIONS: A STUDY IN UNEQUAL PROTECTION

What made New York City's 2006 Solid Waste Management Plan special was the intentional use of an equity lens to identify how waste-handling burdens were spread across the City. This focus on equity was a direct result of advocacy from grassroots environmental justice organizations that tirelessly documented the many ways the current system placed undue burdens on New York's low-income communities of color.¹⁷³ In adopting the Plan, the City explicitly acknowledged the injustice inherent in the current waste handling system and sought to establish a network of marine and rail transfer stations in other neighborhoods in order to minimize the existing burdens on these communities. Plans to site one of these waste transfer stations at 91st Street on the Upper East Side became a flashpoint and testing ground for the City's commitment to equity.

A. *91st Street Marine Transfer Station: The Taj Mahal of Waste Transfer Stations*

The thrust of the environmental justice movement has been to call into question the acceptability of current distributions of environmental burdens and benefits and to advocate for change that equalizes burdens. When the City's commitment to environmental justice moved beyond formal incantations of equality to taking actual steps toward equity by shifting burdens from overburdened to underburdened communities, the backlash was swift and harsh. The comparatively wealthy, comparatively White community that was designated to be home to the 91st Street waste transfer station as part of the waste equity plan organized itself under a narrative focused wholly on the negative impacts the proposed facility would have on *their* community. This narrative evaluated the 91st Street waste transfer station in isolation, without regard to the overall distribution of such facilities across the City.¹⁷⁴

The neighborhood around the 91st Street facility is "pleasant" and "relatively quiet" with extensive residential areas.¹⁷⁵ It is part of the Upper East Side of Manhattan, one of the Whitest¹⁷⁶ and wealthiest neighborhoods in the

173. Key to the adoption of this plan were environmental justice groups WEACTION, UPROSE, and NYC-EJA. JULIE SZE, NOXIOUS NEW YORK: THE RACIAL POLITICS OF URBAN HEALTH AND ENVIRONMENTAL JUSTICE 140–141 (2006). Probably no single person did more to make this plan a reality than Eddie Bautista, the leader of NYC-EJA. See generally Affidavit of Eddie Bautista, Nat'l Waste & Recycling Ass'n v. City of New York, 2019 N.Y. Misc. LEXIS 5312 (2018) (No. 101686/2018) (describing his role in the Solid Waste Management Plan, and in environmental justice advocacy more generally).

174. Cheryl Harris describes this phenomenon in detail. Harris, *supra* note 106, at 1713.

175. 3 N.Y.C. DEP'T OF SANITATION, COMMERCIAL WASTE MANAGEMENT STUDY: ENVIRONMENTAL REVIEW: EAST 91ST STREET CONVERTED MTS, app. A, at 10-44 (2004).

176. More than 72 percent of the residents are White, while roughly 2.5 percent are Black. *Upper East Side, MN08*, N.Y.U. FURMAN CTR., <https://furmancenter.org/neighborhoods/view/upper-east-side> [<https://perma.cc/2YYQ-KEY2>].

City, with just 7.2 percent of residents living in poverty.¹⁷⁷ The median household and family income in the neighborhood are notably higher than the citywide medians, and the neighborhood has a significantly lower percentage of children living in poverty than the rest of Manhattan or the City as a whole.¹⁷⁸ Residents are more than twice as likely to hold college degrees than City residents overall.¹⁷⁹ Upper East Side residents experience better-than-average health outcomes across a number of dimensions. Childhood asthma hospitalizations occur at a rate of one quarter of the city-wide average.¹⁸⁰ During the COVID-19 pandemic, this area maintained one of the lowest case counts per capita in the city.¹⁸¹ New York City and New York State designate most of this area as not an environmental justice community.¹⁸²

The design proposed for the 91st Street waste transfer station reflected the affluence of its neighbors, with an esplanade providing aesthetic enhancements, and trees planted near the facility to “soften[]” the appearance of the structure.¹⁸³ Even so, siting a waste transfer station in this neighborhood surfaced the unspoken, highly racialized hierarchy that more commonly determines which communities need an *away*, and which communities are the *away*.

Habituated as the Upper East Side was to an environmental baseline that prioritized their community at the expense of others, any move toward bearing their equal share seemed to this community like an undue burden.¹⁸⁴ A spokesperson for then-Mayor Bloomberg responded to community objections by reiterating that “[i]n order to achieve that fairness, each borough must manage

177. This is the second-lowest poverty level in the City. Only Tottenville in Staten Island has a lower poverty rate. See N.Y.C. HEALTH, COMMUNITY HEALTH PROFILES 2015: MANHATTAN COMMUNITY DISTRICT: UPPER EAST SIDE 8 at 6 (2015), <https://www1.nyc.gov/assets/doh/downloads/pdf/data/2015chp-mn8.pdf> [<https://perma.cc/KTT6-9GDY>].

178. Indeed, more than one-third of the residents have a household income exceeding \$100,000. N.Y.U. FURMAN CTR., *supra* note 176.

179. *Community District Profiles: Manhattan Community District 8*, NYC PLAN., <https://communityprofiles.planning.nyc.gov/manhattan/8#indicators> [<https://perma.cc/S9EQ-TFVN>] (reporting that 80.5 percent of residents have college or higher degrees versus 37.4 percent for the city overall).

180. NYC HEALTH, *supra* note 177. The asthma hospitalization rate in this neighborhood is 8 per 10,000 children, compared to 36 per 10,000 for the City as a whole. *Id.*

181. 6,951.99 cases per 100,000 people. *Covid-19: Data*, N.Y.C. HEALTH, <https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page#zip> [<https://perma.cc/4F4Y-9YR7>].

182. *Maps & Geospatial Information System (GIS) Tools for Environmental Justice*, N.Y. DEP’T OF ENV’T CONSERV., <https://www.dec.ny.gov/public/911.html> [<https://perma.cc/35C5-P6BA>]; *Environmental Justice Areas*, N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, <https://nycdohmh.maps.arcgis.com/apps/instant/lookup/index.html?appid=fc9a0dc8b7564148b4079d294498a3cf> [<https://perma.cc/Z84A-H8JL>].

183. N.Y.C. DEP’T OF SANITATION, *supra* note 175, at 10-37.

184. Mireya Navarro, *In Fight Against Trash Station, Upper East Side Cites Injustice*, N.Y. TIMES (June 30, 2011), <https://www.nytimes.com/2011/07/01/science/earth/01garbage.html> [<https://perma.cc/V4SR-XD83>].

its own waste—and that includes Manhattan. No exceptions.”¹⁸⁵ The mostly White neighborhood tried to showcase New York City Housing Authority (NYCHA) residents and “minority children” as the face of their movement.¹⁸⁶ Then-Councilmember Melissa Mark Viverito, who represented a genuinely overburdened Bronx district, accused these Upper East Side residents of mischaracterizing themselves as an environmental justice community and using inflammatory mailings to “try[] to undo the hard work that actual environmental justice communities put in for decades.”¹⁸⁷

To a community accustomed to having their underburdened status invisibilized and normalized, this was a staggering response. The siting decision seemed to Upper East Side residents to be the disruption of a valid, preexisting distribution of burdens. Imbued with this belief, scores of Upper East Side residents flooded the City’s first-ever environmental justice hearing with complaints about the 91st Street station, seemingly oblivious that the siting of this facility on the Upper East Side was a *remedy* for past environmental injustice.¹⁸⁸

It took more than a decade, but the 91st Street Marine Waste Transfer Station finally opened in 2019.¹⁸⁹ Manhattan now has a waste transfer station capable of handling up to 1,860 tons of waste per day, reducing its need for *away*. And the facility is the Taj Mahal of waste transfer stations—clean and quiet, with a negative air pressure system, rapid roll-up doors, odor control systems, and

185. Gena Mangiaratti, *Defeated in Court, Waste Station’s Foes Take to the Streets*, CITYLIMITS (June 30, 2011), <https://citylimits.org/2011/06/30/defeated-in-court-waste-stations-foes-take-to-the-streets/> [<https://perma.cc/4ATM-3XZ8>] (quoting an email from Mayoral Spokesperson Julie Woods).

186. Jackie Ludorf, Jane Swanson, and Carol Tweedy, Testimony at the Environmental Justice Information Meeting (Apr. 19, 2007). One repeatedly emphasized talking point involved services provided to poor “minority children,” specifically free swimming lessons at Asphalt Green, the nearby park. Yet, when asked by Councilmember Donovan Richards how many NYCHA residents participated in this Asphalt Green program, the Director had no idea of the answer. See *Oversight - Air Quality Impacts and Ways to Measure and Address Them in NYC Environmental Justice Communities: Hearing Before the N.Y.C. Council Comm. on Env’t Prot.*, N.Y.C. COUNCIL, at 00:03:46 (2014), <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=297608&GUID=506234C3-5D78-48BF-B74D-B458DD269A4B&Options=&Search=> [<https://perma.cc/6TEW-WW2G>] (statement of Donovan Richards, Councilmember, N.Y.C. Council).

187. Melissa Mark-Viverito, *Taking on Our Fair Share of the City’s Waste Burden*, HUFFPOST (Sept. 18, 2012), https://www.huffpost.com/entry/nyc-trash_b_1686656 [<https://perma.cc/KJ3S-LUJ8>].

188. Indeed, the neighbors opposed to the 91st Street Waste Transfer Station not only packed City Council’s first ever hearing on environmental justice, but they unironically labeled themselves environmental justice advocates. See *Oversight - Air Quality Impacts and Ways to Measure and Address Them*, *supra* note 186. Then-Councilmember Donovan Richards, who chaired the proceedings, asked these advocates where they would like the trash to go instead. *Id.* at 00:3:30.

189. Mallory Szczepanski, *An Exclusive Look at the 91st Street Marine Transfer Station in New York*, WASTE360 (May 23, 2019), <https://www.waste360.com/transfer-stations/exclusive-look-91st-street-marine-transfer-station-new-york> [<https://perma.cc/B3WP-3LZE>].

sealed containers.¹⁹⁰ DSNY touted the facility as “state-of-the-art” and “designed to be the very best possible neighbors.”¹⁹¹

The fact that New Yorkers enjoying the East River Greenway routinely pass by the 91st Street Waste Transfer Station without even realizing what goes on inside is proof that waste handling need not turn a community into *away*. Without inventing any new technology, the city’s waste can be handled without overburdening host communities. All that is required is an appropriate physical plant, and a commitment to proper management. Moreover, siting this facility in a community accustomed to sending its waste *away* spurred a significant reduction in the waste these neighborhoods generated.¹⁹² When waste disposal has a feedback loop to waste generation, it creates incentives to reduce impacts— incentives that the *away* strategy removes.

B. Waste Transfer Stations in Jamaica, Queens: A Stark Contrast

While the 91st Street station shows what is possible, it also calls into question why lower standards are tolerated in other communities. For example, just a few miles from the Upper East Side, the neighborhood of Jamaica, Queens plays unwilling host to two dirty, smelly waste transfer stations that are far from state-of-the-art.¹⁹³ The roll-up door at one of the facilities stays open continually, and there is no odor control or negative air pressure system. The noise, dust, and

190. Letter from N.Y.C. Dep’t of Sanitation Commissioner Kathryn Garcia to East Side Elected Officials and Community Advisory Group, (Jan. 25, 2018), <https://benkallos.com/press-release/letter-new-york-city-department-sanitation-commissioner-kathryn-garcia> [<https://perma.cc/N4P2-JY4Q>]. For more details on these pollution and odor controls, see Szczepanski, *supra* note 189.

191. Letter from N.Y.C. Dep’t of Sanitation Commissioner Kathryn Garcia, *supra* note 190. Contemporary news reports emphasized that, because of its wealthy and well-connected population, neighborhood “clout” would ensure the regulations designed to control noise, odor, and vermin were actually enforced. Stanley N. Alpert, *Be Our Guest: Building the 91st St. Waste Transfer Station Makes Good Sense, Economically and Environmentally*, DAILY NEWS (Sept. 15, 2013), <https://www.nydailynews.com/new-york/guest-build-91st-st-waste-transfer-station-article-1.1456691> [<https://perma.cc/SG2Z-2GK6>].

192. Brendan Krisel, *City Downsizes Plan for UES Marine Transfer Station*, PATCH (Mar. 15, 2018), <https://patch.com/new-york/upper-east-side-nyc/city-downsizes-plan-ues-marine-transfer-station> [<https://perma.cc/ZB7E-A7PH>] (tying 25 percent decrease in waste serviced at the facility to recycling and conservation efforts in the communities served by the facility).

193. The insights, suggestions, and proposals in this Article grow from an on-going research and advocacy project related to waste equity. *Community-Led Investigation of Air Quality and Environmental Injustice in Proximity to Two Waste Transfer Stations in Jamaica, Queens*, ICAHN SCH. OF MED. AT MOUNT SINAI (Jan. 13, 2021), http://tceee.icahn.mssm.edu/pilot_projects/awarded-pilot-projects-2/ [<https://perma.cc/QRZ5-RZZA>]. At the behest of local community groups, the project emerged to identify and try to remedy the environmental health impacts from the waste transfer stations in this community. It is a collaboration between CUNY School of Law, York College, a nearby NYC Public School (Institute for Health Professions High School), Mt. Sinai’s Pediatric Environmental Health Clinic and the Queens Solid Waste Advisory Board. Part of the goal of this research is to disrupt what Farhana Sultana has called “the taken-for-grantedness” of what knowledge and whose expertise gets to ‘count.’ It does so by centering community voices in the research process, and by naming community leaders as co-investigators. Farhana Sultana, *Decolonizing Development Education and the Pursuit of Social Justice*, 12 HUM. GEOGRAPHY 31, 36 (2021).

odor from the facilities cast a pall over an entire neighborhood. The stark disparities between the clean, odor-free 91st Street Waste Transfer Station and the noxious Jamaica waste transfer stations illustrate how environmental racism sets vastly different baselines for what is considered an acceptable environmental burden in different communities within the same City.

The profiles of the two neighborhoods are strikingly different. Jamaica, Queens is one of the four communities that New York City's Waste Equity Law identified as disproportionately impacted by waste transfer stations.¹⁹⁴ Unlike the Upper East Side, more than 90 percent of Jamaica residents are people of color, and nearly a third live below the poverty line.¹⁹⁵ The wider neighborhood, Queens Community District 12, has a similar demographic, with 90.3 percent of residents identifying as Black, Latinx, or Asian.¹⁹⁶ Both New York City and New York State identify the neighborhood as an environmental justice community.¹⁹⁷ Jamaica has one of the highest levels of food insecurity in the City,¹⁹⁸ and just over 30 percent of households are severely rent burdened.¹⁹⁹ Nearly a quarter of Jamaica residents do not have health insurance.²⁰⁰ The childhood asthma hospitalization rate in this neighborhood is five times the rate of wealthier, Whiter neighborhoods of the City,²⁰¹ and the adult asthma hospitalization rate is double the Queens average.²⁰² COVID-19 starkly revealed the connection between these racial and economic demographics and the health outcomes in this area. Jamaica has consistently been one of the areas of the City hit the hardest by

194. N.Y.C. Council, *supra* note 155, at 4. Note, these communities were identified by Community Board District, rather than by City Council District. Queens Community Board 12 is represented in City Council by I. Daneek Miller (City Council District 27) as well as by Adrienne Adams (District 28) Karen Koslowitz (District 29). The waste transfer stations are located in District 27. These are the waste transfer stations that were the intended beneficiaries of Councilmember Miller's Intro 2349A, which would have rolled back the limitations that the 2018 Waste Equity Law imposed on these facilities.

195. *Maps & Geospatial Information System (GIS) Tools for Environmental Justice*, *supra* note 182.

196. *Jamaica/Hollis: QN12*, N.Y.U. FURMAN CTR., <https://furmancenter.org/neighborhoods/view/jamaica-hollis> [<https://perma.cc/AUK2-KUWU>].

197. *Maps & Geospatial Information System (GIS) Tools for Environmental Justice*, *supra* note 182.

198. Naeisha Rose, *These Queens Neighborhoods Have the City's Highest Levels of Food Insecurity*, QNS (Nov. 26, 2018), <https://qns.com/2018/11/queens-neighborhoods-citys-highest-levels-food-insecurity/> [<https://perma.cc/3MT6-ZVNE>].

199. *Jamaica/Hollis: QN12*, *supra* note 196 (defining severely rent burdened as spending more than 50 percent of household income on rent).

200. N.Y.C. HEALTH, COMMUNITY HEALTH PROFILES 2015, QUEENS COMMUNITY DISTRICT 12 at 10, <https://www1.nyc.gov/assets/doh/downloads/pdf/data/2015chp-qn12.pdf> [<https://perma.cc/442W-S5MT>].

201. *Id.* at 12. In Queens Community District 12, 32 out of every 10,000 children are hospitalized for asthma as opposed to 21 in Queens overall and levels as low as 6 in the wealthiest neighborhoods. *Id.*

202. *Id.* This neighborhood has the highest rate of adult asthma hospitalization in Queens, affecting 231 out of every 100,000 adults compared to 141 in Queens overall. *Id.*

COVID-19.²⁰³ The EPA’s environmental justice screen shows elevated levels of pollutants like Ozone, Diesel, and PM_{2.5} in this area.²⁰⁴

Like the 91st Street station, the Jamaica facilities receive collection trucks with multiple types of solid waste. However, where the 91st Street station is a marine transfer station, the Jamaica facilities load the sorted and processed waste onto heavy-duty diesel trucks bound for out-of-state landfills. The Jamaica facilities are directly across the street from a residential neighborhood of mostly one- and two-family homes²⁰⁵ and Detective Keith L. Williams Park, a large urban park with ball fields, playgrounds, and other amenities.²⁰⁶ The 91st Street station is also relatively close to an urban park—Asphalt Green.²⁰⁷ However, while significant steps were taken to ensure that the 91st Street facility does not impact the park,²⁰⁸ the same cannot be said of the Jamaica facilities. The odor and dust from the facilities makes the Detective Keith Park all but unusable on many days.²⁰⁹

Both Jamaica facilities hold permits from the State Department of Environmental Conservation (DEC), and the City Department of Sanitation. These permits impose maximum throughput limits,²¹⁰ allow 24-hour per day operations Monday through Friday,²¹¹ and set minimum standards for operation,

203. See, e.g., *Coronavirus News: 12 NYC Neighborhoods with COVID-19 Positivity Rates Above 3%*, ABC NEWS (Oct. 5, 2020), <https://abc7ny.com/covid-spike-compliance-order-shutdown-nyc-coronavirus/6759977/> [<https://perma.cc/3MWZ-83UY>]; *In 2020 NeON Summer Served the Neighborhoods Hardest-Hit by COVID-19*, NYC NEIGHBORHOOD OPPORTUNITY NETWORK, <https://www1.nyc.gov/site/neon/programs/covid-neighborhoods.page> [<https://perma.cc/HW63-2YRV>].

204. See *EPA’s Environmental Justice Screening and Mapping Tool (Version 2.0)*, U.S. ENV’T PROT. AGENCY, <https://ejscreen.epa.gov/mapper/> [<https://perma.cc/H4PZ-L6JF>]. For an account of how these conditions burden residents, see Gloria Boyce-Charles, Opinion, *Tractor-Trailers Clogging Queens Residential Streets*, DAILY NEWS (Sept. 6, 2022), <https://www.nydailynews.com/opinion/ny-opened-get-these-hulking-trucks-out-of-our-neighborhood-20220906-r3caoinvvhijlsxhikijjpdmm-story.html> [<https://perma.cc/VMT7-R3CJ>] (focusing on cargo trucks).

205. See *Queens Community District 12 - Land Use*, N.Y.C. PLAN., https://docs.google.com/viewer?url=https://raw.githubusercontent.com/NYCPlanning/labs-cd-files/master/landuse/qn12_landuse.pdf [<https://perma.cc/MT79-TDMZ>].

206. Jill Sifah Sigman, *Waste Equity and the Law: An Analysis of the Legal Context Surrounding Two Permitted Waste Transfer Stations in Jamaica, Queens 7* (Jan. 16, 2021) (unpublished manuscript) (on file with author).

207. See ASPHALT GREEN, <https://asphaltgreen.org/ues> [<https://perma.cc/829D-PP6T>].

208. Arlene Karidis, *Manhattan Marine Transfer Station Moves Forward Despite Opposition*, WASTE360 (Aug. 30, 2016), <https://www.waste360.com/transfer-stations/manhattan-marine-transfer-station-moves-forward-despite-opposition> [<https://perma.cc/GQT8-G5WJ>].

209. Chung, *supra* note 168 (quoting residents).

210. American Recycling Management is permitted for 850 tons per day of putrescible solid waste and 150 tons per day of construction and demolition debris. N.Y. Dep’t Env’t Conservation Permit No. 2-6307-00108/00002 (July 11, 2019) (issued to American Recycling Management LLC) (on file with author). Regal is permitted for 600 tons per day of municipal solid waste and 266 tons per day of construction and demolition debris. N.Y. Dep’t Env’t Conservation Permit No. 2-6307-000008/000007 (May 20, 2020) (issued to Regal Recycling Co. Inc.) (on file with author).

211. N.Y. Dep’t Env’t Conservation Permit No. 2-6307-000008/000007, *supra* note 210. Regal is also permitted to operate 24 hours on Saturday. *Id.* American can also operate on Saturdays, though

safety, and environmental protection under authority delegated to the DEC by the State Legislature²¹² and to the Department of Sanitation by City Council.²¹³ New York State regulations spell out the general operating requirements for permitted waste transfer facilities. There are regulations governing leachate,²¹⁴ containment,²¹⁵ litter,²¹⁶ dust,²¹⁷ odor,²¹⁸ and noise.²¹⁹ These regulations are translated into permit conditions supposedly crafted to prevent the facilities from negatively impacting the health and welfare of those living adjacent to them. The permits make the operation of facilities contingent on strict compliance with permit conditions and all applicable regulatory and legal requirements.²²⁰ In theory, these restrictions are designed to ensure that the facilities do not unreasonably interfere with the ability of neighbors to use and enjoy their property.

Yet, even with all these regulations, the Jamaica facilities are “locally undesirable land uses” (LULUs) that immensely burden the hosting community by degrading quality of life, making people sick, and lowering property values. Jamaica residents living near the facilities routinely complain of foul odors, diesel exhaust, waste blowoff and leachate, and noise. Disruption from these facilities and trucks disturb the quiet enjoyment of their property on a daily basis.²²¹ In the summer, the stench emanating from these waste transfer stations is so unbearable that residents are unable to use their backyards or open their windows.²²² Waste transfer center and recycling station operator, American

with more limited hours. N.Y. Dep’t Env’t Conservation Permit No. 2-6307-00108/00002, *supra* note 210.

212. N.Y. ENV’T CONSERV. LAW, art. 27 (LexisNexis 2022).

213. N.Y.C. Charter § 751–55; N.Y.C. Admin. Code § 16-131.

214. N.Y. COMP. CODES R. & REGS. tit. 6, § 360.19 (2022). Leachate is “formed when rain water filters through wastes placed in a landfill. When this liquid comes in contact with buried wastes, it leaches, or draws out, chemicals or constituents from those wastes.” *Municipal Solid Waste Landfills*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/landfills/municipal-solid-waste-landfills#:~:text=Leachate%20formed%20when%20rain%20water,or%20constituents%20from%20those%20wastes> [https://perma.cc/C8AP-46SM].

215. N.Y. COMP. CODES R. & REGS. tit. 6, § 360.19(d).

216. *Id.* § 360.19(f).

217. *Id.* § 360.19(g).

218. *Id.* §§ 360.19(i), 362-3.5(b).

219. *Id.* § 360.19(j).

220. N.Y. Dep’t Env’t Conservation Permit No. 2-6307-000008/00007, *supra* note 210; N.Y. Dep’t Env’t Conservation Permit No. 2-6307-00108/00002, *supra* note 210.

221. See Complaint at ¶ 1, *Raritan Baykeeper, Inc. v. Am. Recycling Mgmt.* (E.D.N.Y. Sept. 20, 2021) (No. 21 Civ. 5211), <https://www.nylpi.org/wp-content/uploads/2022/01/FINAL-Complaint-filed.pdf> [https://perma.cc/2AFK-SU8T].

222. See *id.* at 1-2; see also Rachel Vick, *Jamaica Residents Fight Waste Transfer Stations*, QUEENS DAILY EAGLE (July 20, 2021), <https://queenseagle.com/all/jamaica-residents-fight-waste-transfer-stations#:~:text=A%20group%20of%20Jamaica%20residents,violate%20the%20Clean%20Water%20Act> [https://perma.cc/7JRV-QCLZ] (quoting community leader Walter Dogan); Liz Donovan, *NYC Council Considers Waste Transfer Bill That Would Roll Back Environmental Gains in Queens, Critics Say*, CITY LIMITS (July 29, 2021), <https://citylimits.org/2021/07/29/nyc-council-considers-waste-transfer-bill/>.

Recycling, keeps its building-sized front door open continually, allowing large quantities of dust to escape.²²³ As a result, the nearby street and trees are coated with a layer of particulate matter.²²⁴ The contrast between these grimy, smelly facilities located in an environmental justice community and the much cleaner, much quieter, state-of-the-art waste transfer station on the Upper East Side is striking.

A CUNY Law student writing about the Jamaica waste transfer stations commented on the fragmented nature of the legal and regulatory regime governing these facilities and the inability to take cumulative impacts into account. She wrote:

There is obviously a huge gap between the lived experience of the Queens community members and the reduction of their experience to a series of possible legal infractions. On one hand, the silo-ing of regulation—separate provisions around noise, odor, traffic, etc.—abstractly creates more possibilities for violation and thus more possibilities for remedy. But on the other hand, it brings a kind of legal myopia to the situation, reminiscent of James C. Scott’s description of the high modernist state’s efforts to create legibility. . . . Further, the legal possibilities discussed here for agency enforcement and nuisance claims do not have the gravitas of the worst of the harms. The potential to litigate around the private enjoyment of one’s backyard or to enforce noise regulations does not fully capture the dangerous health impacts, contamination of the earth, and disrespect for life that are at issue here.²²⁵

These observations are salient and go to the heart of the limitations of our current legal tools for siting and managing undesirable neighbors like waste transfer stations. They emphasize that procedural justice alone is seldom enough to secure equal treatment or environmental justice.

IV

PARTICIPATION IS CRITICAL, BUT NOT ENOUGH

Much of the scholarship around environmental justice focuses on increasing public participation in decision-making, but participation alone cannot achieve environmental justice. Participation is generally considered

transfer-bill-that-would-roll-back-environmental-gains-in-queens-advocates-say/
[<https://perma.cc/6YKE-Q2DC>] (quoting residents).

223. Complaint at ¶ 146, *Raritan Baykeeper, Inc. v. Am. Recycling Mgmt.* (E.D.N.Y. Sept. 20, 2021) (No. 21 Civ. 5211).

224. *See id.* ¶¶ 145, 156–158, 165–167; first-hand account of the author.

225. Sigman, *supra* note 206, at 32–33.

essential for democratic legitimacy²²⁶ and for producing better decisions.²²⁷ It is a key element of procedural justice, which emphasizes meeting formal expectations about the legal and regulatory system. Thus, the focus for procedural justice is on whether all the requisite procedural steps have occurred, rather than on whether the outcome is substantively just.²²⁸ Unfortunately, procedural justice, even when realized, often falls far short of what participants might consider “fair treatment,” and rarely even rises to a participation level that can honestly be characterized as “meaningful involvement.”²²⁹

Moreover, as Professor Julie Sze pointed out, “[r]epresentation and participation, however important, are never enough.”²³⁰ This observation is particularly salient because the entire edifice of public participation is structured to inform a community about a decision. It typically does not encompass the possibility that the community could reject the proposal or otherwise refuse to consent.²³¹ Rather than meaningful opportunities to control their destiny,

226. See TOM R. TYLER, *WHY PEOPLE OBEY LAW passim* (1990); BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 132 (1984); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1027–32 (1997); M. Stephen Weatherford, *Measuring Political Legitimacy*, 86 AM. POL. SCI. REV. 149, 160 (1992).

227. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS* (2004) (making the case that large groups make better decisions than lone experts); Sheila Jasanoff, *Technologies of Humility: Citizen Participation in Governing Science*, 41 MINERVA 223 (2003) (emphasizing how much lay participation adds to decision-making done under conditions of uncertainty and ambiguity). Critics of public participation often suggest that the public prioritizes the “wrong” concerns. See RAGNAR E. LÖFSTEDT, *RISK MANAGEMENT IN POST-TRUST SOCIETIES* 23 (2005). This thinking dates back at least two decades. See, e.g., William D. Ruckelshaus, *Science, Risk, and Public Policy*, 221 SCI. 1026 (1983) (decrying the public’s risk priorities). However, so-called experts often miss, or discount, the unique vulnerabilities of marginalized communities that are rooted in structural inequality. See, e.g., Michael Méndez, Genevieve Flores-Haro, & Lucas Zucker, *The (In)Visible Victims of Disaster: Understanding the Vulnerability of Undocumented Latino/a and Indigenous Immigrants*, 116 GEOFORUM 50 (2020) (describing how the unique vulnerabilities of undocumented individuals are ignored in wildfire response and recovery planning).

228. For a detailed discussion of the pros and cons of procedural environmental rights, see Joshua Gellers & Christopher Jeffords, *Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism* (Aug. 2015) (unpublished manuscript), <https://media.economics.uconn.edu/working/HRI25.pdf> [<https://perma.cc/P4CA-W2WK>].

229. For a taxonomy of environmental justice, see Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 77–97 (Shawkat Alam, Md. Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury & Erika Techera eds., 2013); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV’T L. REP. 10681, 10682–83, 10692 (2000). I have elsewhere criticized participatory schemes that treat urban residents as recipients of information rather than its co-creators. See Rebecca Bratspies, *Seeing New York City’s Urban Canopy as a Commons*, in *THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH INNOVATIONS*, *supra* note 18, at 113, 121–22 (examining New York City’s Million Trees program).

230. Naomi Ambriz & David Correia, *Conversations in Environmental Justice: An Interview with Julie Sze*, 28 CAPITALISM NATURE SOCIALISM 54, 54 (2017) (quoting Julie Sze).

231. The debate over whether meaningful participation requires the possibility of withholding consent or merely involves consultation is best developed in the context of the United Nations Declaration on the Rights of Indigenous Peoples. See, e.g., JENNIFER FRANCO, *TRANSNAT’L INST. FOR HANDS OFF THE LAND ALL., RECLAIMING FREE PRIOR AND INFORMED CONSENT (FPIC) IN THE*

participation rights too often only offer communities the opportunity to participate in decisions about their own destruction. They must engage with antagonistic and often ignorant outsiders bent on extracting value, but rarely does the participation process give the impacted communities any actual power. Having to explain one's experience of oppression to skeptical outsiders is not consultation, it is epistemic exploitation.²³² Moreover, structural inequities too often tamp down participation by overburdened members of poor and minority communities, while amplifying the voices of the already underburdened.²³³ The story of how New York City is implementing its commercial waste zone system illustrates why this is so.

Take, for example, the initiative to revamp the City's commercial waste hauling system to reduce pollution associated with collecting this waste. To meet this goal, DSNY released a 2016 study of commercial waste hauling.²³⁴ This study documented the outsized pollution burdens from a system that allowed waste trucks to crisscross the City. DSNY therefore proposed dividing the City into commercial waste hauling zones. By limiting the truck miles traveled, DSNY projected that commercial waste zones could halve pollution from waste hauling activities.²³⁵ Local Law 199 authorized DSNY to move forward with this plan to create commercial waste zones. DSNY is in the process of finalizing these rules now.

Whether by design or lack of planning, there was no meaningful opportunity for participation during this process. The City claimed that it engaged in extensive and exhaustive community consultation at every stage of this process. However, the reality was quite different. Rather than providing a forum for genuine exchange or soliciting community input in the early design stages, the multiple government-community interactions along the process of adopting these rules were largely a one-way flow of information. Endless government presentations explained proposed actions *to* communities, but offered relatively narrow windows for public response. Those presentations and limited feedback windows were the sum total of community involvement.²³⁶

CONTEXT OF GLOBAL LAND GRABS (July 15, 2014), <https://www.tni.org/en/publication/reclaiming-free-prior-and-informed-consent> [<https://perma.cc/V849-2BVE>] (laying out the issues).

232. See Nora Berenstain, *Epistemic Exploitation*, 3 ERGO: OPEN ACCESS J. PHIL. 569, 569 (2016).

233. See Svitlana Kravchenko, *The Myth of Public Participation in a World of Poverty*, 34 TUL. ENV'T L.J. 33, 42-47 (2009). The New York City Environmental Justice Advisory Board recently experienced this. In our analysis of the public participation processes we held around the Draft Scope for the New York City Environmental Justice for All Report, we found that the majority of comments did not come from residents of environmental justice communities.

234. See N.Y.C. DEP'T OF SANITATION, BUS. INTEGRITY COMM'N, PRIVATE CARTING STUDY: EXECUTIVE SUMMARY (Aug. 17, 2016), https://www1.nyc.gov/assets/dsny/downloads/pdf/studies-and-reports/Private_Carting_Study_Executive_Summary.pdf [<https://perma.cc/7FCZ-TV3B>].

235. *Id.* at 6-9.

236. The public's opportunity to participate in decisions about the need for and location of facilities like waste transfer stations is extremely limited. When private actors seek to develop private

Public comments were solicited after key decisions had already been made, and the public was invited to weigh in on an already nearly-completed proposal. Moreover, participation opportunities were not structured to make participation easy or likely. For example, DSNY held a public hearing on a portion of the new commercial zoning plan on April 13, 2021.²³⁷ This hearing was at 9:30 am on a Wednesday, making it next to impossible for many people to attend, most notably for those workers in the commercial waste industry who work all night and into the morning.²³⁸

Moreover, tracing the history of this plan is a story of broken links, both literally and metaphorically. New York City's websites are littered with broken hyperlinks. Error 404²³⁹ and Page Not Found,²⁴⁰ or general introductory web pages,²⁴¹ are common responses to attempts to find source documents. The City's failure to properly maintain hyperlinks obscures the reasoning behind these plans for all but the most determined researchers. This lack of transparency breaks the links that connect affected communities with the process of civic engagement that purportedly developed this policy. It undermines the possibilities for meaningful community involvement, a core tenet of environmental justice. By cloaking decision-making in participatory rhetoric without offering genuine opportunities for communities to share their ideas or the possibility that those ideas might influence the ultimate decisions, these kinds of decision-making

land for locally undesirable facilities like waste transfer stations, the public's first—and sometimes only—opportunity for input happens when the permit application is put out for public comment.

237. *Notice of Public Hearing and Opportunity to Comment on Proposed Rules*, N.Y.C. DEP'T OF SANITATION, <https://dsny.cityofnewyork.us/wp-content/uploads/2021/03/DSNY-Proposed-Public-Safety-Requirements-for-Carters-Operating-in-Commercial-Waste-Zones-With-certifications.pdf> [<https://perma.cc/FJ79-P55Z>].

238. Barnard, *supra* note 4.

239. DSNY's resource page on Commercial Waste Zones includes a hyperlink to the final zone map, as changed by the February 2020 final rules. *Commercial Waste Zones*, N.Y.C. DEP'T OF SANITATION, <https://www1.nyc.gov/assets/dsny/site/resources/reports/commercial-waste-zones-plan> [<https://perma.cc/ZNH3-J6QZ>]. Yet, for months, anyone clicking on that hyperlink did not get to a map, but instead were directed to an Error 404 message. As of August 2022, DSNY had resolved this error.

240. As an example, DSNY's page introducing the Private Carting Study explains that the study was first proposed in One NYC: The Plan for a Strong and Just City. Yet the accompanying hyperlink, leads to a page that just says "Page Not Found." ONE NYC 2050, <https://onenyc.cityofnewyork.us/plan/> [<https://perma.cc/D97M-5XQE>].

241. The DSNY rulemaking requirements for carters operating in commercial waste zones closed on February 9, 2021. The January 26, 2021 notice of public hearing included a link to review all of the public comments. *Notice of Public Hearing and Opportunity to Comment on Proposed Rules II*, N.Y.C. DEP'T OF SANITATION 1, <https://dsny.cityofnewyork.us/wp-content/uploads/2020/12/DSNY-Proposed-Rules-Revised-12.16.20-Preliminarily-Certified-Rules-for-City-Record-Legal-11355633.pdf> [<https://perma.cc/K4TM-3B26>]. However, that link, <https://rules.cityofnewyork.us/>, at the time of this writing, merely takes a reader to the general opening page for all City rulemaking. *Id.* At the time of writing this draft, the rule and its comments are not available under the Recently Adopted Rule tab, or at least not findable through the obvious search terms of "commercial waste" "waste" "zone" or "carting." Thus, the public has no access to the comments submitted as part of this rulemaking at the time of this writing.

processes impoverishes the idea of community participation and engenders cynicism rather than legitimacy.

Legislators can be as guilty as administrators of twisting public participation to suit their own ends. On June 24, 2021, City Council held a hearing on Intro. 2349—a waste-handling bill that proposed gutting the Waste Equity Law by increasing the capacity at the Jamaica transfer waste stations.²⁴² This Bill was sprung on the affected Jamaica community with no public outreach, no stakeholder consultation, no opportunity for “meaningful involvement.” An April 15, 2021 “public hearing” on the Bill was announced on April 14th solely via Councilmember Daneek Miller’s Facebook page.²⁴³ The meeting turned out to be a Zoom webinar—with no opportunity for the public to ask questions directly or to even know who was in attendance.²⁴⁴ Two months later, the Sanitation Committee held a hearing on the Bill at Councilmember Miller’s behest. This hearing was originally scheduled for 10:00 am, but the night before the hearing it was rescheduled for 9:00 am.²⁴⁵ Anyone who showed up at the original time missed most of the hearing and had no opportunity to hear or respond to Miller’s justification for the Bill or DSNY’s opinion.²⁴⁶

Processes that give the veneer of public participation without actually creating opportunities for affected individuals to share their concerns or influence decisions impoverish public discourse and undermine public trust in government.²⁴⁷ The rest of this Article takes up the challenge of thinking beyond the limited procedural justice that public participation rules provide. It takes seriously Julie Sze’s assertion that environmental justice should be “a way to critique and restructure existing power relations”²⁴⁸ and asks what would happen if we used the lens, not of administrative law, but of the commons to examine and manage these facilities. Would thinking of the neighborhood as a commons where people live, work, and play as commoners give local environmental justice

242. N.Y.C. Council, Int. 2349-2021-A, Increasing Transfer Station Permitted Capacity for Export by Rail (June 17, 2021).

243. Testimony of Rebecca Bratspies on behalf of the Ctr. for Urb. Env’t Reform Before the N.Y.C. Council Comm. on Sanitation & Solid Waste (June 24, 2021).

244. Although moderated by City Councilmember I. Daneek Miller, the sole sponsor of Intro. 2349, his office refused to make the recording of the event available, referring requesters instead to the waste transfer station, which never responded. E-mail from Ali Rasoulinejad, Chief of Staff, Off. of Daneek Miller, to author (Apr. 21, 2021) (on file with author).

245. E-mail from City Council to author (on file with author).

246. *Id.*

247. In the New York State Climate Action Council Draft Scoping Plan, required under the Climate Leadership and Community Protection Act, New York began the discussion of climate justice by explicitly acknowledging that “frontline communities have historically been excluded from the environmental decision-making process and had limited opportunities for participation.” N.Y. STATE CLIMATE ACTION COUNCIL, DRAFT SCOPING PLAN 32 (Dec. 30, 2022), <https://climate.ny.gov/-/media/Project/Climate/Files/Draft-Scoping-Plan.ashx> [<https://perma.cc/YS2G-7RX3>].

248. Ambriz & Correia, *supra* note 230, at 54 (quoting Julie Sze).

groups new tools or additional traction in their struggle for equity?²⁴⁹ Would such an approach better allow us to “confront the real source of environmental degradation . . . and debate who should govern it, and for what purpose?”²⁵⁰

V.

COMMONS THEORY CAN PROMOTE PARTICIPATORY AND SUBSTANTIVE JUSTICE

It is increasingly clear that environmental justice must be at the center of sustainability and climate change planning.²⁵¹ This is true in the United States and around the world. In recognition of this, the United Nation’s 2030 Sustainable Development Goals emphasize the intertwined nature of social justice and sustainable development.²⁵² For example, Sustainable Development Goal 16, *Peace, Justice, and Strong Institutions*, includes targets focused on making government responsive to all people. Specifically, Target 16.6 is “develop effective, accountable, and transparent institutions at all levels,” and Target 16.7 is “ensure responsive, inclusive, participatory, and representative decision-making at all levels.”²⁵³ These targets should be read as a global commitment to a key principle of environmental justice—that affected communities have “the right to participate as equal partners at every level of decision-making including needs assessments, planning, implementation, enforcement and evaluation.”²⁵⁴

Focusing on underprivileged, overburdened communities without seeing them in the context of the underburdened, overprivileged communities they make possible misses a crucial piece of the story. Truly transformative change

249. There is also a commons analysis to be done with regard to the City streets that these waste transfer stations occasionally privatize and always rely on, but that is outside the scope of this Article. A bigger question is whether commons thinking might shift the focus to ending the single-stream usage that creates the need for these *away* way stations in the first place. This Article is the first step in engaging with that question.

250. MILLER, *supra* note 123, at 247.

251. The Biden Administration seems to have taken this necessity to heart, with its Justice40 Initiative placing environmental justice at the center of decision-making. Shalanda Young, Brenda Mallory & Gina McCarthy, *The Path to Achieving Justice40*, WHITE HOUSE BRIEFING ROOM (July 20, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/> [<https://perma.cc/VMM6-KPB3>]. Time will tell whether this initiative delivers on its environmental justice rhetoric.

252. See *What Are the Sustainable Development Goals?*, UNDP, <https://www.undp.org/sustainable-development-goals> [<https://perma.cc/UP46-CS6K>].

253. *Goal 16: Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions at All Levels*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <https://sdgs.un.org/goals/goal16> [<https://perma.cc/BQ9K-ZRE5>].

254. DELEGATES TO THE FIRST NAT’L PEOPLE OF COLOR ENV’T LEADERSHIP SUMMIT, THE PRINCIPLES OF ENVIRONMENTAL JUSTICE (EJ) NO. 7 (1991), <https://www.ejnet.org/ej/principles.pdf> [<https://perma.cc/CXB7-KEMG>]; *Indicators by Target*, SUSTAINABLE DEV. SOLS. NETWORK: INDICATORS & A MONITORING FRAMEWORK, <https://indicators.report/target> [<https://perma.cc/D8JA-MRC4>].

requires expanding the administrative vision to see underburdened communities as part of the problem. Carving underburdened communities out from the larger whole necessarily creates overburdened communities. *Away* begins with the choice to transfer burdens to one community and thereby insulate another community from the consequences of its actions and choices. Yet, too often this choice is so normalized as to be invisible. For example, at the very first congressional hearing on environmental justice, Representative Henry Hyde noted that, of course, polluting industries and waste transfer stations are located where land is cheaper.²⁵⁵ There is an entire genre of scholarship explaining that economics rather than race explains siting decisions—as though those two concepts were not intimately entwined.²⁵⁶ Moreover, Hyde’s explanation accepts without interrogation that certain parcels of land are more valuable than others—as though value were a physical characteristic akin to soil chemistry or elevation. It excises land value from the political system that has systematically deprived Black and Brown people of lands deemed valuable,²⁵⁷ while simultaneously devaluing the places they actually live.²⁵⁸ This politics of pretending that counting and accounting are not political obscures the ways that the entire counting process is skewed from the outset to legitimize designating certain communities as *away*. The economic stories we tell ourselves normalize this transfer, this burdening. The erasure of this explicit transfer happens through language, and it happens through law. It is an essential framing for modern society.

For many years, Garrett Hardin’s tragedy of the commons parable was used to justify privatization of the commons.²⁵⁹ In her Nobel Prize winning work, political economist Professor Elinor Ostrom conclusively demonstrated that commons management need not be a “tragedy” and documented how communities can and have successfully managed their commons.²⁶⁰

255. *Environmental Justice: Hearing Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, *supra* note 12, at 2.

256. *See generally* Been, *supra* note 105 (questioning the notion that environmental injustice or environmental racism exists with regard to siting).

257. The documentary *Decade of Fire* connects the dots between lucrative redevelopment plans and strategic dislocation of Black and Latinx communities in the South Bronx. *See* DECADE OF FIRE, <https://www.decadeoffire.com> [<https://perma.cc/KZJ4-D4GM>]; *see generally* Melissa Checker, *Wiped out by the “Green Wave”: Environmental Gentrification and the Paradoxical Politics of Urban Sustainability*, 23 CITY & SOC’Y 210 (2011) (describing how environmental gentrification appropriates environmental justice victories and sustainability-oriented improvements to benefit private real estate developers).

258. Andre M. Perry, Jonathan Rothwell & David Harshbarger, *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property*, BROOKINGS (Nov. 27, 2018), <https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/> [<https://perma.cc/YF59-QK9D>]; *see generally* ROTHSTEIN, *supra* note 69 (describing how redlining and other racist policies stripped value from Black neighborhoods).

259. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (making the claim that freedom of the commons brings ruin to all).

260. Ostrom points to pasture management in Törbel, Switzerland, and irrigation systems in Spain and the Philippines as examples of long-enduring commons management schemes. *See* ELINOR

Law Professors Sheila Foster and Christian Iaioni have written extensively about how Ostrom’s insights might apply in the urban setting.²⁶¹ Starting from Saskia Sassen’s question “who owns our cities?”²⁶² they postulate the city as open access commons subject to the same rivalries and contests as any other commons. From this vantage point, they demonstrate how commons thinking can be adapted and deployed as a framework for addressing a host of urban challenges.²⁶³ This framework engages with the urban commons on three levels simultaneously—as the *object* of cooperation, as the *activity* of maintaining and co-producing the city, and as the *mode of governance* that protects and allocates the city based on rules and norms urban dwellers themselves generate.²⁶⁴

Characterizing the city as a commons is a normative claim that offers an alternative starting place for policymaking. It starts with the principle that a city’s residents all share a common stake in their neighborhoods, as well as in the urban resources and services they have helped to co-create.²⁶⁵ Often called “the right

OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 61–88 (1990). Ostrom developed design principles for successful community management of a commons, including: 1) clearly defined boundaries, 2) congruence between appropriation and provision rules and local conditions, 3) collective-choice arrangements, 4) monitoring, 5) graduated sanctions, 6) conflict-resolution mechanisms, 7) minimal recognition of rights to organize, and 8) nested enterprises. *Id.* at 110.

261. See generally Foster & Iaione, *supra* note 20 (developing an urban commons framework and suggesting collaborative governance strategies for managing shared resources within cities); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011) (examining how regulatory slippage can create the tragedy of overuse and degradation in urban parks); Christian Iaione, *The Right to the Co-City*, 9 ITALIAN J. PUB. L. 80 (2017) (tracing the emergence of a right-based conceptualization of the city in order to manage common urban resources).

262. Saskia Sassen, *Who Owns Our Cities - and Why This Urban Takeover Should Concern Us All*, GUARDIAN (Nov. 24, 2015), <https://www.theguardian.com/cities/2015/nov/24/who-owns-our-cities-and-why-this-urban-takeover-should-concern-us-all> [<https://perma.cc/GH4K-9PAV>].

263. Specifically, Foster and Iaione identify five core design principles for managing an urban commons: 1) collective governance; 2) an enabling state; 3) social and economic pooling; 4) experimentalism; and 5) technology justice. See Sheila R. Foster & Christian Iaione, *Ostrom in the City: Design Principles and Practices for the Urban Commons*, in ROUTLEDGE HANDBOOK OF THE STUDY OF THE COMMONS 235, 240 (Blake Hudson, Jonathan Rosenbloom & Dan Cole, 2019).

264. MICHEL BAUWENS & VASILIS NIAROS, CHANGING SOCIETIES THROUGH URBAN COMMONS TRANSITIONS 5 (2017), <https://commonstransition.org/wp-content/uploads/2017/12/Bauwens-Niaros-Urban-Commons-Transitions.pdf> [<https://perma.cc/PDW7-53G6>]. This definition helpfully draws a clear distinction between commons and both the private and public/state forms of managing and owning resources.

265. See DAVID BOLLIER, THINK LIKE A COMMONER 1–8 (2014); Dan Webb, *Urban Commons Property: Notes Towards a Political Theory of the City*, 17 RADICAL PHIL. REV. 371, 388–91 (2014). In Fall of 2022, New York City will be voting on a proposed charter amendment that would add a preamble to the City Charter clarifying that “the people of New York City [are] the source of the City’s legitimacy and power.” N.Y.C. RACIAL JUST. COMM’N, NYC FOR RACIAL JUSTICE: FINAL REPORT OF THE NYC RACIAL JUSTICE COMMISSION 37 (Dec. 27, 2021), <https://racialjustice.cityofnewyork.us/wp-content/uploads/2021/12/Final-Report-of-the-NYC-Racial-Justice-Commission.pdf> [<https://perma.cc/SF8J-QZVW>]. This proposed charter amendment was adopted unanimously by the NYC Charter Revision Commission and will be placed on the Fall 2022 ballot. NYC Racial Justice Commission, *NYC Racial Justice Commission Public Meeting 12/27/21*, YOUTUBE (Dec. 27, 2021), https://www.youtube.com/watch?v=HtruhbE_IrQ [<https://perma.cc/L9FZ-4N83>].

to the city,” this approach recognizes that all residents have a right to be part of the decision-making processes that create and recreate the city.²⁶⁶ Specifically, this approach recognizes that renters, non-citizens, and young people have an important stake in how urban resources are managed and should have a voice in decisions about those resources. By intentionally expanding the stakeholder beyond those who own real property or businesses, such an approach ensures that a wider array of interests are recognized than those protected by either private, market-driven property management or state administration of resources.²⁶⁷

This urban commons theory draws on Jane Jacobs’s recognition that there is “irreplaceable social capital” embedded in urban neighborhoods.²⁶⁸ The networks and relations embedded in, and emerging from, the urban commons create much of the value ascribed to private goods.²⁶⁹ For example, urban inhabitants interacting, creating styles and fashions, and preparing food create what gets called the “vibe” of the city neighborhood.²⁷⁰ This “vibe” is what developers rely on to support premium prices for luxury housing. Developers seek to capture and privatize this value.²⁷¹ Where conventional urban policy

266. Mark Purcell, *Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant*, 58 *GEOJOURNAL* 99, 99 (2002).

267. In Catholic teaching, this concept is called *Social Mortgage*. Where a conventional mortgage binds the homeowner to repay the lending institution that made ownership of that home possible, a social mortgage does the same thing with the commons. A social mortgage recognizes that the wider community, through provisions of social services, makes it possible for private owners to develop, use, and enjoy their lands. Analogizing that public subsidy to private owners to a mortgage, social mortgage obligates private property owners “to give back to the community so that those with no private property holdings have access to the same basic services such as health care, education, transportation, police and fire protection that helped make possible the personal development of that property owner.” EDWARD J. O’BOYLE, JOHN PAUL II ON SOCIAL MORTGAGE: ORIGINS, QUESTIONS, AND NORMS 2 (Spring 2014) <https://www.mayoresearch.org/files/SOCIAL%20MORTGAGE%20april%2029%202014.pdf> [<https://perma.cc/7B84-XP6W>].

268. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 138 (1961). Jacobs emphasized the importance of networks of residents, and the relationships they build over time, for the self-governance of urban neighborhoods. More recently, Erika Swensen and Lindsay Campbell have studied the role that these neighborhood networks play in environmental stewardship and land management. See generally Erika S. Svendsen & Lindsay K. Campbell, *Urban Ecological Stewardship: Understanding the Structure, Function and Network of Community-Based Urban Land Management*, 1 *CITIES & ENV’T* 31 (2008).

269. Borch & Kornberger, *supra* note 23, at 6–7.

270. William H. Frey, *Young Adults Choose “Cool Cities” During Recession*, *BROOKINGS* (Oct. 28, 2011), <https://www.brookings.edu/blog/up-front/2011/10/28/young-adults-choose-cool-cities-during-recession/> [<https://perma.cc/E3ES-L7DZ>].

271. The saga surrounding 5Pointz in Long Island City Queens is an example. A building owner destroyed what had become an urban graffiti museum in order to clear the way for building luxury high-rise apartment towers. Geoff Cobb, *The Tragic Death and Lasting Legacy of Five Pointz*, *GREENPOINTERS* (Apr. 30, 2019), <https://greenpointers.com/2019/04/30/the-tragic-death-and-lasting-legacy-of-five-pointz/> [<https://perma.cc/S8A9-JBPH>]. The luxury apartments in these towers are priced far too high for long-term neighborhood residents to afford—the rent for a two-bedroom apartment ranges from \$5000 to \$6000 per month. See 5POINTZLIC, <https://www.5pointzlic.com> [<https://perma.cc/WPQ5-EJN8>]. In an attempt to cash in on the “vibe” these excluded residents and

treats the social capital embedded in the “vibe” as a resource subject to enclosure by private actors seeking to extract value,²⁷² the city as commons explicitly vests common ownership and control of that value in the community and its members. Viewed through this lens, many urban conflicts around gentrification and environmental justice resolve themselves into a tug-of-war between private actors attempting to capture this “unearned increment”²⁷³ from local residents who assert a competing ownership claim.²⁷⁴

By valuing the urban commons *qua* commons, this framing makes visible the losses when the city’s resources are privatized or commodified,²⁷⁵ specifically the loss of social networks, community, history, and continuity.²⁷⁶ As such, it creates possibilities for more inclusive and more equitable management of the city.²⁷⁷ Community members, as commoners, share a right to shape the city, to design its infrastructure, and to benefit from those choices.²⁷⁸ This framing has obvious utility to an environmental justice advocate seeking to broaden the class of users participating in creating the rules and norms governing urban resources. It offers a language for revealing “the push and pull of entirely

artists have created, the new luxury towers bear the name of the destroyed graffiti museum and tout the “unique culture” of the neighborhood. *Id.* The exterior façade of the buildings and lobbies display curated, sanitized graffiti-style artwork. (Personal observation of author.)

272. Borch & Kornberger, *supra* note 23, at 6–7.

273. John Stewart Mill coined the term “unearned increment” to mean the increase in value of land that was not associated with any effort or activity on the part of its owner, but was created by the state or by the tenants. JOHN STEWART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 616 (abr. ed. 1885). Henry George elaborated on this idea. See HENRY GEORGE, *PROGRESS AND POVERTY* 165–172 (1879).

274. For a good non-technical description of these tensions, see generally Jenny Dubnau, *Artwashing During a Pandemic: Should Artists Say No to Real Estate Crumbs?*, *HYPERALLERGIC* (Feb. 2, 2021), <https://hyperallergic.com/616931/artwashing-during-a-pandemic-should-artists-say-no-to-real-estate-crumbs/> [<https://perma.cc/RTW4-XPWE>]; for a more theoretical approach, see Zawadi Rucks-Ahidiana, *Theorizing Gentrification as a Process of Racial Capitalism*, 21 *CITY & CMTY.* 173 (2022), <https://journals.sagepub.com/doi/pdf/10.1177/15356841211054790> [<https://perma.cc/9MT7-CK72>].

275. See generally Charlotte Hess, *Mapping the New Commons* (July 1, 2008) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356835 [<https://perma.cc/294T-K5K4>] (making this point and offering a survey of commons literature). Indeed, history has shown that urban “revitalization” is rarely intended to benefit those who have called the community home for generations. Adam Mahoney, *Decades After Watts Revolted, the Black Neighborhood Is Being ‘Revitalized’—But the Cost Is Steep*, *GRIST* (June 18, 2021), <https://grist.org/cities/jordan-downs-watts-los-angeles-gentrification-contamination-housing/> [<https://perma.cc/X2QL-KCBN>] (quoting Watts Labor Community Action Committee President Timothy Watkins).

276. In particular, a commons framing highlights the racialized privilege embedded in the explanations typically advanced to justify how property owners have more consideration and influence than renters and the property-less in urban decision-making. See, e.g., Amber R. Crowell, *Renting Under Racial Capitalism: Residential Segregation and Rent Exploitation in the United States*, 42 *SOCIO. SPECTRUM* 95, 99–100 (2022) (situating these claims within a context of racial capitalism).

277. See generally GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (2001) (outlining how zoning and other land use strategies create incentives for opportunity hoarding, and proposing new local government frameworks aimed at building cohesive yet diverse urban communities).

278. *Mission, History & Platform*, *supra* note 24.

different competing uses”²⁷⁹ by explicitly recognizing the rights that flow from uses and contributions typically obscured by an economic lens. By expanding recognition of who has a claim to the urban commons, and thus who can participate in urban resource norm generation, urban commons thinkers and environmental justice advocates converge in redefining the object of cooperation as the city itself, and expanding the actions deemed part of its coproduction.

Unfortunately, New York has been slow to take up this idea. In his 2015 *One New York* plan, Mayor Bill de Blasio announced a commitment to make equity “an explicit guiding principle”²⁸⁰ and the lens through which the City would view all planning, policymaking, and governing, including waste handling.²⁸¹ This approach should put environmental justice at the center.²⁸² *One New York* also committed the City to “Vision Zero”—a target of zero waste going to out-of-state landfills by 2030.²⁸³ That could have been a transformative moment—one that brought commons thinking into city planning, and rejected the *away* strategy of waste management. Unfortunately, this seems to have been largely rhetorical. *One New York* offered little in the way of concrete plans to achieve this goal.²⁸⁴ It made vague gestures toward rethinking the root problem—the disposable culture that necessitates an *away*.²⁸⁵ But, neither the 2006 Solid Waste Plan, nor Vision Zero, employed a commons frame. And that is a shame. The City missed an opportunity to step outside the existing regulatory regime rooted in nuisance, and to direct its policy energy instead toward waste as a collective problem that needs solving.

A. Commons Thinking Can Promote Participatory Environmental Justice

Recognizing the commoner’s rights to fully participate in decisions that affect them involves major changes to business-as-usual decision-making in the

279. Brigham Daniels, *Commons Storytelling: Tragedies, Comedies, and Tragicomedies*, in ROUTLEDGE HANDBOOK OF THE STUDY OF THE COMMONS, *supra* note 261, at 102.

280. N.Y.C. OFF. OF MAYOR BILL DE BLASIO, ONE NEW YORK: THE PLAN FOR A STRONG AND JUST CITY 5 (2015), <https://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf> [<https://perma.cc/JB7P-SEBB>].

281. *Id.* at 176. This commitment extended to all aspects of waste generation, handling, and disposal.

282. Unfortunately, as subsequent events have shown, this is much easier to say than to do.

283. N.Y.C. OFF. OF MAYOR BILL DE BLASIO, *supra* note 280, at 176–87. Because all these landfills are out of state, this initiative would necessarily involve measures to reduce waste generation, and to divert the waste that is generated away from landfills into recycling or composting. The notions that waste generation should be reduced to a minimum, and that waste should be treated and disposed of as close as possible to the site of generation is the animating principle of the Basel Convention on the Transboundary Movement of Hazardous Waste. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, pmbl., Mar. 22, 1989, 1673 U.N.T.S. 126.

284. At a recent hearing of the City Council Committee on Sanitation and Waste, DSNY had little to offer when pressed for any specific plans or policies that the Administration had for achieving this ambitious goal.

285. See N.Y.C. DEP’T OF SANITATION, *supra* note 162.

City. The existing top-down technocratic process gives outsized influence to real property owners and economic actors at the expense of communities, particularly low-income and Black and Brown communities. In contrast, the proposed framework gives way to a more collaborative system designed to bring together a broader spectrum of actors to co-design and co-produce goods and services based on communally agreed upon priorities.²⁸⁶ To accomplish this, the City must turn to iterative participatory processes that facilitate wide-spread participation in city-making on equal terms.

New York City's participatory budgeting process offers a model for what meaningful participation might look like.²⁸⁷ Through this award-winning process,²⁸⁸ community members in each participating Council District directly decide how to spend a portion of public funds in the district. The central tenet is that communities speak first and last about community priorities.

The participatory budgeting process begins with multiple hyper-local brainstorming sessions that are open to all—either in person or online. These initial conversations occur in accessible community spaces across the City—spaces where residents feel safe, welcomed, and valued. The meetings are held in multiple languages and at times that are convenient for working people and for parents. Ideas from these sessions are then sifted, winnowed, and organized by the City Councilmember's Office based on levels of community support and other pre-announced criteria.²⁸⁹ Their governmental expertise still plays a key

286. See generally THE COMMONS STRATEGIES GROUP, PATTERNS OF COMMONING (David Bollier & Silke Helfrich eds., 2015) (surveying successful commons practices from around the world). Under such an approach, the lived experiences of frontline communities would inform policy decision making, from the very earliest stages. See, e.g., Farhana Sultana, *Climate Change, COVID-19, and the Co-Production of Injustices: A Feminist Reading of Overlapping Crises*, 22 SOC. & CULTURAL GEOGRAPHY 447 *passim* (2021) (calling for this kind of analysis).

287. My CUNY colleague Michael Menser has been a leading voice for participatory budgeting. See generally MICHAEL MENSER, WE DECIDE! THEORIES AND CASES IN PARTICIPATORY DEMOCRACY (2018) (outlining a theory of maximal democracy rooted in participatory decision-making). He offers a visionary but practical analysis for how this practice can transform New York City. See Michael Menser, *From City-Wide Participatory Budgeting in NYC to a Global Green New Deal: On the Power and Role of PB in a Time of System Change* (unpublished manuscript) (on file with author).

288. In 2015, New York City won the Roy and Lila Ash Innovation Award for Public Engagement in Government, and in 2018 the project "myPB.community" received both the Mayor's Civics Award and the Open Data Award in the first New York City Open Data Project Gallery Contest. *San Francisco, New York Named Winners of Harvard's 2015 Innovation in American Government Award*, ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION (Sept. 17, 2015), <https://ash.harvard.edu/news/new-york-san-francisco-named-winners-harvards-2015-innovation-american-government-award> [<https://perma.cc/54MU-SUMW>]; *NYC Open Data Announces Winners of 1st Annual Citywide Competition!*, NYC OPENDATA (July 10, 2018), <https://nycopendata.tumblr.com/post/175754878120/nyc-open-data-announces-winners-of-1st-annual> [<https://perma.cc/5RFX-4FYE>].

289. To be eligible, a project proposal must be for physical infrastructure that benefits the public, cost at least \$50,000, and have a lifespan of at least five years. *Participatory Budgeting*, N.Y.C. COUNCIL, <https://council.nyc.gov/pb/> [<https://perma.cc/LRT2-SBAW>]. Last year, \$35 million in public funds were allocated through participatory budgeting. *Id.* The priorities in each district were different, and the funds were spent accordingly.

role, but communities set the agenda, and legislators and regulators take seriously their self-identified needs and priorities. The final options are then returned to the same community for a vote.

The franchise for participatory budgeting is distributed widely. Any resident age twelve or older is eligible to vote. Neither citizenship nor formal registration is required.²⁹⁰ This ensures that anyone with a stake in the outcome has a voice in the process. Voting is made as easy as possible, with pop-up voting booths stationed outside schools, near transit stations, and in large housing complexes across the city.

This iterative process gives elected officials a clearer sense of their constituents’ priorities and ensures that those priorities drive public spending and investment.²⁹¹ Whichever projects get the most votes are funded. Funded projects include a pest-proof waste management system for NYCHA houses, playground renovations, water bottle refilling stations, bus countdown clocks, tree plantings, library upgrades, and school bathroom renovations.²⁹²

While participatory budgeting may not seem like an obvious one-to-one analogy with city-wide waste management, the process and participation model from participatory budgeting can offer valuable instruction on how the City can change its consultation and participation practices to better ensure procedural justice.²⁹³ By proactively seeking community participation, providing translation, and promoting transparency, accessibility and accountability, the City can better achieve procedural justice, while laying groundwork for a more widespread democratization that prioritizes equity, environmental justice, and sustainability.²⁹⁴

290. In January 2022, New York City enacted Introduction 1867A, the *Our City Our Vote* law, which extended the franchise for City elections to non-citizen permanent residents. N.Y.C. COUNCIL, INT. 867-2020-A, <https://legistar.council.nyc.gov/LegislationDetail.aspx?GUID=DF600BDA-B675-41D8-A8BD-282C38DC4C62&ID=4313327&Options=ID%7Ctext%7C&Search=1867> [<https://perma.cc/VC4Q-F9H2>]. This law will take effect for the 2023 municipal elections, making NYC the largest United States city giving non-citizens access to the ballot.

291. Of the fifty-one council districts in New York City, thirty-four opted to participate in this process. Jamaica, which is in City Council District 27, voted for bus countdown clocks, beautifying a road, and various school and library upgrades; in 2018, New York City voters changed the City’s Charter to incorporate participatory budgeting permanently. See N.Y.C. CHARTER REVISION COMM., FINAL REPORT OF THE 2018 NEW YORK CITY CHARTER REVISION COMMISSION 49–51 (Sept. 6, 2018), <https://www1.nyc.gov/assets/charter/downloads/pdf/final-report-20180904.pdf> [<https://perma.cc/2A3S-HEUW>]. COVID-19 delayed the rollout of citywide participatory budgeting beyond the 2020 deadline. Ethan Geringer-Sameth, *City Engagement Commission to Launch Citywide Participatory Budgeting After Pandemic Delay*, GOTHAM GAZETTE (May 1, 2022), <https://www.gothamgazette.com/city/11269-nyc-civic-engagement-commission-participatory-budgeting> [<https://perma.cc/E8LZ-BEKF>].

292. *Participatory Budgeting: Winning Projects*, N.Y.C. COUNCIL, <https://council.nyc.gov/pb/results/cycle-8-results/> [<https://perma.cc/B8YL-7HAJ>].

293. See MENSER, WE DECIDE!, *supra* note 287, at 14–16 (describing Civics for All).

294. ANNE LE STRAT & MICHAEL MENSER, DEMOCRATIZING PUBLIC SERVICES 16–17, 73, 81 (Aaron Eisenberg & Carrington Morris eds., 2022); see also Andrea McArdle, *Re-imagining Urban Public Housing as a Commons*, in THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH

Community participation early in the process, when policymakers are in the process of formulating the problems they will explore and address, is essential for genuine procedural justice. Going into affected communities *before* there is a plan is very different than soliciting community reactions to already-formulated, proposed solutions. Actively soliciting early input allows communities to help shape the way that decisionmakers perceive and define their regulatory task. This framing moves communities from being the background—for example, the space through which waste trucks will pass in the new commercial waste plan—and instead assigns them a key role as significant stakeholders with interests that must be protected and advanced by any such plan. This kind of community participation keeps regulators focused on their ultimate task of protecting and providing healthy environments, and prevents the bureaucratic tendency to resolve issues in isolation from each other and from that bigger picture.

Adapting the participatory framework to the process for developing other city policies would put communities on par with developers and commercial interests as actors holding rights that must be protected and accounted for in urban policy decisions.²⁹⁵ The city and its institutions become a convener, the facilitating mechanisms for truly transparent and participatory processes. Such an approach promotes greater access and equity for all urban inhabitants. This opens space for what Urban Studies Professor Michael Menser called “a powershifting democratization” that creates exciting, large-scale possibilities for rethinking how city spaces and resources are used, and how decisions about them are made.²⁹⁶ These new lines of thought might help cities “transition to fairer, inclusive, sustainable, resilient futures.”²⁹⁷ More prosaically, applying this urban commons framework to the New York City’s waste handling processes might allow for a more holistic vision of the Jamaica community’s problem and potentially suggest new advocacy routes for overcoming that problem. It would ensure that residents participate in defining and formulating the problems about which City policies would be made. In that way, it would help residents reclaim control over decisions about how the City develops and grows and reject the

INNOVATIONS, *supra* note 18, at 87 (proposing that robust participation is key to reorienting NYCHA decision-making to respond to fiscal and management challenges).

295. In the Final Scope for the New York City Environmental Justice for All Report, the NYC Environmental Justice Advisory Board urged the city to adopt community-based participatory research as a way to elevate community voices. N.Y.C. ENV’T JUST. INTERAGENCY WORKING GRP., NEW YORK CITY’S ENVIRONMENTAL JUSTICE FOR ALL REPORT SCOPE OF WORK 27–28 (2021), <https://www1.nyc.gov/assets/sustainability/downloads/pdf/EJ-Report-Scope.pdf>, [<https://perma.cc/5MQW-3UHB>] (referencing Comment 120: Task 3.5). The City made a commitment to incorporating this approach as it complies with Local Law 60 and 64 regarding environmental justice. *Id.*

296. Menser, From City-Wide Participatory Budgeting in NYC to a Global Green New Deal, *supra* note 287, at 3 (positing that participatory budgeting is a “democratizing interface” for building an inclusive, sustainable, and resilient city).

297. Foster & Iaione, *supra* note 261, at 2–3.

designation of *away*. Applying this approach to the City's unfolding commercial waste zone process shows just how transformative it might be in terms of facilitating the kind of meaningful involvement that environmental justices requires.

The procedural defects in the existing process were described above. A commons-based process applying the maxim that communities speak first and last would proceed very differently. It would still study the waste hauling companies, their routes, and the pollution the trucks generated. But a commons approach would allocate time, at the beginning of the process and at each decisional stage for communities to identify their needs, interests, and priorities with regard to waste generation, handling, and disposal. Studying communities' daily consumption patterns, such as the kinds and quantities of waste they generate, and the social and economic drivers of those activities, would be as central as studying the waste hauling companies. These analyses would be seen as inherently integrated, and the core question would be how to shift consumption out of its single-use complacency. Moreover, information would flow at least two ways, with local visioning sessions driving proposed City policies as well as reacting to them. The ideas, issues, and knowledge created by this participatory process would feed into an iterative policymaking process. Perhaps most importantly, this approach would build "embedded bargaining power"²⁹⁸ that could be used to combat the tendency to treat one community as *away* so that another community might enjoy being underburdened.

B. Commons Thinking Can Promote Substantive Justice

There is already a burgeoning movement recognizing the atmosphere as a global commons and characterizing emissions of greenhouse gases as a commons problem.²⁹⁹ As Professor Barton Thompson notes, it is a slightly different form of a commons problem, because rather than taking something *out* of the atmospheric commons, people are instead putting carbon dioxide and other greenhouse gases *in*.³⁰⁰ Businesses, individuals, and governmental entities across the globe treat the atmosphere as a great waste repository. Each individual adding greenhouse gases to the global atmosphere experiences all the benefits associated with the gas-producing activity while bearing only a small sliver of the costs. Cumulatively, these individual actions create an immense threat to the stability of the world's climatic system. As with New York City's commercial waste

298. HILARY WAINWRIGHT, RECLAIM THE STATE: EXPERIMENTS IN POPULAR DEMOCRACY 186 (2003) (describing participatory democracy not as an institution but as a source of bargaining power).

299. See, e.g., Ottmar Edenhofer, Christian Flachsland & Bernhard Lorentz, *The Atmosphere as a Global Commons*, in THE WEALTH OF THE COMMONS: A WORLD BEYOND MARKET & STATE 389 (David Bollier & Silke Helfrich eds., 2012).

300. Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENV'T L. 241, 253 (2000).

handling, most of the burdens associated with overuse fall on poor communities of color who have contributed the least to the creation of the problem.

Recognition of the atmosphere as a commons translates down to the airshed³⁰¹ at the local level. The air each of us breathes is part of that localized version of the global commons. We breathe it into our lungs and return it to the commons where the carbon–oxygen balance is continually readjusted by the respiration activities of animals and plants. Left to itself, it is a sustainable system. Use of the local airshed as a waste repository disrupts this balance, leaving community residents vulnerable to harms caused by pollution, dust, noise, and odor.

If we instead start from the proposition that everyone has the right to breathe clean air, as enshrined in the New York Constitution³⁰² and endorsed by the United Nations,³⁰³ we might approach these localized questions of air quality differently. Every person’s claim to an equal, undivided share of clean air offers a different starting place for a new way of managing the local airshed rooted in commons theory. Everyone breathes, but not everyone pollutes. By recognizing breathing clean air as a stakeholding activity, and the local airshed as a commons, actions that pollute that airshed shift from lawful activities, authorized by permits and bounded only by nuisance, to competing uses of a common, shared resource. “Breathers” can assert rights as commoners procedurally entitled to equal participation in decisions about the local airshed, and substantively entitled to a fair share of the air resource. This critical shift in emphasis operationalizes Urban and Environmental Professor Julian Agyeman’s assertion that “who can belong in our cities will determine what our cities can become.”³⁰⁴ It offers a way into the conversation for environmental justice communities that have historically

301. *Airsheds*, in AIRSHED ASSESSMENT: TOPOGRAPHY, METEOROLOGY AND CLIMATOLOGY IMPACTS ON AIR QUALITY at 1, NAT. RES. CONSERVATION SERV., https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_043673.pdf [<https://perma.cc/V3DU-SAXM>] (“An airshed is a part of the atmosphere that behaves in a coherent way with respect to the dispersion of emissions. It typically forms an analytical or management unit. Also: A geographic boundary for air quality standards.”).

302. New York voters endorsed this proposition in November 2021 when they voted overwhelmingly to add Section 19 to Article I of the New York Constitution. Section 19 provides that “Each person shall have a right to clean air and water, and a healthful environment.” N.Y. Const., art. I, § 19. This language was added to the Bill of Rights, the part of the state constitution that defines individual rights and the limits of state power. For a full discussion, see generally 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/> [<https://perma.cc/FJ58-X7HX>].

303. See Human Rights Council Res. 48/13, U.N. Doc. A/HRC/Res/48/13 (Oct. 8, 2021). In a historic vote, the United Nations General Assembly recently recognized the right to a clean, healthy, and sustainable environment as a human right. G.A. Res. 76/300 (July 28, 2022). This resolution built on the October 2021 Human Rights Council Human Declaration recognizing “the right to a clean, healthy, and sustainable environment as a human right that is important for the full enjoyment of all human rights.” Human Rights Council Res. 48/13, *supra*.

304. *Research*, JULIAN AGYEMAN, <https://julianagyeman.com/research> [<https://perma.cc/2HA4-H4J6>].

been shut out of policymaking decisions that affect them. The substantive right to breathe clean air gives residents an ownership claim to a share of the commons. Residents are commoners with a right to own, use, and manage “their” air. This changes the regulatory backdrop significantly because states have an obligation to respect, protect, and fulfill human rights, including environmental rights.³⁰⁵

In an historic 2021 vote, New Yorkers overwhelmingly approved a ballot initiative to add a right to a healthy environment, including the right to clean air and clean water, to the New York Constitution.³⁰⁶ Article I of the Constitution, the Bill of Rights, now boasts a new Section 19, the Green Amendment, which reads: “*Every person shall have a right to clean air and water, and a healthful environment.*”³⁰⁷ This sweeping, yet simple, language guarantees all New Yorkers the constitutional right to live, work, and play in communities that are safe, healthy, and free from harmful environmental conditions. In short, no community can be treated as *away*.

This newly recognized foundational right might be a game changer in terms of moving toward a commons-based environmental governance.³⁰⁸ The right to a healthy environment now stands on equal footing with other fundamental liberty or property interests like the rights to property,³⁰⁹ to petition the government,³¹⁰ to religious freedom,³¹¹ and to freedom of speech.³¹² Like these other constitutionally-protected fundamental rights, the new Green Amendment delineates self-executing rights—meaning they can be claimed without waiting for implementing legislation. Moreover, the environmental rights guaranteed by Section 19 must be read alongside the preexisting guarantee of equal protection under the law and the prohibition of discrimination.³¹³ Fulfilling these

305. See generally Comm. on Econ., Soc. & Cultural Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 14, U.N. Doc E/C.12/2000/4 (Aug. 11, 2000) (laying out the respect, protect, and fulfill framework in paragraph 39, and recognizing in paragraph 15 that Section 12(2)(b) includes, *inter alia* the state obligation to prevent and reduce the population’s exposure to harmful substances and other detrimental environmental conditions that impact human health); David Jason Karp, *What Is the Responsibility to Respect Human Rights? Reconsidering the ‘Respect, Protect, and Fulfill’ Framework*, 12 INT’L THEORY 83 (2020) (postulating that state duties to respect, protect, and fulfill human rights are rooted in the moral equality of all persons).

306. The final vote indicated wide-spread popular support—just over 70 percent of New York voters supported adding this language to the Constitution. *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)) [<https://perma.cc/4EHZ-W59U>].

307. N.Y. Const., art. I, § 19.

308. See Bratspies, *supra* note 302.

309. N.Y. Const., art. I, § 7.

310. *Id.* § 9.

311. *Id.* § 3.

312. *Id.* § 8.

313. *Id.* § 11.

interrelated constitutional duties will reshape New York law in ways that remain to be seen.³¹⁴

Viewed through the lens of the constitutional and human right to clean air, the story of the Jamaica waste facilities becomes one of conflicting demands put on a common pool resource, the air. Where neighbors want clean air to breathe and the ability to open their windows and enjoy their yards, the waste transfer facilities want the airshed to be a convenient and inexpensive disposal route for particulates, odors, and other hazards. Currently, the permit is the governance device for navigating between these conflicting demands.

By permit, use of the Jamaica airshed is allocated to the waste transfer stations as a repository for particulate matter—from both the facilities and the trucks that transport waste to and from them—and for the odors associated with putrescible waste. However, the permit is rooted in nuisance—specifically in the presupposition that the main constraint on the operation of these waste transfer stations is that they cannot impair “any rights, title, or interest in real or personal property held or vested in a person not a party to the permit.”³¹⁵ The many specific terms of the permit are a means of fleshing out this central obligation of non-interference with quiet enjoyment of property.

This nuisance-based approach is an impoverished vision of the conflicting claims and the stakeholders in that conflict. It does not properly account for the claims that surely everyone who breathes might make to an equal stake in the neighborhood airshed as a commons from which they draw life. This is perhaps more properly characterized as a liberty interest rather than a property interest. But, as the recent report by the UN Special Rapporteur for the Human Right to a Healthy Environment shows,³¹⁶ it can be thought of as a very real, legally cognizable interest that governments have an obligation to respect, protect, and fulfill.³¹⁷ With its new constitutional amendment guaranteeing a right to clean air, pure water, and a healthy environment,³¹⁸ New York has placed itself among the governments holding that obligation. Again, what this will mean in practice is still unclear. An individual right to breathe clean air, for example, might make each individual a claimant to a property-like right in their airshed as a commoner. It is the community’s air, and all commoners have the right to use it equally. Private actors may use it for purposes other than breathing only to the extent that

314. See *Transcript of Assembly Debate of April 30, 2019*, N.Y. Assembly Chamber at 28 (2019), https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_c2f2d97b9b136b1121b9f5ff2040a39a.pdf&view=1 [<https://perma.cc/R3B4-KSUB>] (statement of Steve Englebright, Assemb. and bill sponsor, N.Y. Assembly).

315. N.Y. Dep’t Env’t Conservation Permit No. 2-6307-00108/00002, *supra* note 210, at 9 (American Recycling’s Permit); N.Y. Dep’t Env’t Conservation Permit No. 2-6307-000008/000007, *supra* note 210, at 9 (Regal’s Permit).

316. Human Rights Council, *Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Rep. of the Special Rapporteur*, U.N. Doc. A/HRC/40/55 (Jan. 8, 2019).

317. *Id.*

318. N.Y. Const., art. I, § 19 (ratified Nov. 2, 2021).

those uses do not interfere with the common right to claim a share of clean air for breathing. Once everyone who uses the airshed commons for breathing is recognized as a stakeholder, the simplistic nuisance analysis embedded in the existing permit process will no longer suffice.

Recognizing the commons dimension of this conflict over the Jamaica waste transfer stations could create a new narrative rooted in community experience, but organized and structured through the lens of rule-bound decision-making. Such an approach would supplement the official narrative encoded in official inspection logs with the lived community experience.³¹⁹ Reading both the community and the regulatory information together certainly reveals their contradictions, highlighting the partial and constructed nature of the existing regulatory narratives around these facilities. By interrogating the assumptions behind the official narrative of compliance with permit conditions, this more nuanced approach would empower community advocates to engage on equal terms in the rarefied realm of administrative compliance, as well as in the popular vernacular of the press.

Framed in this light, Jamaica’s localized waste transfer station problem reveals a bigger, more complex commons asymmetry embedded in the wider system for regulating noxious uses. For example, the New York regulations governing waste transfer stations require “adequate odor controls to effectively control off-site nuisances.”³²⁰ This requirement reduces odor control to a transactional view, with the state expressly allowing odors in exchange for services provided and revenues created by the waste stations up to the point it creates a nuisance.³²¹ Neighbors bothered by odors from the facility’s putrescible waste can complain to the agency and hope for an inspection, or in more extreme cases, they might sue under a nuisance theory.³²² However, nuisance only prohibits “unreasonable” interference with the rights of others. In any nuisance action, compliance with the permit is a defense: an assertion that the odors, noise, or dust are a “reasonable,” rather than unreasonable, interference with the neighbors’ interests.³²³ Interference that stems from conduct the agency deems to be within the scope of the permit scope likely has no recourse. And the DEC

319. See Complaint, *Raritan Baykeeper, Inc. v. Am. Recycling Mgmt.* (E.D.N.Y. Sept. 20, 2021) (No. 68 Civ. 394) (documenting a sliver of that lived experience).

320. N.Y. COMP. CODES R. & REGS. tit. 6, § 362.3.5(b) (2022).

321. A nuisance is an unreasonable interference with quiet enjoyment of property. Until and unless odors are deemed to create an interference with quiet enjoyment of property that is unreasonable, it is not a nuisance and is therefore a permit violation.

322. Currently, a waste transfer station in one of the other overburdened New York City neighborhoods is the subject of a nuisance lawsuit. The community was fortunate that the New York Lawyers for the Public Interest was willing to act as their lawyer. Without that vital assistance, the lawsuit would not be possible. Even with able representation, and significant data documenting permit violations, their success is by no means assured.

323. Nearly a century ago, the Supreme Court explicitly found that compliance with permit conditions does not wholly insulate waste handlers from allegations that their conduct creates an unreasonable nuisance. See *New Jersey v. City of New York*, 283 U.S. 473, 482-83 (1931).

has tremendous discretion to determine what constitutes adequate compliance with this obligation. The standards for adequacy seem to vary widely depending on the neighborhood. The Jamaica facilities, located in a poor, majority Black community, are being held to a much lower standard than the one imposed on the waste transfer station located in the wealthier, Whiter Upper East Side.

Moreover, this existing framing places the burden on aggrieved neighbors to complain or to sue. It gives the facility the default right to act until and unless the agency deems that such complaints stem from unreasonable conduct on the part of the facility. Philosopher Charles Mills's point that communities of color are deemed waste spaces emphasizes the difficulty such communities face in vindicating their rights under these circumstances. These communities often lack the financial, legal, technical, and organizational resources to bring a lawsuit, particularly because they often have to face off against locally powerful economic actors. Even when a community manages to organize itself to file suit, inertia clearly favors the polluters. Environmental justice communities are at an extraordinary disadvantage, trying to persuade unsympathetic decisionmakers to value their concerns and to take seriously the interferences with their use and enjoyment of property. As the Jamaica situation shows, even extreme burdens on the ability to use and enjoy property are often deemed to be reasonable, when they occur in environmental justice communities, even though similar burdens would not be tolerated elsewhere.³²⁴

The 2018 Waste Equity Law made gestures toward recognizing substantive communal rights when it set a cap on the amount of waste that could be sent into overburdened communities. In essence, it rejected *away* in favor of an acknowledgement of the commons nature of the waste problem and the need for an equitable, commons-based solution. This provided the affected communities with a measure of substantive justice—an enforceable right to limit the pollution they experience in their neighborhoods. The new waste-hauling bill, if it started from the right to breath clean air embedded in the New York Constitution, could similarly contribute to substantive justice by ensuring that overburdened communities have enforceable rights here as well. It could reduce the overall pollution burdens associated with waste hauling, and simultaneously redistribute the residual burden away from overburdened communities, striking another blow against *away*.

324. The saga of the opposition to the 91st Street Waste Transfer Station is a good illustration of this point. See Navarro, *supra* note 184. Outraged Upper East Side residents overwhelmed City Council's first ever hearing on environmental justice, pointing to the negative externalities the facility would have for their community. *Id.* Yet, at the time, Manhattan had no facilities for handling waste generated on the Upper East Side or anywhere else in the borough. *Id.* Instead, all Manhattan's waste was trucked to overburdened communities of color in Brooklyn, Queens, the Bronx, and New Jersey for processing. *Id.*

CONCLUSION

It has been two decades since the 1991 People of Color Environmental Leadership Summit advised that “if we are to find solutions to the critical and intractable problems of environment and justice, we must think innovatively and alternatively.”³²⁵ Framing the pollution and odors associated with waste handling as a commons problem, and residents as commoners, offers a way to go beyond the limitations of nuisance law and help them “see” new problems or new solutions. After all, environmental justice is both relational and dialectic—disparities exist not only because one group is more powerful but also because we allow it. By changing the social practices and values we use to manage our shared resources, we can change the outcomes. As the Fourth Circuit recently stated, “environmental justice is not merely a box to be checked.”³²⁶

This question is much broader than the disparities between two New York City neighborhoods. Waste generation and disposal is a national and global problem. The United States produces more than 30 percent of the planet’s total waste, though it is home to only 4 percent of the world’s population.³²⁷ The problems associated with managing this national and global system replicate the challenges that New York City faces, only on a larger scale. Managing and changing this larger system involves grappling with the same problems of the disparities between the 91st Street and the Jamaica waste transfer stations, only writ large. The lessons about equity, participation, and substantive fairness gleaned from examining these two facilities together applies not only locally, but at this wider scale. A waste handling system that set out to manifest environmental justice might still fall short, either substantively or procedurally. But when the policies for waste handling do not identify environmental justice as a central goal, the resulting waste handling system will inevitably fail to achieve just outcomes. Equity happens intentionally. It does not happen by accident.³²⁸

325. Chavis, *supra* note 87, at vi.

326. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (2020). In this case, Dominion Energy deployed flawed analytical approaches to represent that its Atlantic Pipeline proposal would not disproportionately affect any predominantly minority or low-income communities in Virginia. *Id.* This self-serving conclusion was news to the 83.5 percent minority population (more than 60 percent Black) that lived in Union Hill, a historically Black community directly adjacent to one of the facility installation sites. *Id.* at 89. A 2018 study found that the North Carolina portion of the pipeline was disproportionately routed through Black and Indigenous communities. SARAH WRAIGHT, JULIA HOFMANN, JUSTINE ALLPRESS & BROOKS DEPRO, RTI INT’L, ENVIRONMENTAL JUSTICE CONCERNS AND THE PROPOSED ATLANTIC COAST PIPELINE ROUTE IN NORTH CAROLINA (Mar. 2018), <https://www.rti.org/rti-press-publication/environmental-justice-concerns-and-proposed-atlantic-coast-pipeline-route/fulltext.pdf> [<https://perma.cc/2KBY-2ZVN>].

327. Abi Bradford, Sylvia Broude & Alexander Truelove, *Trash in America: Moving from Destructive Consumption to a Zero-Waste System*, FRONTIER GRP. (Feb. 12, 2018), <https://frontiergroup.org/reports/fg/trash-america> [<https://perma.cc/23VU-Q9HC>].

328. Michelle de la Uz, Executive Director of the Fifth Avenue Committee made this point in her testimony before the New York City Racial Justice Commission. NYC Racial Justice Commission,

Moreover, pollution, especially air pollution, respects no political boundaries. Collective governance of environmental quality, like collective governance of urban commons more generally, clearly requires rethinking the law and politics of pollution to encourage a more vibrant form of nested governance.³²⁹ Experimentation around environmental and property rights and legal regimes will be a necessary feature of creating and managing a neighborhood as an urban commons, within the broader context of the need for regional, national, and global management of waste.³³⁰ As Elinor Ostrom pointed out, appropriate scale is key to effective governance institutions.³³¹ Political subdivisions obscure and sometimes make it impossible to see the connection between underburdened and overburdened communities. This is as true internationally as it is within the United States.

Finally, the global COVID-19 pandemic hit environmental justice communities first and hardest.³³² Demonstrated relationships between pollution exposure and COVID-19 infection levels focused attention on unequal exposure to pollution,³³³ unequal access to health care,³³⁴ and the resulting unequal

Transforming Foundations: Planning for a Racially Equitable Future, YOUTUBE, at 1:43:00 (Aug. 3, 2021), <https://www.youtube.com/watch?v=wnj1yBrijo> [https://perma.cc/HVG3-7TXXS].

329. Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change*, 64 HASTINGS L.J. 1273, 1273 (2013).

330. See Nate Ela, *Urban Commons as Property Experiment: Mapping Chicago's Farms and Gardens*, 43 FORDHAM URB. L.J. 247, 247 (2016).

331. OSTROM, *supra* note 260, at 10-12.

332. Rachel Ramirez, *A Threat Multiplier: The Hidden Factors Contributing to New York City's Coronavirus Disparities*, GRIST (Apr. 21, 2020), <https://grist.org/justice/a-threat-multiplier-the-hidden-factors-contributing-to-new-york-citys-coronavirus-disparities/> [https://perma.cc/8K2R-C4QZ]; Theresa Andrasfay & Noreen Goldman, *Reductions in 2020 US Life Expectancy due to COVID-19 and the Disproportionate Impact on the Black and Latino Populations*, 118 PROC. NAT'L ACAD. SCI. 1 (2021), <https://www.pnas.org/doi/epdf/10.1073/pnas.2014746118> [https://perma.cc/WEG5-AFRQ]; Elisabeth Gawthrop, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH, LAB (Oct. 20, 2022), <https://www.apmresearchlab.org/covid/deaths-by-race> [https://perma.cc/A6ED-NL2H]; see also Hollie Silverman, Konstantin Toropin, Sara Sidner & Leslie Perrot, *Navajo Nation Surpasses New York State for the Highest Covid-19 Infection Rate in the US*, CNN (May 19, 2020), <https://www.cnn.com/2020/05/18/us/navajo-nation-infection-rate-tmd/index.html> [https://perma.cc/9HE8-CX3A]. For an in-depth discussion of COVID-19's racialized impacts, see Rebecca Bratspies, *This Great Catastrophe: Bungling Pandemics from 1918 to Today*, 30 MICH. STATE INT'L L. REV. 189, 235-43 (2022) (tracing parallels between the racialized impacts of the 1918 flu pandemic and the 2020 COVID-19 pandemic).

333. Xiao Wu, Rachel C. Nethery, Benjamin M. Sabath, Danielle Braun & Francesca Dominici, *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, SCI. ADVANCES (2020), <https://www.science.org/doi/epdf/10.1126/sciadv.abd4049> [https://perma.cc/3D7A-GKL7]; Jamie 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/> [https://perma.cc/D5NV-6TA6].

334. Isaac Chotiner, *The Interwoven Threads of Inequality and Health*, NEW YORKER (Apr. 14, 2020), <https://www.newyorker.com/news/q-and-a/the-coronavirus-and-the-interwoven-threads-of-inequality-and-health> [https://perma.cc/42KF-B6PU] (quoting epidemiologist Nancy Krieger).

impacts this public health crisis had on environmental justice communities.³³⁵ COVID-19 has created a moment where the problem is visible, solutions are available, and pressure for change is mounting.

The Biden Administration has explicitly committed itself to moving forward toward a more equitable and environmentally just society based on many of these principles, including elimination of *away* as a strategy—albeit not in those words.³³⁶ Among the more significant steps the Biden Administration has taken toward attaining this goal was the EPA announcement in Fall 2022 that it was creating the Office of Environmental Justice and External Civil Rights to “elevate these critical issues to the highest levels of government and solidif[y] the agency’s ability to deliver justice and equity for all.”³³⁷ EPA Administrator Michael Regan traveled to Warren County, North Carolina, the birthplace of the environmental justice movement, to make this announcement. We will have to see what happens next.

335. See Elizabeth Wrigley-Field, *US Racial Inequality May Be as Deadly as COVID-19*, 117 PROC. NAT’L ACAD. SCIS. 21854 (Sept. 8, 2020), <https://www.pnas.org/doi/10.1073/pnas.2014750117> [<https://perma.cc/Y87S-YX4K>].

336. Young, Mallory & McCarthy, *supra* note 251.

337. Press Release, EPA Launches New National Office Dedicated to Advancing Environmental Justice and Civil Rights (Sept. 24, 2022), <https://www.epa.gov/newsreleases/epa-launches-new-national-office-dedicated-advancing-environmental-justice-and-civil> [<https://perma.cc/FP2C-9NSH>].