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INDIGENOUS ENVIRONMENTAL JUSTICE: ACCESS TO ENVIRONMENTAL JUSTICE FOR MĀORI

*By Catherine J Iorns Magallanes**

Kaitiakitanga, aroha and customary rights were no match
for individuality, greed and private property rights.[1]

I. INTRODUCTION

Environmental issues are justice issues. This is so for everyone, not just Māori or other indigenous peoples. Who gets what access to clean air, water, food, and the natural environment, as well as to the decision-making processes for such distributions, are issues of broad, societal justice. This includes access to the benefits of a clean and healthy environment, as well as the burdens of a polluted or degraded environment. It includes access to ownership and use of our environment, whether for ecosystem services in general or for particular resources.

While these may be general justice issues, in Aotearoa New Zealand environmental justice is of particular concern to the indigenous Māori peoples. Part of this is because environmental justice can be considered the "environmentalism of the poor,"[2] of which Māori form a disproportionate share; this is partly because of aspects particular to Māori, notably their history and indigenous culture. A key concern for this paper is how well these are recognized as matters of access to environmental justice for Māori.

Access to justice is typically framed as being about access to decision-making. This encompasses matters such as natural justice and fairness in administrative decision-making, as reflected in administrative law origins.[3] It also encompasses assessments of how well the justice system enables individuals and groups to access it, particularly for remedies. In discussions of environmental justice, these aspects are extended to the realm of environmental law and to the distribution of environmental goods and services. This is the second type of justice that New Zealand jurist Sir Grant

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1. WAITANGI TRIBUNAL, THE HAURAKI REP. VOL. III 1151 (2006).

2. *See Environmentalism of the Poor*, ENV'T JUSTICE ORG., LIABILITIES & TRADE, http://www.ejolt.org/2012/12/environmentalism-of-the-poor/ (last visited Jan. 22, 2022) (providing a short summary about the concept environmentalism of the poor); *see also* Iain Davey, *Environmentalism of the Poor and Sustainable Development: An Appraisal*, 4 J. ADMIN. & GOVERNANCE 1 (2009) (discussing why environmentalism of the poor has the potential to become the main driving force to achieve an ecologically sustainable society); *see also* JOAN MARTINEZ-ALIER, THE ENVIRONMENTALISM OF THE POOR: A STUDY OF ECOLOGICAL CONFLICT AND VALUATION 10 (Edward Elgar 2002) (analyzing the environmental movement with an emphasis on the growing environmental justice movement, also known as popular environmentalism or environmentalism of the poor).

3. Rt. Hon. Dame Sian Elias, GNZM, C. J. of N. Z., Address to the Resource Management Law Association, Salmon Lecture: Righting Environmental Justice (July 25, 2013) (available at https://www.courtsofnz.govt.nz/assets/speechpapers/sl3jh.pdf).

Hammond identifies.[4] It requires examination of law and its practice to see if procedural and substantive justice is achieved, including "proper recognition and dues" for Māori.[5] This includes (procedural) access to the decisions by which natural resources are allocated, and justice in the substantive results of those decisions. While environmental justice goals are typically conceptualized as being either procedural or substantive, Māori claims to and aspirations for environmental justice introduce additional elements that make this binary categorization too simplistic.

The aspect of environmental justice unique to Māori is their cultural connections to New Zealand's natural environment, while also having a history of dispossession and forced alienation from it. One way of conceptualizing Māori aspirations for environmental justice is as three types of goals. One goal for Māori environmental justice is political, in that it concerns the distribution of power. This goal is for the respect of Māori *iwi* (tribes) and *hapū* (sub-tribes) as Treaty partners to substantive active protection of the environmental assets of Aotearoa as well as the recognition of their authority to control and/or share in making decisions over them. A second type of environmental justice goal is cultural. Māori values and culture need to be equally respected and protected in environmental law and decision-making, including metaphysical as well as physical features of the natural environment. A third type of goal is the respect of equality of treatment as individuals. This encompasses the more traditional procedural and substantive aspects identified above. This includes access to the legal system in respect of environmental and resource decision-making, and the distribution of environmental benefits and burdens; this distribution is most commonly discussed in relation to bearing of environmental burdens such as pollution and its impact on individual health.

There is no one single definition or conception of environmental justice, especially one that can capture all these types of Māori goals and the elements within them. Instead, environmental justice for Māori is an overarching concept that incorporates this range of concerns and concepts that vary, depending on the issue involved. This paper does not attempt to cover the various conceptions or elements comprehensively, nor address all the legislative regimes relevant to any one aspect; it merely introduces a few environmental justice issues for Māori in Aotearoa.

Part II introduces some of the different types of environmental justice: procedural, substantive, and indigenous. Part III then discusses aspects of justice under the Resource Management Act 1991 (RMA) and Environment Court. It summarizes environmental justice concerns with the RMA and

4. Sir Grant Hammond, *Access to Justice and Indigenous Peoples*, 15 N.Z. Y.B. OF JURIS., at vii, viii (2017).

5. *Id*. at vii.

addresses the 2017 RMA amendments to increase iwi participation, Mana Whakahono ā Rohe. The current issues of access to justice in the Environment Court discussed include funding, Maori cultural expertise on the Court, and the use of mediation to resolve Environment Court cases.

The second half of the paper illustrates some of the elements and issues identified in Parts II and III with two case studies. Part IV uses the example of Mount Te Aroha and the Tui mine pollution to illustrate the interplay of various procedural and substantive aspects of environmental justice for the *kaitiaki* (guardians) of that *maunga* (mountain). Part V examines the aftermath of the grounding of the MV Rena in the Bay of Plenty to illustrate a different combination of aspects of environmental justice.

The issues arising from the loss of land and resources after colonization adds an extra layer of complexity to the discussion of environmental justice in Aotearoa. Some issues of environmental justice for Māori will concern traditional procedural aspects, such as an individual's access to the courts for environmental claims, and some will concern traditional substantive elements, such as the distribution of pollution and other environmental burdens. Other environmental justice claims can only be understood in terms of these additional historical, political, and cultural elements of justice. This may seem trite for those who are well used to considering issues of Māori access to justice in areas other than environmental justice. Yet it is helpful nonetheless to be able to assess the utility of the traditional environmental justice frame and how it might be adapted to better serve environmental justice needs in Aotearoa. The reframing offered in this paper may in turn help to better serve indigenous justice needs elsewhere.

II. ENVIRONMENTAL JUSTICE

> Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.[6]

The term "environmental justice" initially arose in the USA in the early 1980s in relation to the racially discriminatory siting of toxic waste dumps;[7] it was used interchangeably with "environmental racism." Both terms refer to the concern with the (racially) unequal distribution of negative environmental burdens, rather than unequal access to positive environmental

6. Delegates to the First Nat'l People of Color Env't Leadership Summit, *Principles of Environmental Justice*, http://www.ejnet.org/ej/principles.html (last modified Apr. 06, 1996).

7. *See* Commission for Racial Justice, *Toxic Wastes and Race and the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (United Church of Christ, 1987), https://www.nrc.gov/docs/ML1310/ML13109A339.pdf (demonstrating the origins of the term environmental justice).

benefits. And while the focus was initially on racially equal substantive outcomes—such as not suffering the effects of toxic waste sites—procedural access to decision-making became an important component of environmental justice in order to ensure equality of substantive results.[8] Today, concern with the racial distribution of negative environmental burdens is still a significant aspect of environmental justice, both in the USA and worldwide.[9] Yet surprisingly, more official attention is now paid to achieving procedural access to environmental justice, through access to environmental decision-making procedures and systems, than is given to the substantive outcomes of those decisions. This is surprising because, despite such procedural attention, and even though it was the substantive outcomes which provoked the procedural attention in the first place, the actual distribution of negative environmental burdens is still racially unequal throughout at least the developed world.[10] Substantive environmental justice is still a key concern.

Since the 1980s, environmental justice concerns have become broader in coverage. Environmental justice has also come to refer to fairness for all socio-economic groups, not just racial groups; for example, low-income populations as well as those defined on racial and ethnic grounds.[11] It can also refer to the need for everyone to equally share in environmental benefits, such as access to parks and other beneficial features of the natural environment, without focusing only on those suffering pollutions and other such burdens.

Further, while also becoming broader in coverage, conceptions of environmental justice have also become broader in type: some concepts refer not just to a liberal equality of distribution, within a Western or liberal capitalist frame of property ownership and resource utilization, but they

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8. *See Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice (last visited Jan. 22, 2022) (providing an overview of the role of the EPA's Office of Environmental Justice which is located with its Office of Policy). The Office of Environmental Justice "works to protect human health and the environment in communities overburdened by environmental pollution by integrating environmental justice into all EPA programs, policies and activities" *id.*

9. *See* ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987–2007, at 45 (discussing environmental injustice in toxic waste). A follow-up report on the original 1987 assessment of the distribution of hazardous waste sites by racial make-up of the communities they are sited within, found that there was not much change 20 years later *id.* at xi. Hazardous waste was still largely—90%—sited in the communities of people of colour *id.*

10. *Id*. at xii.

11. *See Bush EPA Dilutes Meaning of Environmental Justice*, GRIST (Mar. 5, 2004), https://grist.org/article/griscom-envjustice/ (contrasting the focus of environmental justice within the EPA under the Clinton administration and first term of the George W. Bush administration); *see also* Talia Buford, *Has the Moment For Environmental Justice Been Lost?*, SALON (Aug. 3, 2017), http://www.salon.com/2017/08/03/has-the-moment-for-environmental-justice-been-lost_partner/ (discussing the evolution of environmental justice and the Office of Environmental Justice within the EPA across presidential administrations).

recognize a wider set of relationships with our natural environment.[12] Thus, for example, some conceptions recognize that environmental justice for indigenous peoples is more than what is currently included in predominant conceptions of benefits and burdens, but encompasses recognition of metaphysical relationships and responsibilities for an ancestral natural world. Other conceptions focus on the need to adopt a true ecological sustainability in order to achieve justice in the availability of nature and its resources for future as well as present generations. Finally, yet others refer to justice for the natural world itself, such as upholding the inherent interest of nature to exist as a form of eco-justice.[13] This range of ideas about what is or can be encompassed by environmental justice is unsurprising, given that environmentalism itself means different things to different people. All of these can be relevant to the various goals of Māori access to environmental justice.

A. Procedural Environmental Justice

> Environmental justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.[14]

Procedural access to environmental justice concerns equitable access to the procedures and systems by which environmental decisions are made. It differs from the substantive equitable sharing of benefits and burdens, and relates to the need for Māori voices and concerns to be heard and addressed in all relevant decision-making processes. This necessarily includes procedural participation in the decisions themselves, such as at a local authority or government department level. It also includes the review of these decisions, and thus administrative access to justice matters such as access to the courts.

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12. *See Principles of Environmental Justice*, *supra* note 6 (proclaiming 17 principles of environmental justice that address a wide range of goals, including political, the decision-making power, self-determination, sovereignty for indigenous First Nations, universal protection from toxic waste, recognising the threat of toxics to natural resources, and also framing waste as a product of colonisation, oppression and injustice).

13. *See* DAVID SCHLOSBERG, DEFINING ENVIRONMENTAL JUSTICE THEORIES, MOVEMENTS, AND NATURE (Oxford Univ. Press 2009) (exploring the meaning of justice in definitions of environmental and ecological justice); *See also* GORDON WALKER, ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE AND POLITICS 2–3 (2012) (analysing the evolution of environmental justice); *See also* PETER S. WENZ, ENVIRONMENTAL JUSTICE (Routledge 1988) (exploring the philosophical background of environmental justice and particularly focusing on theories of distributive justice).

14. *Principles of Environmental Justice, supra* note 6, at Principle 7.

The USA first developed the term "environmental justice"; justice in respect of access to initial decision-making on environmental matters is now well developed in US law and policy. Some aspects are broader than the New Zealand conceptions of consultation, in that participation applies to all public groups, not only to indigenous or racial groups.[15] However, the American conception is limited by the traditional liberal framework within which it sits. For example, the US EPA uses equality goals for both procedural and substantive justice, not affirmative action nor any other type of special preferences such as Treaty or other political rights for indigenous peoples.[16] In contrast, in Aotearoa there is a strong call for special participation rights for Maori, based on the Treaty relationship, and not just on racial disadvantage. Discussion of such issues in Aotearoa needs to be attentive to these differences.

Another generous aspect of the USA conception of procedural environmental justice is that procedural participation rights are often coupled with substantive environmental outcomes. This is addressed at the level of assessing individual benefits and burdens as well as systemic decision-making.[17] This has not been seen in Aotearoa in the same way.

In Aotearoa, access to environmental justice for Māori includes a concern with the more traditional sense of access to the justice system, such as to the Environment Court for review of some environmental decisions. In addition, access to environmental justice is discussed under the rubric of consultation by decision-makers, as well as increasingly discussed as a

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15. *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last updated Sept. 22, 2021). The US Environmental Protection Agency (EPA) frames procedural environmental justice as "meaningful involvement." "Environmental justice is the fair treatment and meaningful involvement of all people, particularly minority, low-income and indigenous populations, in the environmental decision-making process. *Meaningful involvement* means that: potentially affected community residents have an appropriate *opportunity to participate* in decisions about a proposed activity that will affect their environment and/or health; the public's contribution can *influence* the regulatory agency's decision; the concerns of all participants involved will be *considered* in the decision-making process; and the decision makers seek out and facilitate the *involvement* of those potentially affected," *id.*

16. *Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 8. The environmental justice goals are defined as: "the *same degree* of protection from environmental and health hazards, and *equal access* to the decision-making process to have a healthy environment in which to live, learn, and work," *id.*

17. *See* Buford, *supra* note 11. Indeed, it was determined early on that playing such a coordinating role was the key means by which the EPA could progress environmental justice, *id.*; *see also Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15; *see also* NAT'L ENV'T JUST. ADVISORY COUNCIL, U.S. ENV'T PROT. AGENCY, INTEGRATION OF ENVIRONMENTAL JUSTICE IN FEDERAL AGENCY PROGRAMS (May 2002), https://www.epa.gov/sites/production/files/2015-02/documents/integration-ej-federal-programs-030102.pdf (providing examples, advice, and recommendations on federal government efforts toward integrating environmental justice into agency policies, programs, and activities). The US systematically uses inter-agency agreements whereby different government agencies explicitly agree on procedures and goals to work together to better achieve substantive environmental justice, *id*.

matter of exercising environmental governance. There is an expectation that Māori will participate in this governance, whether instead of or in combination with existing governance arrangements. This entails Māori becoming the decision-makers, not merely contributors to decision-making processes run by others. Notably, this focus on governance and the operation of decision-making procedures is much stronger and more pronounced in Aotearoa than in other countries' policies on environmental justice. Even in New Zealand this is still a procedural and systems focus rather than one focusing, for example, on who suffers which environmental detriments; but it is a political goal rather than an individual citizenship goal.

B. Substantive Environmental Justice: The Distribution of Burdens and Benefits

> Environmental justice calls for universal protection from…extraction, production and disposal of toxic/hazardous wastes and poisons…that threaten the fundamental right to clean air, land, water, and food.[18]

The other branch within environmental justice as traditionally framed is the disproportionate sharing of (substantive) environmental benefits and hazards, particularly according to race. As mentioned above, the term "environmental justice" initially arose in the USA in the early 1980s in relation to racially discriminatory siting of toxic waste dumps; it was often also referred to as environmental racism. In New Zealand, work on environmental burdens is much less developed than in the USA, thus it is instructive to turn to the US EPA program and consider how we might learn from the US experience in Aotearoa.

The work of the US EPA Environmental Justice Office has focused on the distribution of (negative) environmental burdens:[19]

> Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.[20]

It explicitly recognizes that lower socio-economic and some racial communities suffer the worst substantive environmental burdens, and that

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18. *Principles of Environmental Justice*, *supra* note 6.
19. *Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 8.
20. *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15.

government needs to pay special attention to address such effects.[21] Significant work to identify and address these issues has been done pursuant to the US EPA's Environmental Justice program.[22]

The most significant practical work done pursuant to this program is the gathering of information about where negative environmental outcomes meet disadvantage and race.[23] A new environmental justice mapping and screening tool, EJSCREEN, was released in 2015.[24] It combines national data on environmental and demographic indicators in maps and reports, identifying "a community's potential susceptibility" to a number of environmental threats.[25] There are 11 environmental indicators, covering nationally collected data on matters such as air quality, lead paint indicators, proximity to waste storage or treatment sites, and proximity to major discharges into water.[26] The demographic indicators address income, race, education level, language spoken, and age.[27]

The most useful aspect of this screening tool is that, using these demographic indicators, measurements are generated for assessing the correlation of environmental burdens and different disadvantage risk factors. This data is then combined by overlaying the various maps to show whether the environmental burdens are correlated with these particular demographic groups. Overall, it is an extremely effective tool for gathering information on—and determining the correlation between—environmental burdens suffered by different communities.

There is much New Zealand can learn from this example. The suffering of environmental burdens is a major concern of the environmental justice

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21. *See Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15 (providing an overview of the EPA's environmental justice approach and work). The EPA quotes Dr Robert Bullard: "Whether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation," *id*.; *see also* Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (focusing federal attention on the environmental and human health effects of federal actions on minority and low-income populations with the goal of achieving environmental protection for all communities). In 1994 President Clinton directed each federal agency to develop an agency-wide environmental justice strategy that "identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations," *id.*

22. *See Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15 (highlighting the EPA's environmental justice approach and work).

23. *See* Justice Map: Visualize Race and Income for Your Community and Country, JUSTICEMAP.ORG, http://www.justicemap.org (identifying locations and concentration of racial communities) (last visited Jan. 22, 2022).

24. U.S. ENV'T PROT. AGENCY, *How was EJSCREEN Developed?* https://www.epa.gov/ejscreen/how-was-ejscreen-developed (last updated Aug. 23, 2021).

25. *Overview of Demographic Indicators in EJSCREEN,* U.S. ENV'T. PROT. AGENCY, https://www.epa.gov/ejscreen/overview-demographic-indicators-ejscreen (last updated Mar. 5, 2021).

26. *Overview of Environmental Indicators in EJSCREEN,* U.S. ENV'T. PROT. AGENCY, https://www.epa.gov/ejscreen/overview-environmental-indicators-ejscreen (last updated Jan. 10, 2022).

27. *Id*.

movement in the USA, yet not talked about as much in Aotearoa. New Zealand does not appear to take such a systematic approach to identify communities burdened by environmental pollution. Whether or not Māori have the same scale of the burdens that indigenous and other minority communities in other countries suffer, if we are to ensure that environmental justice is achieved for Māori, we should know where these burdens lie.[28] For example, in relation to urban and industrial areas, some communities are likely to be more adversely affected than others, if only because of economic factors.[29] Much of New Zealand's farming, mining, and industrial waste has been drained into New Zealand's rivers and streams, often over the objection of local Maori.[30]

New Zealand could usefully pursue mapping mechanisms such as that of the US EPA, in order to better define and achieve this type of environmental justice. The primary focus could first be the negative burdens but it could also possibly include data on positive benefits, such as how close different communities are to accessible green spaces, parks, clean waterways, and wild nature.[31] As with the US model, it would best be achieved through the provision of maps of communities overlaid with the various burdens. It would be particularly helpful to identify the siting of Māori communities relevant to burdens such as waste dumps, airports, factories, industrial zones, polluting industries, and toxic wastes.

A New Zealand screening tool would presumably be based primarily on the scientific measurements of the type that the US EPA uses, but it need not be limited to that and would include local knowledge and *matauranga Māori* (traditional indigenous knowledge). For example, to know how any particular environment has degraded over time, there may not be relevant air or water quality measurements from 20, 30, or 50 years ago; but there will be local Māori elders (*kaumatua* and *kuia*) who know and can describe what it used to be like. In addition, a New Zealand screening tool may also include a record or measure of metaphysical aspects and thereby extend it

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28. Jamie Pearce & Simon Kingham, *Environmental Inequalities in New Zealand: A National Study of Pollution and Environmental Justice,* 39 GEOFORUM 980 (2007).

29. Deborah Read & Craig Wright, *Cancer Incidence and Mortality in New Plymouth* 4 (Oct. 2005), https://www.health.govt.nz/system/files/documents/pages/cancerincidenceandmortalityinnewplymouth.pdf.

30. *See* Materoa Dodd, *Effects of Industry on Maori Cultural Values: The Case of the Tarawera River*, 1 INDIGENOUS VOICES, INDIGENOUS RSCH. 53 (2010) (discussing the Kawerau pulp and paper mill discharges into the Tarawera River which have been allowed to continue since the mid 20th century despite objection from local Maori).

31. *See* Rhys Jones et al., *Climate Change and the Rights to Health for Māori in Aoteara/New Zealand*, 16 HEALTH & HUM. RIGHTS. 54, 57 (2014) (Environmental benefits may be greater than average for rural Māori who live closer to the land. In contrast, urban Māori may face less access than other communities to land and nature, especially for recreational purposes, perhaps as a result of the combination of location or neighbourhood and income).

beyond the solely physical aspects of pollution. For example, a 'mauriometer' has been developed by Māori scholars in order to assess the effects of physical environmental damage on the metaphysical mauri of that environment.[32] Such a meter could appropriately assist an environmental burdens screening tool to identify a wider range of environmental burdens suffered by Maori and thereby better provide environmental justice.

Of the three most significant New Zealand environmental disasters,[33] two have significantly adversely affected Māori: pollution from the abandoned Tui mine at Te Aroha, and pollution from the Rena grounding on Otaiti (Astrolabe Reef). Both of these examples provide excellent illustrations of different aspects of environmental justice for Māori, particularly the way the physical and metaphysical, as well as different procedural and substantive aspects, interrelate. Each of these examples are addressed separately in Parts IV and V, respectively, below.

C. Indigenous Environmental Justice

> Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.[34]

Environmental justice for indigenous peoples brings in elements additional to the procedural and substantive branches described above. For example, colonization entailed the loss of most Māori lands and resources; these had been held collectively (by *whanau*, *hapū* and *iwi*) so issues of substantive environmental justice also relate to restoration of collective rights over such lands and resources. Because of the guarantees provided by the Treaty of Waitangi, the political environmental justice goals relate to regaining decision-making powers over such lands and resources, as well as protecting the resources themselves. The cultural goals are also key: upholding Māori cultural values in decision-making processes and results, in respect of lands and resources.

For example, internationally, the taking of land from indigenous peoples for the purpose of environmental protection such as creating parks and reserves is conceived of as an environmental justice issue. It is talked about as environmental justice, not just because land has been confiscated—i.e. not treating land as the monolithic "environment"—but because it exhibits

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32. *See generally* Tumanako Ngawhika Fa'aui & Te Kipa Kepa Brian Morgan, *Restoring the Mauri to the Pre-MV Rena State*, 3 MAI J. 3, (2014) (explaining how the Mauri Model decision-making system helps blend cultural and physical environmental concerns).

33. MINISTRY FOR THE ENV'T, *Environmental Reporting,* https://www.mfe.govt.nz/more/environmental-reporting (last updated Aug. 3, 2021).

34. *Principles of Environmental Justice, supra* note 6 at Principle 5.

the combination of environmental protection and broader justice. In Aotearoa the taking of Māori land for conservation or environmental protection is being addressed through the Treaty grievance resolution procedures. Māori value the conservation estate immensely, for both the land and the species that are protected within it, and "although it is owned by the Treaty partner [Crown], every inch of it is tribal territory."[35] Substantive justice is being addressed through the Treaty settlement process—such as through return of lands and resources, and/or Māori enjoyment of use—as are procedural aspects of justice—such as Māori being involved as decision-makers (co-governance arrangements for conservation land, being just one illustration).[36] However, there are still many unresolved or partially resolved justice issues of this type.[37]

An illustration of substantive and procedural justice in respect of conservation lands is that of Te Urewera. Te Urewera was confiscated from the Tuhoe people for the purposes of creating a national park. As a result of the negotiation process to settle the grievance from this confiscation, the lands have been transferred out of National Park status and into a co-governance arrangement where iwi are expected to make up the majority of the decision-making body.[38] Most significantly, Te Urewera has been made a legal person, with the territory being vested in Te Urewera, and the decision-making body effectively being appointed as guardians of its interests. A traditional fee-simple ownership might accord better with full control in the Western property sense; yet the guardianship and legal person model gives effect to Māori cosmology and is one way to give effect to cultural claims as well as to partially uphold the political claims.

These indigenous aspects of political and cultural justice in relation to our natural environment are relevant also to traditional environmental concerns such as pollution and species conservation. For example, in relation to pollution, this is combined with the loss of control of ancestral lands; Māori thus have to suffer the effects of the pollution without being able to remove it. Examples include the Te Aroha Tui mine pollution, Kawerau pulp and paper mill waste, and the Glenbrook steel mill water usage and waste. But further—and this is not a concern addressed in the overseas screening tools—Māori have cultural and spiritual concerns in relation to environmental activities, even where there is no recognized scientific effect.

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35. WAITANGI TRIBUNAL, *Ko Aotearoa Tēnei: A Report on the Wai 262 Claim Released, Concerning New Zealand law and Policy Affecting Maori Culture and Identity* 127, (July 2, 2011), https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/.

36. *See* Letter from the Hon. Kate Wilkinson, Minister for Conservation, to Brendon Mills, (Aug. 22, 2012) (showing that the Department of Conservation administers eight million hectares of land and the treaty settlement process transferred 17,235 hectares of public conservation land to iwi).

37. WAITANGI TRIBUNAL, *supra* note 35 at 126.

38. Te Urewera Act 2014, s 21 (N.Z.).

For example, the simple mixing of different bodies of water, such as one stream or river being diverted into another, affects their *wairua* (spirit) and *mauri* (life force); *tangata whenua* (Māori with traditional authority over a territory) perceive this as an environmental burden, affecting their health as well as that of their community. The Huakina Development Trust objected to the Glenbrook steel mill water uses and discharge on this basis, even when the water was not being polluted in Western scientific terms.[39] The same can be said for Whanganui River *iwi* objections to the diversion and mixing of water at the headwaters of the river.[40] The *Huakina* case in particular was a significant, ground-breaking case where an application to discharge treated effluent and improve upon the untreated discharge was objected to on the basis of the offence it caused to Māori cultural spiritual beliefs.[41]

III. ENVIRONMENTAL JUSTICE UNDER THE RESOURCE MANAGEMENT ACT AND THE ENVIRONMENT COURT

> To get the Resource Management Act enacted at all was something of a miracle. To make it work properly is an even greater challenge.[42]

Several statutes govern New Zealand's natural resources allocation and decision-making. The one with the largest scope of application is the Resource Management Act 1991 (RMA).

A. Resource Management Act 1991

The Resource Management Act governs most official environmental decision-making in New Zealand. Māori participation in the range of RMA processes—from broad plan-making to individual consents—is an area that has been well-studied and extensively commented on. While there are several mechanisms specifically designed to accord appropriate Māori access and participation under the Act, there have been many criticisms of such access and participation, and these criticisms continue today.

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39. See *Minhinnick v Auckland Regional Water Board,* Plan. Tribunal, Decision No. A116/81, 16 (Dec. 1981) (N.Z.); *Minhinnick v. Waikato Valley Authority,* Plan. Tribunal Decision No. A 66/84, 23 (July 1984) (N.Z.); *Minhinnick v Auckland Regional Water Board,* Plan. Tribunal, Decision No. A119/84, 6 (Nov. 1984) (N.Z.); *Minhinnick v. Manukau Harbour Mar.,* Plan. Tribunal A120/84 (1984) (N.Z.).

40. WAITANGI TRIBUNAL, *The Whanganui River Report: Wai 167*, N.Z. (1999).

41. *Huakina Development Trust v. Waikato Valley Authority*, 2 NZLR, 188 HC (1987) (N.Z.).

42. SIR GEOFFREY PALMER, ENVIRONMENT: THE INTERNATIONAL CHALLENGE: ESSAYS 147 (Victoria Univ. Press, 1995).

The RMA includes substantive provisions designed to enable decisions under the Act to protect environmental assets that Māori value. For example, section 6(e) requires councils to "recognise and provide for…the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred sites], and other taonga [treasures]."[43] Such substantive goals are relevant to procedural access to environmental justice as they require the decision maker to adopt a particular process for consideration of what such a relationship is and how it can be recognized and provided for in the decision in question. If there are deficiencies in the process of such consideration, there are likely to be deficiencies in the substantive outcome as well.

In addition to these substantive provisions, there are a range of procedural provisions requiring consideration of *tikanga* Māori (Māori customs) at different stages and enabling and/or requiring consultation and/or other forms of participation with *iwi* and Māori in decision-making processes under the Act. For example, local authorities are required to consult with *tangata whenua*, typically through relevant *iwi* authorities, when preparing or changing policy statements or regional and district plans[44] and "must consult tangata whenua through relevant iwi authorities" in relation to the appointment of hearings commissioners with understanding of *tikanga* Māori.[45] There are several duties in the Act on local authorities to provide information to "tangata whenua through relevant iwi authorities."[46] There are also various situations where councils have a duty to include as members of the decision-making panel, at least one member who "has an understanding of tikanga Māori and the perspective of tangata whenua."[47]

An amendment in 2005 clarified that there is no duty on an applicant or a consent authority to consult in an individual resource consent application,[48] nor on designations or heritage orders.[49] Yet, consultation may still occur pursuant to other obligations;[50] such consultation may be necessary in order to satisfy the substantive obligations to consider Māori values, relationships, and perspectives.

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43. *See* DEREK NOLAN, ENV'T AND RES. MGMT. LAW 14 (LexisNexis NZ, 5th ed. 2014) (describing that s 6 and s 7(a) require decision-makers to "have particular regard to… Kaitiakitanga," and s 8 requires them to "take into account the principles of the Treaty of Waitangi."; *See* Resource Management Act 1991, s 74(2)(b)(iii) (N.Z.). In addition to these general requirements, the Act also contains specific requirements, such as to have regard to regulations relating to non-commercial Māori customary fishing, *id*.

44. *See id*., Resource Management Act 1991, ss 3, 66(2A), 74(2A), sch 1, cls 2–3, 3B.

45. *Id.* s 34A(1A)(a).

46. *Id*. ss 44, 5(4), 5A(8), 20, 47, 51.

47. *Id*. ss 34(A)(1A)(b), 39, 40(1). The same applies to establishing collaborative decision-making groups, *id.* ss 39, 40(1).

48. *Id.* s 36A(1).

49. *Id.* s 36A(2).

50. Local Government Act 2002, ss 76(5), 77(1), 81 (N.Z.).

Unfortunately, assessment of Māori input into RMA decision-making through such consultation has not been positive. While there has been judicial comment that consultation with *tangata whenua* is "good practice," [51] the Waitangi Tribunal noted the inconsistency of Māori influence on planning instruments or consents under the RMA. Piecemeal results were a reality: where "relations between iwi and the local authority are good and well resourced, Māori priorities stand a fair chance of being heard; if not, the Māori voice is effectively silenced." [52] The Tribunal criticizes New Zealand's reactionary system, where Māori "react to priorities being set by local councils and applicants." This system results in Māori "usually sidelined in the role of objectors" as opposed to being part of initial discussions for such priorities.[53] Unfortunately, where a Māori voice is not considered as part of the decision-making process, it has led to decisions contrary to their interests.[54] It has been commented that:

> The main barriers to Māori effectively participating in the resource management process relate to lack of resources and limited understanding of the resource management process. Indeed, lack of resources is a huge impediment to participating and there appears to be an expectation amongst both local authorities and consent applicants that you will consult about an application, yet limited recognition that this can incur significant costs.[55]

The lack of a budgetary commitment to Māori or *iwi* (tribal) participation on the part of councils demonstrates the limited recognition that significant costs can be incurred.[56] At the same time, *iwi* authorities in popular resource development areas can be expected to handle thousands of resource consents without compensation.[57] This was first officially identified in 1995 yet it still happens today.

A related procedure for considering the substantive environmental concerns of Maori is through the development by *iwi* (tribes) of Iwi

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51. *Carter Holt v Te Runanga o Tuwharetoa Ki Kawerau* [2003] NZHC at [55] per Heath J, 2 NZLR 350, at [55].

52. WAITANGI TRIBUNAL, *supra* note 35, at 115.

53. *Id.*

54. *See Helmbright v. Env't Ct. (No. 1) [*2005] NZHC 118 per Baragwanath J. (N.Z.) (showing that the High Court's refusal to recognize a battleground site as important to Māori lead to the destruction of the site); *See also Ngati Maru ki Hauraki Inc v. Kruithof* [2004] NZRMA 1 (HC) per Baragwanath J. (N.Z.) (reviewing an alleged historic pa site included in a proposed development on private land).

55. Jenny Vince, *Māori Consultation Under the Resource Management Act and the 2005 Amendments*, 10 N.Z. J. ENVTL. L. 295, 311 (2006).

56. *Id*.

57. S*ee generally Marlborough Seafoods Ltd v Marlborough District Council* [1998] NZRMA 241 (NZEnvC) per Kenderdine J. (N.Z.) (where the iwi in that case had 11 local bodies in their rohe and in 1995 alone received 1,330 resource consents for consultation on, without any remuneration.)

Management Plans. Regional and district authorities consider these when preparing or changing their policy statements and plans, and can even inform decision-making on resource consents.[58] However, as Kenderdine J has noted:

> A Local Government New Zealand survey of council engagement with Maori published in 2004 found that only half of the 86 councils surveyed held IMPs. Only eight councils had supplied funding or other support for IMP development. Subsequent investigation by the Ministry for the Environment disclosed that five of the 10 iwi organisations that the department spoke to felt that IMPs were not being utilised as they should by councils and consultants, and that it was all too easy for iwi concerns to be ignored.[59]

Besides these ways that Māori can participate in decision-making by others, the RMA contains methods for Māori organizations to become decision-makers under the Act. The first way this can occur is through a simple transfer of powers under section 33. This section allows local authorities to transfer any of their functions, powers, or duties to a range of public authorities, including to an *iwi* authority. Another type of decision-making process that can be delegated is the issuing of heritage orders to protect places of special significance on spiritual and cultural grounds.[60] Under these provisions, an *iwi* authority can apply to the Minister for the Environment to be made a heritage protection authority. The Waitangi Tribunal notes that these are "significant" powers and can accordingly provide a useful avenue for substantive justice.[61] However, they have not yet been "invoked in favor of iwi, despite attempts to do so."[62]

A third type of decision-making process is a shared one through the creation of joint management agreements, whereby the exercise of any function, power or duty under sections 30 and 31 in relation to particular natural and physical resources can be made jointly between the *iwi* and local or regional authority.[63] However, this provision has not lived up to its promise. Until 2015 there was only one formal such agreement, between

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58. Resource Management Act 1991, ss 66(2A)(a), 74(2A) (N.Z) (indicating that such plans must be recognized by the relevant iwi authority, lodged with the relevant Council, and relevant to the resource management issues of the area covered by the plan).

59. Shonagh J. Kenderdine, RESOURCE MANAGEMENT THEORY & PRACTICE 66 (2010) (footnote omitted).

60. Resource Management Act 1991, s 189 (N.Z.).

61. WAITANGI TRIBUNAL, *supra* note 35, at 113.

62. *Id.*

63. Resource Management Act 1991, ss 36B-E (N.Z.).

Ngāti Tūwharetoa and the Taupō District Council.[64] The Waitangi Tribunal comments that "while a unique and laudable initiative, it remains unproven and appears to be somewhat tentative" due to the numerous restrictions the agreement contains.[65]

A prominent criticism has been that government is not legally compelled to enter into such arrangements.[66] Local authorities are left with most of the power as they are the party relinquishing control to *iwi*. It has been criticised that there is little incentive for local authorities to enter into JMAs.[67] The Waitangi Tribunal is very critical of the lack of use of these decision-making delegation sections. The Tribunal argues that "the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business."[68] This creates an environment where political means, such as through Treaty settlements, are the primary ways in which tangata whenua can become environmental decision makers.

In 2013, Justice Joe Williams criticized the operation of the various provisions that were designed to benefit Māori and better achieve their access to environmental justice:[69]

> Despite the Act's mechanisms aimed at mediating these issues, it has not over the last two decades produced examples of any significant step change in the structural relationships between the necessary players under the Act. Neither s 33 nor the heritage protection provisions in pt 8 have been used by ministers to transfer decision-making powers to iwi or hapu. Partnership-based powers under s 36B have been used by local authorities, as far as I know, only once and then only in relation to Māori-owned land. Iwi generated planning instruments, although they are specifically provided for in the Act, have not enabled iwi and hapu to take the resource management initiative on matters of deep significance to them - that is to drive conversations with local authorities over iwi and hapu priorities. Iwi remain, for the most part, cast in the role of objectors to the initiatives of others. These structural provisions are, for Māori, a dead letter, despite Lord Cooke's obiter in the *McGuire*

64. *Joint Management Agreement,* The Waikato Raupatu River Tr. & Waikato Dist. Council (Mar. 23, 2010), https://wdcsitefinity.blob.core.windows.net/sitefinity-storage/docs/default-source/your-council/council-committees-and-boards/waikato-and-waipa-river-settlements/joint-management-agreement.pdf?sfvrsn=abbb9c9_2.

65. WAITANGI TRIBUNAL, *supra* note 35, at 114.

66. Natalie Coates, *Joint-Management Agreements in New Zealand: Simply Empty Promises?,* 13Journal of South Pac. L. 32, 36 (2009).

67. *Id*. at 36.

68. Waitangi Tribunal, *supra* note 35, at 115.

69. Justice Joseph Williams*, Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law*, 21 WAIKATO L. REV. 1, 22 (2013).

> *v Hastings District Council* case that the Māori provisions in pt 2 of the RMA are "strong directions, to be borne in mind at every stage of the planning process."

It is thus perhaps not surprising that various methods of according both procedural and substantive justice are being negotiated through the Treaty settlement process. Procedural mechanisms are being adopted in order to ensure ongoing collaboration between *iwi*, *hapū*, and councils, as opposed to the more episodic consultation on plans and consents as they arise. For example, one option is the establishment of advisory boards to give advice to local authorities.[70] Another is establishing joint committees to directly assist regional councils with the development of policy statements and plans, as well as to develop separate planning documents that must be recognized and provided for by local authorities in RMA planning instruments.[71] Joint Management Agreements are being negotiated with a similar goal of ongoing collaboration, but in relation to all processes: plan-making, decision-making on resource consents, and monitoring.[72] While Joint Management Agreements under the RMA envisage delegating resource management decision-making roles to an *iwi*, the only settlement agreement to include aspects of such a role is that over the Waikato River, which Waikato-Tainui has taken up. These settlement agreements fill important gaps, but the gaps remain for those without agreements for such arrangements.

1. 2017 RMA Amendments to Increase Iwi Participation: Mana Whakahono ā Rohe.

In April 2017, new *iwi* participation processes—Mana Whakahono ā Rohe—were added to the RMA, with the aim of enhancing Māori participation in resource management. Mana Whakahono ā Rohe are written agreements between *iwi* authorities and local government bodies that record how the two will work together when preparing, reviewing, or changing policy statements and plans.[73] Agreements can be initiated by an *iwi*, rather

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70. Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, ss 158, 160, 161; The Ngati-Tama ki te Tau-Ihu settlement summary, N.Z. Gov't, https://www.govt.nz/treaty-settlement-documents/ngati-tama-ki-te-tau-ihu/ (last visited Jan. 31, 2021).

71. *See generally* TE RAUTAKI O TE ONEROA-A-TŌHE, https://b836a396-45d9-45cf-a2f1-bc6f8b170e04.filesusr.com/ugd/653f56_a0802ba81e434ae29d8ff2d3615b4c35.pdf (last visited Feb. 5, 2021) (illustrating a joint committee assisting a regional counsel with planning and policy).

72. Joint Management Agreement, *supra* note 64.

73. Resource Legislation Amendment Act 2017, s 58R (N.Z.).

than *iwi* waiting for local government to approach them to initiate the relationship.[74]

It is likely that the Mana Whakahono ā Rohe provisions will enable more certainty for iwi participation in local government decision making and will incentivize early involvement of *iwi* by the local governments. They do not shift policy making power to *iwi*, as this remains ultimately with the relevant council, but they do provide a better forum for collaboration by requiring the voices of *iwi* to be heard and understood.[75] While it is too early to evaluate the operation of these provisions, Deputy Chief Judge Fox of the Māori Land Court comments that they "are subject to local authority discretions, internal dispute resolution procedures and a default process back to the Minister, rather than the Court." [76] Further, she comments that, "[w]hile the Environment Court may be asked to have regard to these agreements at some time in the future, it is hard to see how the failure to transfer power will be progressed any time soon in the Environment Court."[77]

It is possible that the focus of these provisions on lower-level participation may be delaying—or at least avoiding—the transfer of decision-making powers to *iwi*. In one sense, this could be seen as procedural justice (participation) being awarded at the expense of substantive justice (political redress). This does not fit the traditional procedural/substantive categories of environmental justice, but illustrates the need for a more nuanced analysis, including considerations of the Maori political goals for indigenous environmental justice.

B. Access to Justice in the Environment Court

> The Court embraces change for positive effect and is constantly looking . . . to enhance access to justice.[78]

The issue of access for Māori to the Environment Court is not usually addressed in discussion of environmental justice in Aotearoa, even in

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74. *Id.* s 58O.

75. Marama Fox & Te Ururoa Flavell, *RMA Strengthens Kaitiakitanga,* SCOOP PARLIAMENT (NOV. 9, 2016), http://www.maoriparty.org/rma_strengthens_kaitiakitanga (suggesting that this arrangement "goes beyond anything that currently exists for Māori outside of a Treaty Settlement" and that addition of Mana Whakahono ā Rohe agreements "gives iwi a chance to engage like they haven't been able to do before.").

76. Caren Fox, Taking into Account Spiritual and Cultural Values and Te Tiriti o Waitangi in the Environment Court (June 26, 2017) (unpublished manuscript) (paper delivered at a symposium entitled: "*Huakina*: "The Fabric of New Zealand Society", on file with the author).

77. *Id*.

78. Laurie Newhook et al., *Issues with Access to Justice in the Environment Court of New Zealand*, INT'L SYMP. ON ENV'T ADJUDICATION IN THE 21ST CENTURY (2017), http://www.rmla.org.nz/wp-content/uploads/2017/05/FINAL-LJN-DAK-and-JJH-PAPER-FINAL-100417-3.pdf.

discussion of access to the Environment Court.[79] This section briefly introduces four such issues and suggests avenues for further research.

1. The Environmental Assistance Legal Fund

The most common issue of access to justice, in relation to access to the courts more generally, is the practical one of cost. In order to address the high cost of participating in RMA proceedings before the Environment Court and boards of inquiry, the Environmental Assistance Legal Fund provides funding for not-for-profit community groups, including *iwi* and *hapū* groups.[80] There have been increasing criticisms of this funding, including the low total amount plus the budget has sometimes been underspent even while applications have been denied.[81] Another criticism has been over who makes the decisions on grants from this fund. In early 2016, the government took this responsibility away from the Ministry for the Environment chief executive and gave it to the Environment Minister Nick Smith to exercise.[82] Even though the increased ministerial powers are to be exercised upon the advice of an independent panel, Sir Geoffrey Palmer labelled it "as a 'constitutional outrage,' saying 'due process is replaced by Executive fiat.'"[83] The Environmental Defense Society submitted that the, "[m]inisterial discretion provided for by the Bill is excessive and the reduction in public participation unjustified. The changes allow the politicization of RMA processes and comprise the democratic separation of powers. The focus on quick decision-making will compromise good-decision making and good environmental outcomes."[84]

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79. *See id*. (discussing the need for access to the courts); *See also* Sian Elias, *supra* note 3 (where the Chief Justice addressed only administrative conceptions of access to environmental justice).

80. MINISTRY FOR THE ENVIRONMENT, *About the Environmental Legal Assistance Fund*, http://www.mfe.govt.nz/more/funding/environmental-legal-assistance-fund/about-fund (last reviewed July 23, 2020).

81. Stacey Kirk, *Government Blocking Public Access to Environmental Assistance Legal Fund, Say Greens*, DOMINION POST (Mar. 20, 2016, 6:54PM), http://www.stuff.co.nz/dominion-post/news/politics/78074905/Government-blocking-public-access-to-Environmental-Assistance-Legal-Fund-say-Greens. For example, the budget was $680,000 for the 2014-2015 year but only $281,000 was spent. Budgets have also been reduced, with the budget for that 2014-2015 year reduced by $445,000 from the 2013-2014 financial year before, *id.*

82. Sam Sachdeva, *Nick Smith Accused of Power Grab Over Change to NGOs' Environment Legal Fund*, STUFF (Oct. 19, 2016) http://www.stuff.co.nz/national/politics/85522500/nick-smith-accused-of-power-grab-over-change-to-ngos-environment-legal-fund.

83. Eugenie Sage, *Resource Legislation Amendment Bill a Shambles* (Nov. 3, 2016), https://www.greens.org.nz/news/press-release/resource-legislation-amendment-bill-shambles.

84. Environmental Defence Society, *Submission to the Local Government and Environment Select Committee on the Resource Legislation Amendment Bill* (2016), https://www.eds.org.nz/assets/Submissions/Submissions2019/191105%20EDS%20submission%20on%20RMA%20Reform.pdf?k=2bdeb2bd72.

However, despite these criticisms of the fund, a positive aspect for Māori is that Māori are receiving significant financial assistance through this fund. For example, in the 2016-2017 financial year alone, it appears that Māori organizations received approximately $374,000 whereas non-Māori organizations received approximately $186,000 from this fund.[85] Perhaps the biggest criticism from Māori is that the application criteria for this fund relate only to decisions under the Resource Management Act. For example, there have been calls to extend the criteria to cover activity consent applications under the Exclusive Economic Zone legislation, but this has not been done.[86]

2. Kaupapa Māori Expertise in the Environment Court

A key cultural issue of access to justice for Māori is how courts deal with the presentation of evidence of Māori *tikanga*, values, and interests.[87] This can be both a procedural and substantive issue. For example, if the court misunderstands *tikanga* or *matauranga* Māori, then it is likely to also misunderstand their appropriate application to resolve a particular case.

The Environment Court is required to "recognize tikanga Maori where appropriate."[88] However, there is no requirement to have any member of the Court with expertise in *tikanga* Māori on any particular hearing panel. The appointment of special advisors in order to assist the Court in a proceeding is possible.[89] Knowledge and experience of "matters relating to the Treaty of Waitangi and kaupapa Māori" are one of the six areas of knowledge that the court is expected to possess in order to ensure an appropriate "mix of knowledge and experience in matters coming before the court."[90] It is thus a matter of good management and best practice that judges and commissioners with expertise in *kaupapa* Māori be appointed. However, it needs to happen more often and, if it does not happen, there is no recourse.

Since 2009, Māori Land Court judges have presided over 13 Environment Court cases involving Māori issues.[91] This came about through the then Principal Environment Court Judge, Bollard J, requesting Māori land court judges who could also sit as Alternate Environment Court judges.[92] Deputy Chief Judge Fox and Judge Clark were appointed—and

85. *See* Ministry for the Environment, Environmental Legal Assistance Fund http://www.mfe.govt.nz/more/funding/environmental-legal-assistance-fund/previous-applications.

86. Environmental Defence Society, *supra* note 84.

87. *See* Williams, *supra* note 69, at 21-22 (explaining how the court lacks understanding of Maori evidence).

88. Resource Management Act 1991, s 269(3) (N.Z.).

89. *Id*. s 259.

90. *Id.* s 253(e).

91. Fox, *supra* note 76.

92. *Id*. at 6.

while they have not been able to accept all invitations to join the Environment Court hearings—at the time of writing they had presided over seven and six cases respectively.[93] Deputy Chief Judge Fox comments that it helps because they can assess evidence related to *tikanga* Māori: "Although we are not experts in tikanga, we work with Māori communities, te reo Māori and tikanga Māori experts on a daily basis."[94]

Fox DCJ notes that, while good substantive results can be and have been achieved even without such expertise on the Court, where it does exist there is less room for avoiding such evidence and issues. She observes that, where a Māori Land Court judge "has presided with an Environment Court judge":[95]

> Exploration of the relationships of parties to their ancestral lands and waters have been comprehensively analyzed; Mana whenua issues have not been avoided where there are competing parties; Kaitiakitanga [stewardship] values have been tested to ascertain how kaitiaki principles have been applied; and the principles of the Treaty of Waitangi have also been taken into account.

Full and appropriate consideration of *tikanga* and *matauranga* Maori (where it is relevant) will ensure that important matters are not left unaddressed and that, when addressed properly, will better justify whatever substantive result is ultimately reached.

3. Access to Alternative Justice in the Environment Court

The Environment Court uses mediation to resolve "approximately 75 per cent of all cases filed in the Court."[96] Mediation provides a more cost-effective approach, lower costs than litigation and no risk of an award of

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93. *See id*. at 7 (citing cases involving Judge Fox,*Ngāi te Hapū Inc v Bay of Plenty Regional Council* [2017] NZENvc 73; *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90; *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 269; *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195; *Te Puna Matauranga o Whanganui v Whanganui District Council* [2013] NZEnvC 110; *Te Rūnanga o Ngäi Te Rangi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402; *Te Rangatiratanga o Ngāti Rangitihi Inc v Bay of Plenty Regional Council* [2010] NZEnvC 26; *Te Rangatiratanga o Ngāti Rangitihi Inc v Bay of Plenty Regional Council* EnvC Auckland A092/2009, 6 October 2009. Those involving Clark J are: *Ngāti Mākino Heritage Trust v Bay of Plenty Regional Council* [2017] NZEnvC 72; *Purewa Ancestral Land Unincorporated Group v Whangarei District Council* [2016] NZEnvC 94; *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnv C 83; *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnv C 248; *Te Rakato Marae Trustees v Hawkes Bay Regional Council* [2011] NZEnvC 231; *Wairoa District Council v Hawkes Bay Regional Council* [2011] NZEnvC 97; and *Wairoa District Council v Hawkes Bay Regional Council* [2010] NZEnvC 420).

94. *Id.*

95. *Id.* at 8.

96. NEWHOOK ET AL., *supra* note 78, ¶ 16.

costs against a party, and thereby provides greater access to justice in a formal sense.[97]

It is also possible that the use of mediation to resolve issues before the Environment Court can provide greater access to environmental justice. In its favor is that the process of mediation is closer to Māori problem solving methods and emphasizes a partnership where "equitable power sharing and decision-making responsibilities"[98] are placed at the forefront, rather than the adversarial approach of litigation which does not encourage an enduring partnership between the two parties. Where two cultures are coming together to find a solution to an issue, "face-to-face contact . . . . throughout the decision-making process" is an important tool for "building trust and respect amongst the individuals involved."[99] *Iwi* and governmental bodies should work together as a partnership; the even-footing and non-adversarial nature of mediation make it a more appropriate method of access to justice for Māori.

On the other hand, Environment Court judges have noted that mediation is a private method of dispute resolution and does not leave the public record that litigation does. The use of mediation, therefore, removes from the public eye matters that should be resolved in the public sphere, thus diminishing public access to justice.[100] It is much harder to track Māori access to justice in the Environment Court if 75 percent of the cases that come before it cannot be easily evaluated. The Environment Court has safeguards in place to protect against concerns of inconsistent treatment: alternative dispute resolutions are facilitated by commissioners of the Environment Court, and any resolution of a case that has gone through an alternative dispute resolution process is subject to final approval by a judge.[101] However, it could be a concern that the understanding of Māori issues and evidence varies widely between commissioners. That is why, for example, there is a requirement for at least one commissioner on a consenting and planning panel to have an understanding of *tikanga* Māori. But if there is only one commissioner as mediator, and one judge's oversight, there is greater possibility for levels of access to justice for Māori to vary depending on the abilities and knowledge of the personnel involved.

Thus, the use of mediation needs to be examined for its ability to provide access to justice for Māori. Procedural and substantive issues should be addressed—from costs, timelines, and consideration of evidence, to the

97. *Id*. at ¶ 21.

98. Philip O. Lyver, *Co-Managing Environmental Research: Lessons from Two Cross-Research Partnerships in New Zealand*, 32 ENVIRONMENTAL CONSERVATION 365, 365 (2005).

99. *Id.* at 366.

100. NEWHOOK ET AL., *supra* note 78, ¶ 6.

101. *Id.*

consistency of results with the interests of the Māori parties and their tikanga. Even though it is a process where the results are a matter of private settlement and not public record, researchers should be given access for these purposes. Results can be reported with anonymized data as well as in aggregate studies. Only when justice is seen to be done can we be sure that it really is being done.

4. Resource Legislation Amendment Act 2017

Concerns have been raised about possible reduced access to justice as a result of changes to court processes and jurisdiction under the Resource Legislation Amendment Act 2017 (assented to on April 18, 2017). For example, there are effective restrictions on the Court's jurisdiction through changes to the notification framework and limitations on rights for merits appeals.[102] Consent authorities are no longer required to do "a comprehensive effects-based assessment to determine whether to notify a resource consent application."[103] This reduces public participation in exchange for a resource consent process that is cheaper for the applicant.

Experienced Environment Court judges have identified the following consequences of the reform where the emphasis on streamlining procedures has been "to the virtual exclusion" of enhancing access to justice.[104] They comment that:

> - Rights of participation in decision-making have been very significantly reduced;
> - Public participation having been substantially constrained in relation to consent decision-making, the reforms might be seen to erode the refuge in participation in policy and plan-making that arose in consequence; and
> - Commentators accordingly perceive a continuing and significant erosion of the opportunity for citizens to participate in decision-making processes and give effect access to judicial proceedings.[105]

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102. *Id.* ¶ 107.

103. MINISTRY FOR THE ENV'T, *Resource Legislation Amendments 2017: Fact Sheet 9* (April 2017), https://www.mfe.govt.nz/sites/default/files/media/factsheet-9-changes-to-resource-consent-notification.pdf.

104. NEWHOOK ET AL., *supra* note 78, ¶ 109.

105. *Id.* ¶ 108.

One concern with the new legislation is that streamlined processes could be particularly detrimental to Māori. For example, oral representations need time. Further, the streamlining processes that have been adopted under the RMA can both limit Māori participation as well as exclude Māori from participating in decisions. One safeguard for Māori representation in streamlined projects is the requirement that counsel identify any implications that the streamlined planning process may have on any relevant iwi participation legislation or on Mana Whakahono ā Rohe arrangements. Counsel is also required to include "a summary of the consultation planned or undertaken on the proposed policy statement, plan, change or variation, including with *iwi* authorities."[106] The Minister, in reaching a decision to grant consent or not, must also have regard to the Mana Whakahono ā Rohe arrangements that are relevant, as these arrangements must specify what iwi participation is to be under a streamlined application.[107]

It will take time before we can assess how these new arrangements will work for Māori; they will need to be assessed to determine how they affect access to justice for Māori in the Environment Court. As with the other suggestions for research, procedural and substantive issues should be addressed—from costs, timelines, and consideration of evidence, to the consistency of results with the interests of the Māori parties and their tikanga.

IV. TUI MINE, HAURAKI IWI AND ENVIRONMENTAL JUSTICE

> Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.[108]

This paper now considers a case study concerning the pollution from the abandoned Tui mine site. The history and ongoing situation of the Tui mine site illustrates the interplay between procedural and substantive environmental justice for Maori, as well as a clash of values and cultures between a minority and the majority. It illustrates a more typical environmental burden of historic pollution that is made more complicated by the history of colonization. It thus serves as an illustration of the interplay

106. MINISTRY FOR THE ENV'T, *Resource Legislation Amendments 2017 Fact Sheet 5: A New Optional Streamlined Planning Process* (Apr. 2017) http://www.mfe.govt.nz/sites/default/files/media/fact-sheet-5-a%20new-optional-streamline-planning-process.pdf.

107. *Id*.

108. *Principles of Environmental Justice, supra* note 6, at Principle 6.

between several different elements of Maori environmental justice; procedural, substantive, and indigenous.

Most discussions of the Tui mine begin with its opening by Norpac Mining Ltd. in 1967. It was mined for a range of metals—particularly copper, lead, and zinc—until 1975. It was then abandoned, leaving behind ore dumps and tailings which leached heavy metals into the Tui and Tunakokohoia Streams. Yet for Hauraki *iwi*, the story of environmental justice and Te Aroha *maunga* starts more than 100 years earlier, in the Native Land Court.

A. Mount Te Aroha's Importance to Hauraki iwi

Mount Te Aroha has always been a site of significant spiritual importance and *wahi tapu* for Hauraki iwi.[109] The cultural importance of Te Aroha *maunga* was significant enough for it to be recognized in the relevant district plan as being a "Māori Historic Sacred Mountain" and *waahi tapu* site;[110] construction of a cellular radio tower was accordingly denied by the Environment Court in 1997.[111] Unfortunately, a failure by the Crown to encourage and foster participation by—or recognize the traditions and values of—the *iwi*, has resulted in the "continuity of tikanga Māori [being] lost at Te Aroha."[112]

B. The Crown and the Aroha Block

The Aroha block has a long history of tribal tension between Hauraki *iwi*, who tried to use the courts as a method for attempting to secure title over the land. For example, from 1869 to 1878 the Native Land Court determined claims to the land from four tribes: Ngati Haua,[113] Ngati Rahiri, Marutuahu

109. WAITANGI TRIBUNAL, THE HAURAKI REPORT 3 at 902 (Wai 686, 2006). Its name, meaning "love, yearning or compassion," is a shortened version of Te Aroha-ki-tai, Te Aroha-a-uta which is an "expression of yearning for home," *id.* In the *Hauraki Report*, the Waitangi Tribunal expressed that, although the land was sold to the Crown in 1878, it is clear that Mount Te Aroha "has remained a maunga tapu, a sacred mountain, in the mind of Ngati Rahiri Tumutumu and Hauraki people generally," *id.*

110. *See Mason-Riseborough v. Matamata-Piako District Council* (1997) NZEnvC A147/93 per Whiting J (holding that Māori had an interest greater than the general public interest in preventing construction on Mt. Te Aroha).

111. *Id.*; *see also* WAITANGI TRIBUNAL, *supra* note 109, at 902.

112. *Id.* at 928.

113. WAITANGI TRIBUNAL, *supra* note 109, at 465 (explaining the Ngati Haua were awarded it in 1869 on the basis that they had occupied it at the time of European settlement in New Zealand).

and Ngati Rahiri Tumutumu.[114] However, the Crown purchased the Aroha block in 1878.[115]

When it faced resistance to reaching an agreement to open a goldmine at Te Aroha, the Crown introduced "the system of raihana - lending money for food and other purchases to Māori landholders in anticipation of future mining revenue." It was through this practice that the Crown was able to secure large blocks of land by calling in debts, including Te Aroha.[116] The Crown conceded that they had exerted "undue pressure or manipulation" in securing this agreement to open the goldfield;[117] the Waitangi Tribunal found that the Crown had failed to "protect the traditional values and kaitiakitanga of [Ngati Rahiri Tumutumu] in [regards to] Te Aroha Mountain."[118] It was through this injustice that the Aroha block was purchased and the Te Aroha goldmine was able to be opened in 1880.

C. The Tui Mine

In addition to the goldmine, in 1967 the Tui mine opened on the western side of Mount Te Aroha. The site was leased by the Government to Norpac Mining Ltd. for extracting "a range of base metals, including copper, lead and zinc."[119] In 1973 the mining became economically unfeasible due to overseas buyers becoming reluctant to purchase metals from the mine due to high levels of mercury.[120] By 1975 Norpac had abandoned the site and gone into liquidation.[121] This left behind ore dumps, the ruins of the mine infrastructure and tailings which leached heavy metals into the Tui and Tunakohoia Streams.[122] While temporary work was done by the Hauraki Catchment Board in 1980 to prevent the tailings from bursting from the

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114. WAITANGI TRIBUNAL, THE TE AROHA MAUNGA SETTLEMENT PROCESS REPORT: WAI 663 at 7, N.Z., (2014).

115. *See* Philip Hart, *The Aroha Block to 1879* (Univ. of Waikato, Te Aroha Mining District Working Paper No. 13, 2016), https://researchcommons.waikato.ac.nz/handle/10289/10322 (showing in the late-1800s, the Government attempted to buy it "against the wishes of a section of the native claimants."); *Id.* at 78.

116. Geoff Cumming, *Hauraki Pains*, NEW ZEALAND HERALD (Feb. 3, 2021), https://www.nzherald.co.nz/nz/hauraki-pains/AQL22AQEBFR7OWCO4RYZOIS2NI/.

117. WAITANGI TRIBUNAL, THE HAURAKI REPORT I, at xxviii (2006).

118. *Id.* at xi.

119. *Tui Mine Remediation Works*, AECOM, https://aecom.com/us/projects/tui-mine-remediation-works/ (last visited Jan. 22, 2022).

120. *A Tale of Mining in New Zealand—and the Tragic Tailings of Tui Mine*, ENVIROHISTORY NZ (May 2, 2010), https://envirohistorynz.com/2010/05/02/a-tale-of-mining-in-new-zealand-and-the-tragic-tailings-of-tui-mine/.

121. *Id*.

122. *Tui Mine Remediation Project*, WAIKATO REG'L COUNCIL, https://www.waikatoregion.govt.nz/Services/Regional-services/Waste-hazardous-substances-and-contaminated-sites/Tui-mine/ (last visited Jan. 22, 2022).

dam,[123] it was another 30 years before remediation began. In 2010, when the remediation project began, "the Tunakohoia Stream was contaminated with heavy metals leaching from the mine and was unsuitable for swimming, fishing, drinking or irrigation. The Tui Stream was dead and unable to support any aquatic life."[124]

Iwi (local tribes) suffered greatly from this contamination from the mine. The contamination of the Tunakohoia and Tui streams destroyed "plant, birdlife and tuna (eel) that were once abundant on the mountain."[125] The oldest known name for Te Aroha was Puke Kakariki Kaitahi—"the place where the Kaka parrots flocked to feed"—and this was a symbolic name to represent "that the mountain supplies an abundance of food and resources."[126] What is not mentioned in most accounts of the environmental pollution is the effect on *kaitiaki* (tribal guardians) of the metaphysical damage to the *mauri* (life force) of Te Aroha, and thus to the *mana* (status) of the *kaitiaki* themselves and the consequent shame when their responsibilities as *kaitiaki* were unable to be fulfilled.

Another concern was the tailings dam which had deteriorated over time and become unstable. The dam was at risk of collapse from a "moderate seismic event," and such a collapse would result in the waste "liquefying and flowing down the Tui stream past the edge of Te Aroha" (i.e., the township).[127]

D. Remediation of the Site

The remediation effort was managed by the Waikato Regional Council and governed by the Waikato Regional Council, the Ministry for the Environment, the landowners (Matamata-Piako District Council and Department of Conservation), and local *iwi*.[128] It had multiple goals aside from stabilizing the tailings, it also aimed to:

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123. *November 2010 Newsletter: The Story so Far*, WAIKATO REGIONAL COUNCIL, https://www.waikatoregion.govt.nz/Services/Regional-services/Waste-hazardous-substances-and-contaminated-sites/Tui-mine/November-newsletter/The-story-so-far/.

124. WAIKATO REGIONAL COUNCIL, *Tui Mine Remediation delivers excellent stream improvements*, SCOOP (Apr. 7, 2014), https://www.scoop.co.nz/stories/AK1404/S00132/tui-mine-remediation-delivers-excellent-stream-improvements.htm.

125. IWI ADVISORY GROUP: TUI MINE REMEDIATION PROJECT, TUI MINE CULTURAL MONITORING PLAN 2012–2017, at 7 (Mar. 2013).

126. WAITANGI TRIBUNAL, *supra* note 107, at 903.

127. *Tui Mine Cleanup: Project Update*, WAIKATO REG'L COUNCIL (Dec. 2011), https://www.waikatoregion.govt.nz/assets/PageFiles/20673/TuimineDec2011.pdf.

128. Nick Smith, *$16.2 Million Tui Mine Clean-up Gets Underway,* NEW ZEALAND GOV'T (Oct. 19, 2011), https://www.beehive.govt.nz/release/162-million-tui-mine-clean-gets-underway (explaining $15.2 million was originally contributed by the government for what it stated was "the largest ever for a clean-up"); *see also* MINISTRY FOR THE ENV'T, *Tui Mine Remediation,*

- "reduce the release of contaminants into the Tui and Tunakohoia streams, thereby improving the water quality in those streams";
- "improve the geotechnical stability of the tailings impoundment";
- "improve the safety and security of the site";
- "improve the visual appearance and aesthetics of the site";
- "address as far as practicable, within the limitations of the project, the impacts of the Tui mine on the taonga (treasures) of the Te Aroha maunga (Mt Te Aroha) for iwi."[129]

Despite completion in 2013, there are still ongoing costs involved with the remediation project. A key environmental impact of the mine was discharge of contaminated water into the Tunakohoia and Tui streams. Although there is a return of life to the streams, both are "still affected by past and/or present activities at the Tui Mine."[130] Particularly affected is the Tunakohoia stream—to this day it has yet to return to healthy conditions.[131]

E. Māori participation in the remediation

The remediation project was overseen by a governance group comprising the senior management of Waikato Regional Council, Ministry for the Environment, the landowners, Matamata-Piako District Council, and the Department of Conservation. Local *iwi* (tribe) Ngāti Rāhiri Tumutumu are also a part of the project governance, as is a representative of the Iwi Advisory Group.

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http://www.mfe.govt.nz/more/environmental-remediation-projects/tui-mine-remediation (last visited Feb. 1, 2021) (explaining this amount eventually grew to $20.53 million (excluding GST). The final figure for the remediation project, which was completed in May 2013, was $21.7 million (Waikato Regional Council and Matamata-Piako District Council also provided funding).

129. Smith, *supra* note 128.

130. PATTLE DELAMORE PARTNERS LTD, TUI MINE: POST REMEDIATION ECOLOGICAL MONITORING 2015, WAIKATO REG'L COUNCIL, (Mar. 2016), https://www.waikatoregion.govt.nz/assets/PageFiles/13588/Tui_Mine_Remediation_-_Ecological_Monitoring_Report_2015_(3747598).pdf.

131. *Id.* at 2 (assessing the different sections of the Tunakohoia, the Waikato Regional Council found that although some sections showed "a significant reduction in the combined mass flux of cadmium, copper, lead and zinc," others had "no significant change in water quality" with the "concentration of a number of elements, particular cadmium, lead, nickel and zinc [remaining] elevated particularly when compared to the concentration of these elements measured in the south branch of the Tunakohoia Stream").

A steering group oversaw the project's implementation; it included senior staff from the main parties, and a representative of the Iwi Advisory Group. The Iwi Advisory Group consisted of members of interested iwi, including Ngati Rahiri Tumutumu, Te Kupenga O Ngati Hako, and Ngati Haua.[132]

The Iwi Advisory Group stated that "Kaitiaki obligations to the mountain" were "marginalised" by the negative impact the mine had on the environment.[133] The effort made to remediate the mountain was done with the knowledge that the mountain "cannot be returned to a pre-mined state," and that the regeneration of the site "is an intergenerational responsibility" of which "iwi have an ongoing responsibility in the monitoring of the maunga."[134] With Hauraki and Ngati Haua as kaitiaki for Te Aroha, they bear an "inter-generational responsibility to ensure the cultural, social and spiritual integrity of the maunga is upheld for present and future generations"[135] and must be active participants in the ongoing regeneration projects for the Tui mine site.

F. Te Aroha Maunga Settlement and the Tui Mine Site

Currently, Te Aroha *maunga* is Crown land and managed by the Department of Conservation as part of the Kaimai Mamaku Forest Park.[136] The Tui mine site sits on land owned by the Matamata-Piako District Council.[137]

The Tui mine site has had an interesting treatment for Treaty settlement in the area and there is, on its face, a conflict between the cultural importance of this site and the reality of offering it in a settlement package. The site now sits outside of any settlement claim, with Pare Hauraki having initialed a Collective Redress Deed with the Crown in December 2016 that includes Te Aroha Tupuna Maunga (an area of 1000 hectares) which is to be vested in the Collective as a Local Purpose (Pare Hauraki Whenua Kura) Reserve, without the contaminated site.[138]

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132. WAIKATO REG'L COUNCIL, *supra* note 127. The Iwi Advisory Group was involved in: "consent compliance planning activities"; "cultural induction of all contractors onsite"; "blessing of the site"; "leading the coordination of, and hosting, the ministerial visit for the official launch of phase 2 of the project"; "accommodating the public open day at Tui Pā"; "providing cultural advice to the project governance and management groups." *Id.*

133. IWI ADVISORY GROUP, *supra* note 125 at 6.

134. *Id*.

135. *Id.* at 11.

136. WAITANGI TRIBUNAL, *supra* note 109, at 901.

137. WAIKATO REG'L COUNCIL, *supra* note 122.

138. PARE HAURAKI COLLECTIVE REDRESS DEED, PARE HAURAKI-CROWN ¶¶ 1.6, 8.97.1 (Aug. 2, 2018), https://www.govt.nz/assets/Documents/OTS/Pare-Hauraki/Pare-Hauraki-Collective-Redress-Deed-v2.pdf.

G. Environmental Justice and the Tui Mine Site

Various issues are raised in terms of environmental justice for *kaitiaki* and the Tui mine site. The first is that the political claims of Maori for ownership and control of the site is not one that is typically faced by traditional environmental justice issues surrounding toxic sites and pollution. For example, it is especially unusual to see a battle to take control of the toxic site rather than attempts to avoid responsibility. As illustrated in the Māori Land Court proceedings in the 1800s, there is conflict over who is *kaitiaki* and how the mountain and site should be treated in any settlement package.[139] The Hauraki Collective put forth a proposal including it in 2011, yet the Crown has not agreed to this, even while Te Aroha Tupuna Maunga is included.[140] Notably, *iwi* carry the responsibility of being *kaitiaki* over the mountain, and are therefore key figures in its regeneration, which has been contaminated by a third party who is no longer around to participate in the remediation process.

In contrast, issues of financial liability and other responsibility for the site are not unique to New Zealand. The site still shows the signs of environmental damage from the mine in the contaminated status of the Tunakohoia Stream. Ongoing monitoring of the streams and ongoing work on the site is required, and more work needs to be done on how the Crown can uphold its responsibility to remediate the site, without placing all of the financial burden on *kaitiaki*.

The Hauraki Collective, as stated *kaitiaki* of mount Te Aroha, have proposed a land transfer that included the site, and are presumably willing to take on the responsibility of the continued remediation of the Tui mine site.[141] It seems that a settlement package that does not include the full western slopes of mount Te Aroha is detrimental to the Hauraki Collective in terms of achieving full redress (the return of mount Te Aroha in full) and the ability to properly fulfil their *kaitiaki* obligations. However, the role of Ngati Rahiri Tumutumu would also need to be resolved.

Overall, this example illustrates how procedural and substantive justice are intertwined with each other and with the uniquely Maori goals of environmental justice. It particularly illustrates how, even in a seemingly traditional case of substantive justice for pollution, historic and continuing substantive Māori environmental justice is much more complicated than simply who bears the burdens of pollution as traditionally framed. Instead, these are intertwined with aspects of justice that are peculiar to Maori,

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139. MAORI LAND COURT, 150 YEARS OF THE MAORI LAND COURT 99 (2015).
140. WAITANGI TRIBUNAL, *supra* note 109 at 902.
141. *Id.*

relating to historical injustice and the remedies that are needed to address that.

V. THE AFTERMATH OF THE GROUNDING OF THE RENA

> There is really only one issue that is immediately relevant to the issues before us—and that is the state of the mauri of the reef.[142]

The grounding of the cargo ship, the MV Rena, provides a second case study illustrating the interplay of a range of issues of Maori environmental justice. The grounding of the Rena was a significant modern environmental disaster that illustrates different issues from that provided by the Tui mine case study. After the initial emergency clean-up, the Rena grounding involved the application of the Resource Management Act (RMA), a hearing and decision at the local authority level, and a hearing in and decision from the Environment Court.[143] It sheds light on Maori goals for environmental justice, including political justice and *iwi* participation in decisions, in substantive justice over the results, and particularly the importance of cultural aspects of substantive and procedural justice.

On the 5th of October 2011 the MV Rena was grounded on the Astrolabe reef (Otaiti) carrying over 1,733 tonnes of oil.[144] Salvage operations began immediately after the event but a tropical storm on the 7th of January 2012, which caused the ship to be split in two, caused cargo and debris, including 1,700 tonnes of oil, to be spilled onto the reef and nearby beaches.[145] It caused the deaths of many marine animals including thousands of seabirds.[146] The stern section remained submerged on the reef, leaking contaminants.[147] Volunteers removed more than 1,000 tonnes of oil and debris from the beaches.[148] A two nautical mile exclusion zone around the wreck was established and a clean-up plan put in place.[149] Even while the wreck remained on the reef, by 2013 the physical effects outside the reef

142. *Ngāi Te Hapū v. Bay of Plenty Reg'l Council* [2017] NZEnvC 073, at 29.

143. *Id.*

144. IAN G. MCLEAN, ANALYSIS OF THE GROUNDING OF THE MV RENA IN NEW ZEALAND, 5 OCTOBER, 2011, at 2 (Feb. 18, 2018).

145. MV Rena, MARITIME N.Z., https://www.maritimenz.govt.nz/public/environment/responding-to-spills/spill-response-case-studies/rena.asp (last visited Jan. 22, 2022).

146. Iryll Findlay, *Rena Spill Field Report*, N.Z. BIRD RESCUE CHARITABLE TR. (Nov. 21, 2011), https://birdrescue.org.nz/rena-spill-field-report/.

147. MCLEAN, *supra* note 144, at 2–3.

148. SIMON MURDOCH, INDEPENDENT REVIEW OF MARITIME NEW ZEALAND'S RESPONSE TO THE MV *RENA* INCIDENT ON 5 OCTOBER 2011, at 74 (2013), https://www.maritimenz.govt.nz/public/environment/responding-to-spills/documents/Independent-Review-MNZ-response-to-Rena.pdf.

149. N.Z. GOV'T, RENA LONG-TERM ENVIRONMENTAL RECOVERY PLAN 8 (2011).

were much improved;[150] by 2015 it was considered by many to be a matter solely for history.[151] However, the impact on Maori lasted longer and, for some, continues today.

For local Maori, both on the mainland and those based on Motiti Island near the reef, Otaiti is a *tipuna* (ancestor) and "an important tāonga and wāhi tapū; and…a significant *mahinga kai* (traditional food gathering place)."[152] For some, Otaiti is also a *toka tapū*, where the spirits of the deceased depart for Hawaiiki.[153] It is thus a site of spiritual significance and the physical damage to Otaiti thereby damages its *mauri* (life force). Because of this connection to Otaiti and the regard in which *iwi* held it, they were severely affected by the grounding of the Rena. The *mana* of *kaitiaki* suffers from an inability to protect the physical and spiritual health of the reef—their *tipuna* (ancestor)—and the physical and spiritual health of the Otaiti *kaitiaki* (guardians) suffered in turn.[154]

There have been several types of remedies, none of which have been enough to accord Maori environmental justice, individually or collectively. They have included criminal liability, compensation for financial losses, compensation for the cleanup, and inclusion in future governance of the area.[155]

In 2012, the owner of the Rena, Daina Shipping Company, was found to be criminally liable under the RMA for the discharge of harmful substances into the sea and was fined $300,000.[156] The shipping company was also liable under the Maritime Transport Act for the removal of the wreck[157] and for remedying the hazard to navigation.[158] Further, it was liable for damages from the pollution.[159]

As a result of liability under the Maritime Transport Act, the ship's owners placed a little over $11 million in a fund to compensate claimants.[160] This was to be for the purposes of restoration of the environment and for

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150. *Decision of Panel on MV Rena Resource Consent Applications, in Astolabe Community Trust*, at 75 [hereinafter *MV Rena Decision*] (2016).

151. *See* Jamie Morton, *Rena: What to do With a Shipwreck*, N.Z. HERALD (Sept. 6, 2015), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11508801 (conveying local sentiments about the Rena incident).

152. *MV Rena Decision*, *supra* note 150, at 113, 114.

153. *MV Rena Decision*, *supra* note 150, at 129.

154. *Ngāi Te Hapū*, [2017] NZEnvC 073, at 29–30.

155. Newshub, *Rena Owners to Pay $27m Compensation* (Jan. 10, 2012), https://www.newshub.co.nz/nznews/rena-owners-to-pay-27m-compensation-2012100210.

156. *Maritime New Zealand v. Daina Shipping Company* DC at Tauranga CRI-2012-070-001872, 26 October 2012 at [17] (N.Z.).

157. Maritime Transport Act 1994, s248(2)(a) (N.Z.); *MV Rena Decision*, *supra* note 150, at 2.

158. Maritime Transport Act 1994, s248(4)(b)(iv) (N.Z.); *MV Rena Decision*, *supra* note 150, at 2.

159. *Daina Shipping Company* DC at Tauranga CRI-2012-070-001872 at [17].

160. Simon Judd, *Compensation for Pollution from the Rena*, 12 N.Z. J. PUB. & INT'L L. 261, 275 (2014).

financial compensation, such as, for losses of profits as a result of the physical damage.[161] This was of limited assistance to Maori, partly because the clean-up to date had already been funded by the Crown or the shipping company, and partly because none of this compensation could be paid for the environmental damage per se or for the cultural or spiritual damage to *kaitiaki*.[162] Further, the compensation fund had to be divided by a large number of claimants, such that even those with economic losses were not fully compensated; those whose losses could not be quantified monetarily could not recover.[163]

A later settlement between the ship's owners and the Crown was similarly unable to address environmental justice for *kaitiaki*. Despite shipowners providing $27.6 million in damages, they paid it to the Crown (e.g., for past and future clean-up).[164] A further $10.4 million compensation would be payable to the Crown if the wreck was allowed to stay on the reef.[165] It is the request for the wreck to remain on the reef which has most divided Maori over the situation.

In June 2014, the shipowner applied to the Bay of Plenty Regional Council for a resource consent under the RMA to authorize leaving the wreck on the reef.[166] The panel received 151 submissions on the application for the consent.[167] Forty-eight submissions were from Māori, of which forty-six then opposed the application.[168] The opposing applications were concerned that "the proposal did not adequately recognise Māori values;" such as *kaitiakitanga* (stewardship), *mauri* (life force), *tapū* (sacredness), and customary practices required to meet customary obligations of those Motiti *iwi* (tribes).[169] A key issue was that of *kaitiakitanga*. For those iwi opposed to the application, some felt that leaving the wreck on the reef would be a "constant reminder…that they had somehow failed in their

161. *See* Marine Transport Act 1994 No 104, ss 345, 346, 351 (N.Z.) (elaborating liability owed for maritime pollution spills).

162. *See* Bevan Marten, *Pollution, Liability, and the Rena: Lessons and Opportunities for New Zealand* 3 (VICTORIA UNIV. WELLINGTON L. RSCH. PAPER 10, 2013) (explaining that the narrow definition of pollution damage in the Maritime Transport Act of 1994 prevents recovery for non-monetary environmental damage).

163. *Id.*

164. Catherine J. Lorns Magallanes, *Treaty of Waitangi Duties Relevant to Adaptation to Coastal Hazards from Sea-Level Rise*, 63 DEEP S. NAT'L SCI. CHALLENGE 54 (2019).

165. *Id.*

166. *MV Rena Decision*, *supra* note 150, at 13.

167. Elton Rikihana Smallman, *Commissioner's Report: Rena Application Granted but Conditions Must be Met*, STUFF (Feb. 27, 2016), https://www.stuff.co.nz/national/77309101/commissioners-report-rena-application-granted-but-conditions-must-be-met.

168. *MV Rena Decision*, *supra* note 150, at 123. One Māori submission supported the application, and one was neutral. *Id.*

169. *Id*.

responsibilities as kaitiaki."[170] Similarly, Ngāi Te Hapū Inc. stated that the proposal "ran counter to, and was inconsistent with, Ngāi Te Hapū responsibilities as kaitiaki of Otaiti."[171] Ngāti Awa Rūnanga also rejected the proposal due to the marginalization of their "strong kaitiakitanga obligations."[172] The status of Otaiti as *tāonga* and, as such, it having a need to be "recognised and provided for as a matter of national importance" was another concern raised by multiple *iwi*.[173] Those opposing the application also considered that the reef's *tapū* (sacred) characteristics had been "totally disregarded" and its *mauri* adversely affected.[174]

As well as the cultural and spiritual concerns about the consent being granted, concerns were raised about the effects on the environment. Contaminants that would continue to be released from the wreck would have "direct detrimental consequences for kai moana and other ecological resources."[175] A concern raised was whether the application could result in "traditional food gathering practices . . . [being] adversely affected and the kai moana resource" being lost.[176] This is a serious consequence to those who rely on the reef as a source of food.

Other reasons for opposing submissions were the failure of the application to uphold the principles of the Treaty of Waitangi (in particular the principle of partnership), a failure to "undertake customary practices, and to meet their customary obligations . . . in a traditional and proper manner . . . would be compromised," that *rangatiratanga* over the reef would be adversely affected, and that "the proposed conditions of consent were inadequate."[177]

In February 2016 the decision-making panel found that "the hapū of Motiti have kaitiaki responsibilities for Otaiti that outweigh others"[178] due to their direct proximity to the reef and reliance on the surrounding sea being "carefully managed and cared for so that it can sustain the people of Motiti."[179] It noted that, if the proposed conditions of consent were accepted, there would be significant effects on Māori values.[180] The panel decided that this was a matter to "weigh in the balance" when evaluating the application and in coming to their decision.[181]

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170. *Id.* at 117.
171. *Id*.
172. *Id.* at 119, 120.
173. *Id.* at 121.
174. *Id.* at 123.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 127.
179. *Id.*
180. *Id.* at 131.
181. *Id.*

However, despite being weighed in the balance, the Motiti *hapū* concerns were outweighed and a resource consent was granted allowing the wreck to remain on the reef. The decision-makers had considerable concerns that they did not have any authority to order removal of the wreck—merely to consent it to remain or not.[182] They instead wanted to be able to impose conditions on that consent which would enable both procedural and substantive concerns of kaitiaki to be better upheld in the future.[183] The only way to impose and enforce such conditions would be with a grant of consent. Thus, the resource consent was granted with conditions for "the establishment and maintenance of a Kaitiakitanga Reference Group" involving *kaitiaki*, which would be involved with monitoring and with an Independent Technical Advisory Group.[184]

These conditions provided a foundation for environmental justice, both procedural and substantive, and gave Māori authority to participate in future action and monitoring. However, despite these conditions, this decision to grant consent was not acceptable to many *kaitiaki*, especially as they ultimately wanted to force removal of the wreck.[185] The decision was accordingly appealed to the Environment Court by Ngai Te Hapu Incorporated and Nga Potiki a Tamapahore Trust.[186] The Environment Court issued the judgement in May 2017.[187] Notably, Fox DCJ of the Māori Land Court presided in this decision.[188]

The Environment Court noted the "complex array of iwi and hapu groups all vying for recognition" regarding their relationships with Otaiti.[189] Starting with s6(e) of the RMA, the Court considered the following as "markers" to understand the relationship between *iwi* and *hapū* with Motiti Island and Otaiti as "Whakapapa (Genealogy), Ancestral traditions and cultural associations, Ahi ka (occupation) and title to land, Mana, Customary associations and activities, Contemporary Mechanisms such as Treaty of Waitangi settlements, [and] claims to customary marine title."[190] These factors demonstrated to the Court that "there are different layers of relationships, cultures and traditions with Otaiti that require different forms of recognition and provision."[191]

182. *Id.*
183. *See id*. at 153 (discussing the benefits of certainty through granting conditions).
184. *Id.* at 2.
185. Ngāi Te Hapū Inc. v. Bay of Plenty Reg'l Council [2017] NZEnvC 073, at [81, 167].
186. *Id,* at 5.
187. *Id.* at 2.
188. *Id.* at 1.
189. *Id.* at 12.
190. *Id.* at 12–13.
191. *Id.* at 13.

The Court began by determining which of the *iwi* or *hapū* had *mana whenua* ("customary authority exercised by an iwi or hapu in an identified area"), noting the "contestability between the tribes on the mainland over the issue" before moving on to determine who had *mana whenua* over the island.[192] The court emphasized that "normally, this Court is not required to undertake such an analysis."[193] It is notable that extensive evidence was considered, including both written and oral history, and that the genealogical stories are included in the summary of evidence contained in the written judgment.[194]

After assessing the relationships, both past and present, with the *iwi* and *hapū* applicants before the Court, it was determined that: "Ngāi Te Hapu - Te Patuwai and Te Whanau a Tauwhao are tangata whenua, and therefore they are the kaitiaki of Otāiti, with mana whenua over Motiti and its associated islands and reefs."[195] The Court subsequently declared that it was the *tikanga* (customs) of Ngati Hapu that should be applied to Otaiti as "a matter that becomes important in our consideration of how the mauri of the reef is recovering."[196] The court also determined that Te Arawa are *tangata whenua* who are affected on the mainland and that they have *kaitiakitanga* responsibilities for Otaiti.[197] This recognition of "different forms of kaitiakitanga" is reflected in the membership of the Kaitiaki Reference Group with Ngai Te Hapu to hold a majority in the Group.[198]

In assessing application of the provisions of the RMA to the case, the Court spent considerable time discussing the relevant Maori values, paying particular attention to the *mauri* of the reef.[199] Most important was the evidence of two Māori experts, one a diver and marine salvage expert and the other a marine scientist.[200] Extensive evidence was provided about the recovery of the reef, including photographs and "video footage taken just prior to the commencement of the hearing."[201] The evidence was that "the remains of the wreck have now been covered by marine organisms, which appear similar to those on the balance of the reef," "that the wreck area has

192. *Id.* at 26.

193. *Id.*

194. *See id.* at 14–26 (discussing the genealogical and historical connections connected to the island). This was based on "ancestral connections," "continuous occupation," "proximity to the reef," "cultural and customary associations with the reef," "traditional use of the area as a fishing ground," and the "manner in which they have exercised their kaitiakitanga including through the use of tikanga, their customary values and practices pre and post the Rena disaster." *Id.* at [82].

195. *Id.* at 27.

196. *Id.*

197. *Id.* at 27–28.

198. *Id.* at 29.

199. *See id.* at 29–32 (discussing what mauri is and its present state on the reef).

200. *See id.* at 31 (showing that Joe Te Kowhai and Dr. Paul-Burke testified to the mauri of the reef).

201. *Id.* at 8.

aquatic life of diversity and abundance similar to other areas of the reef," and that most of the "taonga species identified in the Regional Plan had been sighted." [202] Commissioner Prime, an expert in *tikanga* Maori commented "'Kua hokimai to mana ki a Tangaroa' (the mana has been returned to Tangaroa—the Maori deity of the sea)." [203] The Court concluded that "[g]iven the evidence we have heard and what we saw ourselves, we are persuaded that the reef is recovering its mauri."[204]

Evidence was provided by the Maori salvage expert that all of the possible salvage work had already been undertaken; any other work to remove debris from the wreck still lying on the reef was likely to cause significant damage to "the reef and its biology (at least in the short term)"[205] and create "real and significant risks to life for the salvage divers."[206] The Court concluded "that nothing further at this stage can be done to actively protect the taonga that is Otaiti, as it would not be reasonable to require it in the circumstances."[207]

The combination of evidence "convinced Te Arawa Ki Tai and Te Patuwai to desist from requiring further removal" of the wreck.[208] As a result, five of the seven appeals were withdrawn, [209] leaving only those by Ngai Te Hapu and Nga Potiki.[210] The Court noted that "at the time the original application for these consents was filed a majority of Māori groups within the Bay of Plenty were opposed to the wreck being granted consent and wanted it removed."[211] Yet the intervening evidence and extensive discussions about possible future conditions of consent meant that most parties "have now either withdrawn or reached a position with the Applicant where they consider their concerns are addressed."[212]

The Court was persuaded heavily by this, as well as by the evidence about recovery and the practical matters in relation to any further salvage work; it granted consent for the broken tanker to stay on the reef.[213] The Court also noted its lack of jurisdiction to order removal of the wreck, and that the conditions offered by the applicant meant that the consent met the requirements of the RMA.[214] Notably, the Court also considered that the

202. *Id.* at 8–9.
203. *Id.* at 32.
204. *Id.*
205. *Id.* at 42–43.
206. *Id.* at 33.
207. *Id.* at 34.
208. *Id*.
209. *Id.* at 5.
210. *Id.*
211. Iorns Magallanes, *supra* note 164, at 61.
212. *Ngāi Te Hapū Inc.v. Bay of Plenty Regional Council* [2017] NZEnvC 073, at 48.
213. Iorns Magallanes, *supra* note 164, at 61.
214. *Id.* at 107.

"granting of a consent recognises and provides for mauri better than the refusal of any consent":[215] a consent would give "an opportunity to explicitly give recognition to concerns of the various groups" and it allowed for the "provision of the Kaitiaki Reference Group."[216] Overall, the granting of consent was the best way to "positively recognise and provide for Māori" in relation to the ongoing substantive effects of the wreck.[217]

Despite the result being the best practical option in the situation, the Court recognized that this does not provide justice for all *hapū* affected and that the granting of consent "will not resolve their ongoing concerns. For some, it will break their relationship with Otaiti and their confidence in their local environment. For others, it may mean that they will not eat food from the reef."[218] While the *mauri* of Otaiti would recover as the health of the reef recovered, and even while the evidence about the inability to remove the wreck was recognized, those of Ngai Te Hapu in particular "felt that as a matter of principle the Court should not agree to it being abandoned on the reef."[219] As *kaitiaki*, the chair of Ngai Te Hapu reported her "feelings of riri (anger) and whakamā (shame)" at the continuing interference with the site.[220] It would take a very long time for the physical recovery of the reef and its life to enable spiritual recovery.

This example of the aftermath of the Rena illustrates several aspects raised in this paper in relation to both procedural and substantive justice. Most notably, it illustrates the interplay of—yet also differences between—procedural and substantive environmental justice for Maori, and all three goals for Māori environmental justice. It involves the political claim to authority and control, the cultural goals and the interplay between physical and spiritual effects, and the unequal distribution of individual environmental benefits and burdens, especially the burden of pollution.

The early financial compensation paid by the ship's owners did not assist Māori in addressing physical or spiritual effects over and above compensation as affected citizens.[221] Perhaps the most that can be said about the fines is that they served as *utu* (reciprocity), particularly in relation to the criminal liability and fine.

In terms of the procedural aspects of the proceedings, three Māori appellants were allocated $30,000 each from the Environmental Legal Assistance Fund for their appeals: Ngai Te Hapu, Ngati Makino Heritage

215. *Id.* at 54.
216. *Id.*
217. *Id.* at 97.
218. *Id*.
219. *Id.* at 54.
220. *Id.*
221. *Id.* at 76–78.

Trust, and Te Runanga o Ngati Whakaue ki Maketu Incorporated Society.[222] The consultation and engagement with Māori throughout the process was referred to frequently in the Court decision as more than is normally seen in such situations and that a genuine attempt seemed to be made to accommodate procedural and substantive interests.

The Rena example illustrates well how substantive environmental justice for Māori in cases of pollution differs from the traditional burdens of pollution typically focused on the additional layer of *wairua, mauri, tapu*, and *mana* that are not accounted for by standard physical measures of pollution. Typically this is not handled well in decision proceedings, particularly in relation to evidence in court and the difficulty of assessing this alongside evidence of physical pollution and practical consequences. In this case, these differences are well illustrated; however, they were appropriately addressed by the Environment Court.

There were two members of the Court with significant experience in handling *kaupapa* Māori evidence: Environment Commissioner Prime and Fox DCJ, appointed as Alternate Environment Judge (seconded from the Maori Land Court).[223] This expertise is not seen in most Environment Court hearings. This better enabled procedural environmental justice, through the sensitive hearing and acknowledgement of the Māori evidence, including storytelling, as was reflected in the written decision by Fox DCJ.[224]

It appears that this expertise has also better enabled an understanding of the cultural effects relevant to the application, which enables them to be considered in the application of the law and thereby facilitate substantive justice. For example, the Court took into account *hapū* management plans as a relevant matter under s104(1)(c) RMA, as well as cultural effects more generally.[225] There was no shortcutting of the evidence nor consideration of it in the judgment. All aspects of the effects on Māori were genuinely well considered, including the spiritual effects.

The result affords a considerable role for *kaitiaki* in the ongoing monitoring of the reef and future decision-making in respect of it. Ngai Te Hapu has a greater role in order to recognize its *mana whenua* status. While at the moment this is a procedural step, it is expected that it will lead to greater substantive justice. The ongoing relationship with the Council helpfully entails a greater recognition of *kaitiakitanga* obligations than existed before.

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222. *See* Ministry for the Environment, *supra* note 85 (showing types of applications).

223. MĀORI LAND COURT, *About the Māori Land Court*, https://maorilandcourt.govt.nz/about-mlc/judges/ (last updated Oct. 13, 2021).

224. Iorns Magallanes, *supra* note 164, at 176.

225. Resource Management Act 1991, s104(1)(c).

In terms of procedural justice, *iwi* played an active role in the Court process through receipt of funding from the Environmental Legal Assistance Fund. The consideration of evidence by the Court, along with understanding of *kaupapa* Māori, also satisfy procedural justice elements, as do the consent conditions attempt to ensure an active role of *kaitiaki* in the future. However, whether it provides for substantive justice depends on your point of view. For those who continued with the appeals—those closest *kaitiaki* with *mana whenua* (traditional authority over the land) and *mana moana* (traditional authority over the sea)—they felt that the spiritual effects had not been provided for adequately with the official approval of the wreck remaining in place. Others are swayed by the practical or logical fact that, without a consent, there would be no ongoing procedural provision for Māori participation or for the same requirements of monitoring; thus, better substantive outcomes were enabled through the awarding of a consent and its conditions.

Ultimately, this case is not one whereby the considerations in favor of the Māori applicants have simply been outweighed by those of the general public. The concerns of a minority have arguably been outweighed by the needs of a majority, but *kaitiaki* are on both sides of this equation. It is not possible to say that there has been no environmental justice for Māori; it appears that as much as possible has been obtained given the situation faced, and more than is usually the case.

VI. CONCLUSION

Injustice anywhere is a threat to justice everywhere.[226]

Achieving environmental justice for Māori or for any indigenous people is not simple. There is no simple definition of what environmental justice is, and there are multiple different aspects and overlapping elements. The achievement of environmental justice for Māori is affected by particularities of history and culture as well as of place and time; it is thus not possible to use overseas concepts without adapting them.

It is important that Māori environmental justice claims are recognized and respected. This entails that Māori environmental justice problems are identified, understood, and addressed. For Māori this respect is more complex than is admitted in mainstream concepts of environmental justice. I suggest that perhaps the primary goal for Māori environmental justice is for the respect of Māori *iwi* and *hapū* as Treaty partners to substantive active

226. Letter from Birmingham Jail from Martin Luther King Jr. to Alabama Clergymen (Apr. 16, 1963) (on file with Martin Luther King, Jr. Research and Education Institute).

protection of the environmental assets of Aotearoa, as well as achieving recognition of their authority to preferably control, but at least share in making decisions over those assets. This is a goal that is seen in other countries with indigenous peoples, and entails both procedural and substantive elements. However, this is not discussed in the standard environmental justice concepts. The term "environmental justice" arose in a very different context and has been comparatively limited in its application elsewhere since.

The second, cultural environmental justice goal is for the respect of Māori culture to be equally recognized in environmental law and decision-making, including metaphysical as well as physical features of the natural environment. This cultural goal is also not developed in mainstream or overseas concepts of environmental justice; it is much better developed in Aotearoa, due to its unique history. The example of the grounding of the Rena illustrated well the links between physical and cultural environmental damage.

The third type of goal is the respect of equality of treatment as individuals. This is most commonly discussed in relation to the bearing of environmental burdens such as pollution and its impact on individual health. Individuals are also a strong focus in the literature on procedural justice. Perhaps what is most interesting about the standard discussions of environmental justice overseas is that they reverse the order of these three goals, with the individual appearing first and the community and political structures following behind, if at all.

Māori environmental justice goals add a complexity that makes achieving environmental justice multifaceted. And while the mainstream approaches are not sufficient to achieve environmental justice for Māori, there are aspects which we could usefully borrow in order to better enrich our understanding and better achieve such justice.

There is considerable scope for future work in this area. Procedural participation by Māori in environmental decision-making and governance is widely discussed in Aotearoa, even if it is not yet widely and fairly—let alone generously—accorded. Yet other aspects are not so well researched. The substantive distribution of environmental burdens and benefits could be much more effectively addressed. This could be done along the lines of the U.S. EPA Environmental Justice program, while being adapted to better address the specific justice needs of Māori.

In relation to the range of environmental legislation in New Zealand, there are many aspects that need further research as well as substantive

provision. [227] While environmental justice within the RMA is typically very well studied and analyzed when considering the rules around resource access and management in New Zealand, the needs of Māori in Environment Court proceedings are under-addressed and need to be more thoroughly examined; particularly if more private mediation is to be used to resolve disputes in this area. In addition, it would be valuable for a researcher to examine the various cases where a Māori Land Court judge has presided with an Environment Court judge, as well as those where one was not, but similar Māori issues arose and evidence was heard. It would be helpful to know whether there are differences in the procedural consideration of the issues, as well as their substantive handling and the contribution to the final result. This could help illustrate precisely how the procedural issues intertwine with the substantive, as well as with the three Māori goals, and better enable environmental justice to be achieved for Māori in the Environment Court.

Looking to the future, environmental justice will look different from how it does today. Perhaps, as historical grievances are settled, focus will switch to the future and intergenerational aspects of justice. The needs of future generations, and the future needs of current youth, need more attention if they are to be met fairly in the future. Biodiversity loss, water depletion, and climate change need to be tackled quickly if Māori, in even 30 years' time, are to enjoy the natural environment and its services that we enjoy today.[228] As the final 1991 Principle of Environmental Justice states:

> Environmental Justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.[229]

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227. For example, procedural and substantive environmental justice in relation to other statutes, such as Hazardous Substances and New Organisms Act and the Exclusive Economic Zone and Continental Shelf Act, raise issues similar to those that the RMA raises.

228. *See, e.g.*, Darren N. King et al., *The Climate Change Matrix Facing Maori Society, in* CLIMATE CHANGE ADAPTATION IN NEW ZEALAND: FUTURE SCENARIOS AND SOME SECTORAL PERSPECTIVES 100 (Nottage et al. eds., 2010) (explaining Māori are likely to be particularly hard hit by climate change); *see* Lisa Kanawa, CLIMATE CHANGE IMPLICATIONS FOR MĀORI 212–14 (Rachel Selby et al. eds., 2010) (detailing how various regions of New Zealand will be impacted by climate change); *see* Jones et al., *supra* note 34 (explaining impacts of climate change on Maori health); D.N. KING ET AL., COASTAL ADAPTATION TO CLIMATE VARIABILITY AND CHANGE: EXAMINING COMMUNITY RISK, VULNERABILITY AND ENDURANCE AT MITIMITI, HOKIANGA, AOTEAROA-NEW ZEALAND NAT'L INST. WATER & ATMOSPHERIC RSCH. NO: AKL2013-22 (2013) (reporting on climate change risks in New Zealand).

229. Delegates, *supra* note 6.

There is a lot of research and action that could help provide the attention that will better address Māori environmental justice, now and in the future.

I hope that this article has provided some suggestions and encourages others to take them up. Most of all I hope it illustrates Sir Grant Hammond's comment that "justice is not just about the way we distribute things. It is about the way we value things; and the kind of society we regard as just."[230] An environmentally just society is one which realizes the political, cultural, and individual goals discussed in this paper, as well as the intergenerational and ecological goals. While it makes for a long agenda, it will be essential if we are to better achieve any indigenous environmental justice.

230. Hammond, *supra* note 4, at vi.

SUCH A WASTE: THE ENVIRONMENTAL JUSTICE SHORTCOMINGS OF MODERN COMPOSTING PROGRAMS

Dharma Khalsa*

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INTRODUCTION

In the last ten years there has been a growing recognition of the climate and ecological benefits of composting, and thus a wave of organics recycling expansions has attempted to harness its value. Yet, even in the midst of this growth, it remains important to build environmental justice into new waste management programs and laws in order to provide equitable access to all communities.

Composting has been around as long as humans have been growing food.[1] As far back as the Akkadians in Mesopotamia, there is written record

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of the use of composting in agriculture.[2] The process of organics recycling is not new and the benefits are numerous, yet in recent years the advantages of composting have reached a fever pitch. Amongst the ongoing question of how we address global climate change, composting has been identified as one of the most significant ways for individuals to reduce their environmental footprint.[3] Organic waste material comprises about one-third of landfills in the US (31%),[4] where landfills are the third-largest source of human-related methane emissions (14.1%).[5] Thus, diverting organic waste to composting facilities provides a valuable means to decrease methane emissions, and ultimately reduce individual carbon footprints.[6] Although composting is a technology that has existed for most of human history, climate change is shifting our relationship to everything, composting included.

Composting does not exist in a vacuum. Similar to how reducing and reusing are necessary steps that precede recycling, there are steps that precede composting, such as source reduction and feeding people. The food recovery hierarchy is one tool the United States Environmental Protection Agency uses to promote lifecycle thinking pertaining to food recovery.[7] This approach looks at the impact of food waste as a whole, placing composting fourth on the food hierarchy scale. It is important to note that the problem with food loss and waste is a much larger conversation than just composting.[8] It is also important to acknowledge that composting is not limited to diverting

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class where this paper was conceived. The author would also like to thank the editorial staff of the *Vermont Journal of Environmental Law* for their hard work throughout the editing process.

1. Aaron Sidder, *The Green, Brown, and Beautiful Story of Compost*, NAT'L GEO. (Sept. 9, 2016), https://www.nationalgeographic.com/culture/food/the-plate/2016/09/compost--a-history-in-green-and-brown/ (depending on how you define the process of organic decomposition it may be even earlier).

2. *Id*.

3. *See Reduced Food Waste,* PROJECT DRAWDOWN, https://www.drawdown.org/solutions/reduced-food-waste (last visited Jan. 22, 2022) (stating that "if 50–75 percent of food waste is reduced by 2050, avoided emissions could be equal to 10.3–18.8 gigatons of carbon dioxide.").

4. *America's Food Waste Problem*, U.S. ENV'T. PROT. AGENCY (Apr. 22, 2016), https://www.epa.gov/sciencematters/americas-food-waste-problem; Emily Friedman, *Towards 2030: Shortcomings and Solutions in Food Loss and Waste Reduction Policy*, 55 WASH. UNIV. J. OF L. & POLICY 265, at 266 (2017).

5. *See GHGRP Reported Data*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/ghgreporting/ghgrp-reported-data (providing GHG emissions data for reporting facilities across United States) (last visited Jan. 22, 2021); *Basic Information About Landfill Gas*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/lmop/basic-information-about-landfill-gas#methane (last visited Jan. 22, 2022); U.S. ENV'T PROT. AGENCY, 430-R-20-002, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2018 (2020).

6. Friedman, *supra* note 4, at 266.

7. U.S. ENV'T PROT. AGENCY, *supra* note 4.

8. *See* DR. MARTIN HELLER, WASTE NOT, WANT NOT: REDUCING FOOD LOSS AND WASTE IN NORTH AMERICA THROUGH LIFE CYCLE-BASED APPROACHES 22, U.N. ENV'T PROGRAMME (2019) (showing that 140 million tons of food is lost or wasted in North America every year and of that 63 million tons is due directly to use and consumption rather than agriculture or transportation).

food scraps from landfills. Diversion may also include items like yard waste, biosolids, biodegradable plastics,[9] etc.

Since 2009,[10] a growing trend in cities and states contemplating their environmental impact has been to enact mandatory composting laws or provide programs for citizens to compost.[11] Although the federal government has shown support for expanding local composting, it continues to largely rely on states and municipalities to carry out these programs.[12] Like other forms of waste disposal—traditionally a responsibility of states and municipalities—there are a multitude of programs and ordinances being instituted in vastly different ways. The patchwork of composting implementation consequently raises a variety of environmental justice questions.

Most notably for compost programs are those questions that are entwined with ideas of distributive justice.[13] Furthermore, "in an environmental context, distributive justice involves the equitable distribution of the burdens resulting from environmentally threatening activities or of the environmental benefits of government and private-sector programs."[14] Although not of the same character as radioactive waste, composting does not escape the deeply rooted environmental justice problems that have long plagued the field of waste management; namely who is being served and/or targeted in the process of managing a system of waste.

Although the food waste and climate benefits of composting are incredibly important for understanding its explosion onto the mainstream in the last decade, there are many papers that address that issue.[15] Instead, this paper will dig deeper into the question of how we both support the expansion

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9. Sanya Shahrasbi, *Consumers, Plastic, and What It Means To Be "Biodegradable"*, 31 GEO ENV'T L. REV. 581, 587 (2019) (explaining the meaning of biodegradability and how plastic additives claiming to be biodegradable should be properly labeled).

10. *Food Waste Requirements*, Seattle Public Utilities, http://www.seattle.gov/Util/MyServices/FoodYard/HouseResidents/FoodWasteRequirements/FAQs/index.htm (last visited Jan. 22, 2022).

11. *See, e.g.*, MODEL COMPOST RULE TEMPLATE VERSION 1.1 at i, U.S. COMPOSTING COUNCIL (2013) (explaining that in 2011 the U.S. Composting Council initiated a public-private partnership to develop a model compost rule template) [hereinafter MCRT].

12. *See* 7 U.S.C. § 6923(2)(A) (2018) ("The Secretary, acting through the Director, shall carry out pilot projects under which the Secretary shall offer to enter into cooperative agreements with local or municipal governments in not fewer than 10 States to develop and test strategies for planning and implementing municipal compost plans and food waste reduction plans.").

13. Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10683 (2000) (quoting Ronald Dworkin, Taking Rights Seriously 273 (1977)).

14. *Id.* at 10684.

15. *See, e.g.*, Bonnie L. Smith, *Heat up Those Leftovers, Not the Planet: How Combating Food Waste Can Affect Climate Change*, 18 VT. J. ENV'T L. 648, 650 (2017) (explaining food waste contribution to greenhouse-gas emissions); *see also* Rachel Manning, *Reaching the Individual: A Proposed Federal Framework to Reduce Community-Based Greenhouse Gas Emissions*, 30 FORDHAM ENV'T L. REV. 123, 129 (2019) (stating that incentives for composting can decrease greenhouse gases and combat climate change).

of composting programs and guarantee the equitable development of those programs. This paper will first set out a technical basis for what makes composting fundamentally different from every other modern waste system. Then it will look at the pros and cons associated with composting generally. Next, it will take a closer look at the differences between urban and rural communities and their interaction with composting. This distinction is critical in addressing disparate access to waste disposal because it deals with questions of land use, education, politics, race, and money. These questions are deeply intertwined with disparity and injustice. Lastly, this paper will turn to the current landscape of composting programs across the country to address the specific disparity in different composting programs and suggest solutions to expand access in a way that avoids injustice. As the United States moves further into a world that must contemplate every possible method to create closed loop environmental systems, it is important not to lose sight of doing so in an equitable way.

I. THE INTRICACIES OF COMPOSTING

Black Gold.[16] Farmers have used this colloquial term to refer to humus (the fertile by-product of compost) for generations.[17] There has long been an understanding of the benefits provided by recycling organic waste and many cultures around the world have reaped the earthy reward.[18] Although composting is not a new technology, it is one that has often been practiced on a small scale, mostly in backyards or on small farms.[19] Yet, with the emergence of composting into the mainstream, a gap developed between understanding what composting actually is and what it is not.

This section will outline the processes at play in composting, starting broadly with organic decomposition as a whole and narrowing down to specific requirements for maintaining healthy compost. It will then address the inherent benefits and harms of composting as a whole. Next, it will look at potential solutions for disseminating adequate education to fill the gap of misinformation about composting. Lastly, it will delve into some of the most important differences between composting in rural environments versus urban environments and how these differences can lead both to beneficial and harmful results.

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16. Sarah J. Morath, *Regulating Food Waste*, 48 TEX. ENV'T L. J. 239 (2018).

17. Sidder, *supra* note 1.

18. *See Id.* ("Mediterranean farmers in Greece and Italy commonly cycled agricultural "waste" from one farm operation to another, Chinese farmers regularly fertilized their rice paddies with anaerobic (lacking oxygen) composting techniques [and] [sic] [i]n North America, Native Americans wrapped seeds in fish parts to supplement nutrient availability.").

19. ASHLEY BOURGAULT ET AL., COMPOSTING FOR SUSTAINABLE WASTE MANAGEMENT 1 (2005).

A. Creating the Correct Conditions

There are two main processes for breaking down organic materials: anaerobic decomposition and aerobic decomposition.[20] Anaerobic decomposition occurs when your food scraps end up in a landfill or a pile in the backyard without the proper controlled conditions.[21] Organic materials will always breakdown, but in the anaerobic process they release massive amounts of methane.[22] On the other hand, aerobic decomposition happens when your compost is healthy. This controlled technique creates the correct conditions under which methane is no longer released and bad odors are eliminated.[23] There are three main ways to create the correct conditions for aerobic decomposition: "cold" composting, "hot" composting, and Bokashi.[24] All three of these methods require time and attention, although the trade-off is a plethora of benefits.[25]

The basic composition of any compost pile is quite similar. There must be the correct ratio of browns, greens,[26] water, and air.[27] Note that there is no exact ratio because a lot depends on where you are in the world, i.e., what natural environmental conditions exist.[28] Composting in the deserts of the Southwest requires a different type of tending than composting in the rainy Pacific Northwest, or the hot and humid Southeast. Where there is less moisture, logically, more water must be added to maintain the correct ratio, and more heat may affect how the water interacts with the other elements of the compost pile. Therefore, the "correct" ratio of these four components remains necessary to trigger aerobic decomposition, however that exact ratio might look.

Cold composting is what most people are familiar with: the barrel in your neighbor's backyard or the heap in the local community garden. It is called cold composting because it usually remains at an ambient temperature of 0°–

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20. Lecture: Master Composter Program, held by Mary Green, and the Bernalillo County Extension (Feb. 8, 2020) (on file with the author).

21. *Id.*

22. *Id*. Anaerobic decomposition tends to smell. This is an easy way to tell that the composting process is not working properly, and methane is being released. *Id.*

23. *Id.*

24. *Id.* Bokashi is a method of composting that is limited to a small, sealed bucket, which makes it good for an individual living in an apartment but would be difficult to scale up to a programmatic level. Thus, I will not be going in-depth into this method because it is less relevant to the analysis of composting programs at the federal, state, or municipal level, as well as from the perspective of community composting. *Id.*

25. *Id.* There are also other vermiculture methods adding worms to augment the natural breakdown of materials, however these are less commonly used. *Id.*

26. *Id.* Generally, a ratio of 2:1, Browns to Greens. *Id.*

27. *Composting in Winter: Bernalillo County Extension Master Composters*, N.M. STATE U. (Jan. 2021), https://bernalilloextension.nmsu.edu/mastercomposter/winter.html.

28. Green, *supra* note 20.

100° F, depending on where it is in the world and the current season.[29] This process requires much less upkeep, but correspondingly breaks down organics slower (6–12 months) and less meticulously (may never breakdown weed seeds).[30] For cold composting you can add whatever, whenever, and just let it sit without having to turn the pile, as long as you are sure to maintain the relative amount of browns, greens, water, and air.[31] If that ratio is off it is pretty easy to tell because the compost will begin to stink.[32] When this happens, it means the pile has moved into an anaerobic decomposition state.[33]

Hot composting is a harder process and is generally found at the commercial level.[34] It is possible, although rare, to get a backyard compost pile to become hot enough because of the level of tending required and the limited size of these piles.[35] The only way to get a backyard compost heap hot enough is to maintain a smaller sized pile.[36] This makes it manageable to turn the pile without expensive machinery. Unlike cold composting where you can add anything, whenever, all of the materials (browns, greens, air, and water) for hot composting must be added together.[37] Hot composting is not a passive process and requires proper turning two to three times every two to three weeks to keep the air at adequate levels for proper decomposition, and to distribute the heat to the entire heap.[38] The inside of the heap is what heats up.[39] Therefore, if the pile is not being turned the heat does not get distributed to the entire compost pile. If done correctly, temperatures may reach between 140°–170°F.[40] The benefits of this method are a much faster and more thorough decomposition process. In three to six months, hot composting will break down everything.[41]

The physics of composting often sets limitation on expanding the benefits of compost to a larger population. Three things merit closer attention:

> First, *manageability*. There's a point at which a pile simply becomes unmanageably large, at least if you're

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* Generally, 3'x3'x3' or 4'x4'x4' is an appropriate size. *Id.*
37. *Id,*
38. *Id.*
39. *Composting in Winter*, *supra* note 27.
40. Green, *supra* note 20; *see also* Jean Nick, *A Scientist Shares Insights and Tips For Managing Compost Piles*, RODALE INST. (May 16, 2017), https://rodaleinstitute.org/science/articles/a-scientist-shares-insights-and-tips-for-managing-compost-piles/ (stating that a compost pile "may reach near 170°F and hold for a short while until food resources become exhausted.").
41. Green, *supra* note 20.

> turning it by hand. The second issue is *weight*. An excessively large pile bears down on its bottom layers inhibiting air circulation. Such a pile is likely to go anaerobic. Finally, even if you manage to turn it frequently enough to keep it aerated, a large pile could *heat* up enough to kill off some of the micro-organisms you probably want to add to your soil. One reason commercial, agricultural, and municipal composting systems reach such high temperatures is that they are so large.[42]

These considerations present problems both for local community gardens and larger commercial composters because the larger the pile, the more difficult it is to adequately control the decomposition process.[43] Therefore, in terms of scalability, simply creating a bigger compost pile to reach a larger population is unlikely to work. This is why commercial composting is often used to serve large urban areas because with the addition of machines to manage the physics of a compost pile, production can be scaled up.

A few words about bugs. Compost piles will almost certainly attract insects.[44] However, this is not entirely a good or bad thing. There are two different types of insects when it comes to composting: micro and macro organisms.[45] As many people may know, worms are generally a sign of healthy soil, and are even used to create compost in vermiculture methods.[46] Worms and smaller insects—microorganisms—are a major contributor to the breakdown of organic materials and their presence in a compost pile is generally a favorable sign.[47] Roaches and other macro organisms are considered pests and do not tend to contribute to the health of a compost pile.[48] They are often attracted to compost because it provides a quick and easy snack but may eventually grow into an unhelpful infestation. This is just one of the hidden harms facing the expansion of composting programs.

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42. *Physics*, PLANET NAT. RSCH. CTR., https://www.planetnatural.com/composting-101/science/physics/ (last visited Jan. 22, 2022).

43. E. Vinje, *Composting Big*, PLANET NAT. RSCH. CTR, https://www.planetnatural.com/large-composting/ (last visited Jan. 22, 2022).

44. *How to Regulate the Good and Bad Bugs in Your Compost,* VULCAN TERMITE & PEST CONTROL INC. (May 29, 2014), https://www.vulcantermite.com/eco-friendly-options/regulate-good-bad-bugs-compost/.

45. Green, *supra* note 20.

46. *See Vermicomposting: Composting with Worms*, CALRECYCLE, https://www.calrecycle.ca.gov/organics/worms/wormfact (noting worms convert waste into a nutrient-rich, biologically beneficial soil product known as castings) (last updated Nov. 19, 2021).

47. *Compost Pile Microbes*, CALRECYCLE, https://www.calrecycle.ca.gov/organics/homecompost/microbes (last updated Dec. 7, 2018).

48. *See generally* Sally G. Miller, *Managing Bugs in Your Compost – the Good, the Bad, and the Merely Ugly*, DAVE'S GARDEN (Dec. 20, 2012), https://davesgarden.com/guides/articles/view/3942 (explaining the negative effects that bugs could have on a compost pile).

B. The Benefits and Hidden Harms of Composting

The benefits of composting are many and far reaching.[49] It provides an alternative for recycling organic materials, thus reducing waste, which opens space in landfills.[50] Additionally, compost byproducts can be used to replenish depleted soils, improving soil health in general.[51] Furthermore, composting may improve water and air quality by reducing the discharge of pollutants and methane emissions from landfills.[52] Finally, the development of soil carbon storage through composting may be used as an effective carbon sink to further draw down our total greenhouse gas emissions.[53] The above is by no means an exhaustive list, but it demonstrates the multiplicity of benefits that composting helps generate. Aside from the more tangible advantages to composting there are some often overlooked environmental justice benefits.

Composting may be an important space for community engagement and teaching or learning values. Community composting provides local jobs and benefits that can be a valuable resource for the entire community, including addressing food scarcity, connecting global to local, instilling important ideas about conservation, and providing hands-on education.[54] Community composting provides a space to create a closed loop system where resources that would otherwise be extracted by larger facilities are instead injected back into the community.[55] Furthermore, working together to compile and process compost connects people and creates an environment where individuals may feel more invested in their local neighborhood.[56] As one community composter in New York City put it, "[w]hereas the benefits of a [sic] food scrap collection program are often cast as reduced disposal cost and reduction in greenhouse gases, the benefits of a community-based program may be as

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49. *See* HELLER, *supra* note 8, at 39 (evaluating the benefits associated with land application and digestates).

50. *See* Linnell Edwards et al., *Evaluation of Compost and Straw Mulching on Soil-Loss Characteristics in Erosion Plots of Potatoes in Prince Edward Island, Canada*, 81.3 AGRIC., ECOSYSTEMS, & ENV'T 217, 218 (2000) (noting culled potatoes are a primary material to replenish depleted soils).

51. *Id.*

52. U.S. ENV'T PROT. AGENCY, *supra* note 5 (stating "reducing the amount of food waste sent to landfills can help ease the impact of climate change . . .").

53. U.S. ENV'T PROT. AGENCY, SOLID WASTE MGMT. AND GREENHOUSE GASES: A LIFE-CYCLE ASSESSMENT OF EMISSIONS AND SINKS 13 (3rd ed. Sept. 2006) (evaluating soil carbon storage from compost application to quantify the ultimate emission benefit. The study evaluated the soil carbon storage benefit from year 1 through year 30).

54. GROWING COMPOST: A POLICY GUIDE TO PRESERVING CRITICAL COMMUNITY COMPOSTING IN CALIFORNIA 12–13, SUSTAINABLE ECON. L. CTR. (Jan. 22, 2017) [hereinafter Growing Compost], https://d3n8a8pro7vhmx.cloudfront.net/theselc/pages/927/attachments/original/1485108714/Growing_Compost_Report_smaller.pdf?1485108714.

55. *Id.*

56. *Id.* at 12.

close as your apartment window box and the flowers that flourish there."[57] This observation shows how reframing waste disposal as a truly local issue may give people a direct incentive to more fully participate in community initiatives that keep resources local and bring benefits home.[58]

There is a plethora of benefits to organics diversion, yet it remains important to investigate the potential drawbacks. Although cold composting, on a small scale, may avoid many problems associated with large operations, it does not escape all risks. One problem particular to cold composts is the attraction of pests like cockroaches and rodents, which are enticed by certain organic waste (particularly animal byproducts) that often end up in these piles.[59] Furthermore, backyard and community composters often face the problem of nuisance odors, which are not unique to small scale composting, or for that matter, composting in general.[60]

Even though techniques exist to mitigate these drawbacks, they are not a guaranteed solution and require a certain level of information and work on the part of the individual to be implemented. Without the knowledge or access to resources to correct these common problems, an individual may become fed-up and stop composting completely. While many harms created by composting can exist in non-commercial settings, the concerns of backyard and community composting may be better cured through education, not regulation.[61] Thus, the majority of problems faced in composting programs come from commercial composting and the difficulties in expanding overall capacity. Especially because in the process of scaling up composting programs the hidden harms are bound to be exacerbated.

It may be easy to see compost as a shiny solution with so many benefits that it is a no brainer to expand access. While this is true to some extent, it is important to recognize that as compost facilities continue to expand, hazards may intensify, thus leading to unforeseen problems within vulnerable communities. The harms from commercial facilities often include nuisance odors, human pathogens that lead to contamination, and dangerous bacteria and chemicals from "sewage sludge."[62] The main reason these risks are

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57. Louise Bruce, *The Evolution of New York City's Big!Compost*, BIOCYCLE (Mar. 28, 2014), https://www.biocycle.net/2014/03/28/the-evolution-of-new-york-citys-bigcompost/.

58. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 639-641 (1992) (discussing the importance of differences in experience and perspective for first, second, and third wave environmentalists and how that translates into different community incentives for engaging in environmental improvements).

59. *How to Regulate the Good and Bad Bugs in Your Compost*, *supra* note 44.

60. Brenda Platt & Colton Fagundes, *Yes! In My Backyard: A Home Composting Guide for Local Government*, at 47, INST. LOC. SELF-RELIANCE (May 2018) ("The more densely populated an area, the less amount of space a composting operation can take up before neighbors might start complaining about perceived nuisance odors or appearance of the site.").

61. *Infra* Part I.C.

62. Planet Natural, *Is Your Compost Made of Sewage Sludge?*, YOUTUBE (Oct. 30, 2013), https://www.youtube.com/watch?v=DkYKBnpkh7k.

heightened in commercial facilities is due to not knowing what is going into the compost.[63] Another major risk of commercial facilities is killing important microbes by excess heat that is not properly monitored.[64] All of this can lead to irregular decomposition, creating contamination. If facilities are not taking the proper precautions, a farmer who acquires humus from a commercial facility may find an entire field of crops contaminated.[65] Furthermore, similar to many stories of environmental injustice and racism found in siting landfills, a commercial composting facility may only be allowed to operate in a poor community or community of color.[66] This practice often exposes these communities to risks from unwanted facilities, including nuisance odors and soil, water, or air contamination.[67]

The United States Composting Council ("USCC") in its Model Compost Rule Template ("MCRT") acknowledges that, although composting does not create the same hazards as other forms of waste management, it is not immune to all risks. In order to differentiate between levels and types of risk, the USCC uses a three-tier system in designating materials that enter commercial composting facilities. The MCRT breaks down Feedstocks—organic material used in the production of compost—into three tiers:

> 1) Feedstocks, which include source-separated yard trimmings, woody material, agricultural crop residues, and other materials determined to pose a low level of risk to human health and the environment, including from physical contaminants and human pathogens;
>
> 2) Feedstocks, which include all type 1 feedstocks plus: agricultural residuals, source-separated organics; and [agency] approved food processing residuals and industrial by-products. Type 2 feedstocks are materials that the department determines pose a low level of risk to

63. E. Vinje, *What's In Commercial Compost*, PLANET NATURAL, https://www.planetnatural.com/commercial-compost/ (last visited Jan. 22, 2022).

64. OMRI CANADA, STANDARDS MANUAL 12 (2016).

65. Howard Marks, *Environmental Regulations for Land Application of Sewage Sludge and Municipal Solid Waste Compost May Not Provide Adequate Protection Against Metal Leaching*, 17 TEMP. ENV'T L. & TECH. J. 123, 126 (1998) (discussing the lack of federal regulatory oversight for the disposal of biosolids).

66. *See* Holgate Prop. Assoc. v. Twp. of Howell, 679 A.2d 614 (N.J. 1996) (illustrating a composting facility's clash against a local zoning ordinance); *see also* Robert D. Bullard, *Environmental Justice in the 21st Century: Race Still Matters*, 49 CLARK ATLANTA UNIV. 151, 151–59 (2001) (describing historic cases of racial inequality arising from various waste management sources and zoning restrictions).

67. *See* Baker v. Waste Mgmt. of Michigan, Inc., 528 N.W.2d 835 (Mich. Ct. App. 1995) (discussing liability for public nuisance of a commercial composting facility in Michigan); *see also* Systematic Recycling LLC v. City of Detroit, 635 F. Appx. 175, 177 (6th Cir. 2015) (instituting additional monitoring to Detroit to mitigate potential odor nuisance).

> the environment but have a higher level of risk from physical contaminants and human pathogens compared to Type 1 feedstocks.
>
> 3) Feedstocks, which include mixed solid waste (MSW), diapers, sewage sludge, biosolids, and industrial by-products and food processing residuals not covered in Type 2. They include these and other materials the department determines pose a higher level of risk to human health and the environment from physical and chemical contaminants and from human pathogens compared to Types 1 and 2 feedstocks.[68]

It then recommends designs and operational standards for each tier in order to mitigate the specific harms associated with each type of material. These recommendations are an attempt to minimize hazards for commercial composting facilities by standardizing regulations. In terms of commercial facilities, regimented systems are likely advantageous to protect people and the environment from potential harms.

C. Composting Education

One seemingly easy solution to the misinformation and hidden hazards associated with backyard composting would be expanding access to composting education. There are many states and cities that have composting classes for their citizens to attend.[69] However, classes have many unspoken prerequisites for entry: adequate time to attend, an existing awareness of composting as a beneficial tool, understanding how to use often (unintentionally) concealed educational resources, etc.[70] The access to beneficial tools for government sponsored composting education are largely being funneled to a privileged subset of people because communities and individuals have to seek out these resources instead of being engaged in their own backyards.

Across the board, states and municipalities have recognized the need for composting resources and have created very useful guides and graphics to help backyard composters.[71] The issue is that finding these guides requires a

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68. MCRT, *supra* note 11, at 2, 6, 8, 12.
69. Green, *supra* note 20.
70. *Id*.
71. COMPOST RSCH. & EDUC. FOUND., TOOLKITS/RESOURCES, http://compostfoundation.org/ (last visited Jan. 22, 2022); *Backyard Composting Made Easy*, N.M. ENV'T DEPT.,

proactive step on behalf of the individual. Therefore, an important aspect of composting education is bringing information to the communities rather than expecting them to find it themselves. In order to create social change in the realm of composting, three questions posed by the late Luke W. Cole are a valuable tool: 1) will it educate people? 2) will it build the movement? and 3) will it address the root of the problem, rather than merely a symptom?[72] Although composting education programs tend to answer the first question affirmatively, they often fall short of the second and third.

If folks are unable to access resources or are unaware of said resources, the movement will never move past a good idea. The government will walk away saying, "but we tried, and no one showed up." Therefore, the root of exclusionary programs is not that the resources do not exist and are not adequate, it is that they are inaccessible to most people. A possible solution would be to bring this education to school children. Children are likely the best group to engage because they are already a captive audience in schools, which have a mandate to educate. Teaching children about composting not only instills values about conservation in the next generation, thus building the movement, it also creates the opportunity for them to bring composting into their own communities, and thus expanding access.

The potential for expanding composting resources should begin with teaching children proper composting techniques in school. Similar to recycling programs entering schools in the 90's, the effect of teaching composting to children, "cannot be overstated."[73] In Pennsylvania, armed "with the mantra 'reduce, reuse, recycle,' elementary school students fearlessly led the charge on recycling," due in part to the Pennsylvania's Municipal Waste Planning, Recycling, and Waste Reduction Act.[74] Thanks to this Act and a movement towards early implementation, well-funded education programs taught a "generation that recycling and waste reduction is a way of life, rather than an obligation."[75] Many of the same reasons that states and municipalities rallied around recycling 30 years ago have returned today in the conversation about compost; landfill space, decreased air and water pollution, etc.[76] Needless to say, there are deeply important lessons that can be gleaned from both the successes and failures of recycling over the last

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https://www.recyclenewmexico.com/pdf/Backyard-Composting.pdf (last visited Jan. 22, 2022); *Backyard Composting*, KERN CNTY. PUB. WORKS, https://kernpublicworks.com/organics/backyard-composting/ (last visited Jan. 22, 2022).

72. Cole, *supra* note 58, at 668.

73. John Dernbach, *Next Generation Recycling and Waste Reduction: Building on the Success of Pennsylvania's 1988 Legislation*, 21 WIDENER L. J. 285, 287 (2012).

74. *Id*.

75. *Id.*

76. *Id.*

three decades in order to create effective composting programs, and truly build a lasting movement.

D. Environment Matters: The Rural and Urban Divide

The assumption that "everyone can compost" has arguably spurred an industry geared towards wealthy-city-folk who pay for industrialized organic waste processing and food scrap pick-up, while subjugating poor-rural-communities to limited composting access. This is based, in part, on the assumption that rural communities have the "space" to compost at home. While this may be true, there is much more that goes into composting than simply throwing your potato skins and orange peels into a pile in the backyard. The lack of education and misinformation surrounding composting means that even individuals who have decided to set up their own composts may never reap the benefits because they are simply doing it wrong. As "there are relatively few studies focused on understanding household food waste perceptions and behaviors in rural areas," much of the conversation around organics diversion focuses only on urban environments.[77] This often results in rural communities being entirely left out of composting programs and initiatives.

Another major roadblock to access is simply state and local resources. It is common for rural communities to generally be poorer because where there are fewer residents there is often less money and fewer opportunities for socio-economic growth. The lack of resources in rural environments often leads to distributive injustice with waste management as a whole, especially where pick-up might take hours due to miles between properties, poor infrastructure, and fewer facilities.

> Since there are unique challenges of implementing a program in a rural region, where economies of scale may not be achievable and costs may be significant, this has important policy implications about the tradeoffs for such efforts… A focus on consumer education and backyard composting infrastructure may provide fruitful outcomes for rural regions where many households are already composting or will do so in the future, and where other food waste management options relevant to densely populated regions may be less viable.[78]

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77. Meredith T. Niles, *Majority of Rural Residents Compost Food Waste: Policy and Waste Management Implications for Rural Regions*, 3 FRONTIERS IN SUSTAINABLE FOOD SYS. 123, 124 (2020).

78. *Id.* at 129.

The opportunities for rural folk to backyard compost is often larger and unhindered by regulations and basic functioning of city life (e.g., time and space). Ordinances and mandates may even be detrimental to community participation in organics recycling.[79] As the Sustainable Economies Law Center recognized, "community composting can act as a powerful lever for economic justice and ecological resilience,"[80] giving communities the ability to organize themselves and create their own waste disposal systems. By mandating commercial composting, these communities are often deprived of a critical opportunity "to become more self-reliant, grow fresh produce, create good jobs," and build rich learning environments for generations to come.[81] Although there is an important place for commercial composting facilities, it is important to recognize that cultural and historical food systems have existed for quite some time in rural communities. These systems often include community composting, which should be encouraged and not thrown away in the process of industrial and urbanization. However, these composting initiatives still need support in order to compete with their expanding urban counterparts.

In urban environments, the availability of land and time to tend a home compost is quite limited. Thus, "if cities wish to require residents to compost food waste, they must first provide the necessary infrastructure."[82] Whether the solution is through the marketplace by hiring independent contractors or providing composting alongside traditional garbage and recycling pick-up, it is necessary to have infrastructure in place if urban composting hopes to benefit the community at large. Therefore, a tailored approach to food waste management between rural and urban regions may be the most prudent solution; offering curbside composting alongside garbage services in densely populated places, while providing access to resources and education in rural communities in order to expand backyard composting in these areas.

II. COMPOSTING PROGRAMS

This section of the paper will take an on-the-ground look into various composting programs, beginning by briefly addressing the national approach. Next, it will delve in at the state level by comparing the laws and systems of Vermont and California. Then it will do the same for municipal composting by looking at Seattle, New York City ("NYC"), and Austin. Finally, it will end with a brief discussion of private composting programs through a local

79. *Community Compost Law & Policy,* SUSTAINABLE ECONOMIES L. CTR., https://www.theselc.org/compost.

80. *Id.*

81. *Id.*

82. Alexandra I. Evans & Robin M. Nagele, *A Lot to Digest: Advancing Food Waste Policy in the United States*, 58 NAT. RES. J. 177, 194 (2018).

Albuquerque company—Little Green Bucket—and the international app—ShareWaste. The questions this section focuses on with each program is what has been successful and what about each program is problematic. The paper will conclude each of these inquiries with some suggested improvements, keeping in mind the overarching purpose of expanding access without neglecting important environmental justice considerations.

A. Composting at the National Level

The most glaring problem in national engagement with composting is similar to most traditional waste management systems.[83] The Tenth Amendment gives control of waste management generally to the States.[84] Although there are certain limitations in a State's power to provide waste disposal, it is widely recognized to have this duty under its police powers.[85] Thus, the federal government cannot do much to mandate composting nationwide because States are traditionally providers of waste disposal within their borders.

This reservation of power to states has resulted in a patchwork of differing waste management programs all over the country.[86] Although some states have been effective in providing composting to their residents as an alternative to regular garbage, the result of state control is more often non-action. In some cases, permitting requirements may even create an unreasonable limitation on backyard and community composting that has the effect of preventing further engagement in this valuable waste management alternative.[87]

Although there have been some attempts to standardize waste disposal throughout the United States, there is still not much of a national legal

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83. *National Accounts*, WASTE MANAGEMENT, https://www.wm.com/us/en/business/national-accounts (last visited Jan. 22, 2022).

84. U.S. CONST. amend. X, ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

85. *See, e.g.,* Philadelphia v. New Jersey, 437 U.S. 617, 628 (discussing dormant commerce clause limits on the State of New Jersey's duty to provide for waste disposal within its borders); New York v. United States, 505 U.S. 144, 188 (1992) (holding a federal radioactive waste disposal law invalid as violating the Tenth Amendment); Printz v. United States, 521 U.S. 898, 935 (1997) (holding that a federal law compelling states to implement federal mandates violated the Tenth Amendment); *see also* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766–69 (2006) (discussing the ebb and flow of Tenth Amendment jurisprudence).

86. *See, e.g.*, *State Organics Legislation*, U.S. COMPOSTING COUNCIL, https://www.compostingcouncil.org/page/StateRegulations (including map of laws across the country) (last visited Jan. 22, 2022).

87. ALA. DEP'T ENV'T MGMT. ADMIN. CODE r. 335-6-7-.26, http://adem.alabama.gov/alEnviroRegLaws/files/Division6Vol1.pdf (stating the "adopt[ion] [of] effluent limitation guidelines; a system for issuance of Permits . . ." as a method to effectively compost) (last modified Feb. 15, 2021).

framework for any type of uniform composting system.[88] The national law that exists for "recovered materials" remains at the research and development stage. Thus, various agencies as well as private organizations are spearheading the expansion of composting at the national level by engaging in this research and development.[89] Although these agencies and private entities are well intentioned, what remains problematic in their approach is often a lack of sensitivity towards community needs.

Ultimately, a real lack of data and enforcement resources exists particular to composting because programs are so disjointed and have only existed for about fifteen years. However, this may provide an opportunity to reimagine a new system of waste disposal that centers on community involvement and not on commercial gain. Rather than a one-size-fits-all, it would perhaps be more equitable to compile resources, recommendations, and guidelines that would be made available at the local level for communities to use—or not—in order to serve their specific needs. After all, in order to effectively build a movement around composting, communities themselves should be empowered to take ownership of their own waste management. However, there must be adequate support and space created by government entities for this to occur by providing truly accessible resources to their particular populations. Therefore, a careful balance must be struck between community and government engagement.

B. Programs at the State Level

In 2012, Vermont passed Act 148,[90] which included a move towards mandatory statewide composting by July 2020.[91] One of the most effective aspects of Act 148 is that, although it is mandatory, it is not a wholly prescriptive solution. Rather, Act 148 provides multiple avenues for meeting the mandatory composting directive. This allows for individuals and communities to choose how they engage the requirements set out by the state to meet its overall composting goals. Vermont "has consistently prioritized education and outreach on the food waste ban and has worked to ensure

88. 7 U.S.C. § 6923 (2018); 42 U.S.C. § 6953 (2018) (establishing authority for the Secretary of Commerce to take such actions as may be necessary to: "(1) identify the geographical location of existing or potential markets for recovered materials; (2) identify the economic and technical barriers to the use of recovered materials; and (3) encourage the development of new uses for recovered materials.").

89. *See generally, Working Towards A Sustainable Tomorrow: Understanding & Expanding Compost Infrastructure*, U.S. ENV'T PROT. AGENCY (Sept. 28–29, 2009), https://archive.epa.gov/pesticides/region4/rcra/mgtoolkit/web/pdf/usccupdate1.pdf (explaining how to expand U.S. compost infrastructure and including U.S. Composting Council & BioCycle as sponsors)..

90. VT. STAT. ANN. tit. 10 § 6604 (2015).

91. *Id*; *see generally*, *Food Scraps*, VT. AGENCY OF NAT. RES. DEPT. OF ENV'T CONSERVATION https://dec.vermont.gov/waste-management/solid/materials-mgmt/organic-materials (providing information for state residents to comply with the mandate) (last visited Jan. 22, 2022).

option[s] exist for food scrap collection and drop-off."[92] It has also included subsidies to encourage low-cost residential composting.[93] The law sets forth that:

> The plan shall promote…(A) the greatest feasible reduction in the amount of waste generated; (B) materials management, which furthers the development of products that will generate less waste; (C) the reuse and closed-loop recycling of waste to reduce to the greatest extent feasible the volume remaining for processing and disposal; (D) the reduction of the State's reliance on waste disposal to the greatest extent feasible; (E) the creation of an integrated waste management system that promotes energy conservation, reduces greenhouse gases, and limits adverse environmental impacts; [and] (F) waste processing to reduce the volume or toxicity of the waste stream necessary for disposal.[94]

Furthermore, it requires the plan shall be revised every five years to include appropriate analysis and assessment of the current state of waste management.[95] The revisions are meant to include education and outreach components, and performance and accountability measures.[96] Aside from an extremely effective self-composting brochure,[97] the State has invested in drop off sites, haulers, as well as information on how to site new composting facilities—for its enterprising citizens.[98]

Vermont set out three categories to orchestrate its approach: 1) Convenience.[99] If it is inconvenient, composting rates plummet. Thus, the law includes requirements for services and infrastructure that offer more opportunities to the public;[100] 2) Incentives. It is more likely that everyone will participate in reducing their waste if they have to shoulder the true

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92. *Id.*
93. *Id.*
94. VT. STAT. ANN. tit. 10 § 6604 (a)(1)(A)-(F).
95. VT. STAT. ANN. tit. 10 § 6604 (2).
96. *See* VT. STAT. ANN. tit. 10 § 6601(e) (stating general purposes of the revisions).
97. *See The Dirt on Compost*, VT. DEP'T. OF ENV'T CONSERVATION, https://dec.vermont.gov/sites/dec/files/wmp/SolidWaste/Documents/Universal-Recycling/The-Dirt-on-Compost.pdf (providing tips and strategies for composting at home and complying with the law) (last updated Mar. 2019).
98. *Food Scraps,* AGENCY OF NAT. RES., https://dec.vermont.gov/waste-management/solid/materials-mgmt/organic-materials#:~:text=Drop%2Doff%20composting%3A%20You%20can,about%20services%20in%20your%20area (last visited Jan. 22, 2022).
99. *Act 148: Universal Recycling and Composting Law*, CHITTENDEN SOLID WASTE DIST. [hereinafter Act 148] https://cswd.net/about-cswd/universal-recycling-law-act-148/ (last visited Jan. 22, 2022).
100. *Id.*

burden of their individual contribution; [101] and 3) Mandates. [102] The requirement of universal participation increases participation in composting. [103] Along with these three perspectives, Act 148 initially included a slow phase-in of the law. Starting in 2014, "businesses generating over 104 tons of food scraps per year were required to send those scraps to a donation program, a farmer for livestock feed, and/or a composting facility."[104] In 2015, that was extended to "include those who generate more than 52 tons per year, and so on. By 2020, food scraps from all businesses and residents [were] banned from the landfill."[105] This method allowed space for the culture and infrastructure in Vermont to meet the law, and thus mitigate some of the disproportionate burdens felt by vulnerable communities.

However, "[a]lthough Vermont's food waste laws seem to have garnered success in the state, they may not be successful or even politically acceptable in many other states. For example, more politically conservative states might resist heavy-handed governmental involvement in their decisions about personal waste, and thus may be reluctant to participate due to privacy concerns." [106] Furthermore, the "Pay-As-You-Throw" (PAYT) program, which Vermont perceived to be a successful incentive to reduce trash waste, may be problematic when applied to impoverished communities. The program results in individuals who produce more waste shouldering their "true share of the cost" of managing that waste, while those who generate less pay proportionately less. [107] Yet, when considering folks living in poverty, they are often the same people with limited access to informational resources. Thus, these communities may potentially shoulder an unfair portion of the bill, unless this information and support in changing behaviors is brought to them directly.

On the other hand, in California, local governments were able to successfully reduce the amount of solid waste disposal coming from single-family residential sources (28% of total waste disposal) but faced challenges when it came to commercial and multifamily sources. [108] Thus, instead of enacting a mandatory state law like Vermont, it adopted one directed only at

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101. *Reducing the Impact Of Wasted Food By Feeding The Soil and Composting*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/sustainable-management-food/reducing-impact-wasted-food-feeding-soil-and-composting (stating that the average person makes 1.16 pounds [of] recycling and 0.42 pounds [of] composting [per][day].") (last updated Dec. 15, 2021).

102. Act 148, *supra* note 99.

103. *Id.*

104. *Id*.

105. *Id.*

106. Evans & Nagele, *supra* note 82, at 191.

107. Act 148, *supra* note 99.

108. CAL. STAT. AB 341 SOLID WASTE: DIVERSION, CH. 476 SEC. 1(b)(2) (enacted) (2011).

commercial operations,[109] while mandating municipalities across the Golden State extend their own programs for residential composting.[110] The California legislature identified its intent to: (a) require businesses to recycle their solid waste; yet (b) allow jurisdictions flexibility to develop and maintain individual solid waste recycling programs.[111] Furthermore, "[b]y requiring a jurisdiction to implement a commercial solid waste recycling program," the law essentially imposed a state-mandated local program.[112] However, it was not intended to limit, "modify or abrogate in any manner the rights of a local government or solid waste enterprise with regard to [sic] solid waste handling."[113]

The benefit of this approach is that it allows municipalities to tailor solutions to their specific circumstances, while recognizing that individuals and businesses are not on equal footing when it comes to participating in composting. Unlike Vermont's approach that treats the entire state the same, California is dealing with a much larger and more diverse populace,[114] and thus its method tends to be more friendly towards municipalities by focusing on supporting local programs to help reach its overarching state diversion goals. In response to California mandating local diversion programs, a variety of municipalities adopted differing approaches.

In San Diego, compost bin vouchers were implemented to allow more people to participate in a program that may have otherwise been inaccessible.[115] This is particularly beneficial to low-income folks who may not be able to afford backyard composting equipment. San Diego began this program in order to provide residents with "easy and affordable access to composting resources and education in order to achieve greater diversion of organics entering the landfill."[116] It is also a non-commercial solution that may allow individuals and communities to retain the benefits that come from composting.

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109. *Id.* (defining "business" as "commercial or public entity, including, but not limited to, a firm, partnership, proprietorship, joint stock company, corporation, or association that is organized as a for-profit or nonprofit entity, or a multifamily residential dwelling.").

110. *Mandatory Commercial Composting*, CALRECYCLE, https://www.calrecycle.ca.gov/recycle/commercial (last updated June 21, 2021).

111. CAL. PUB. RES. CODE § 42649 (2012).

112. CAL. PUB. RES. § 18838 (2012).

113. CAL. PUB. RES. § 42649.5(a)–(b).

114. *Compare* U.S. CENSUS BUREAU, *Total Population in Vermont* (2019), https://data.census.gov/cedsci/all?q=vermont (showing Vermont population estimate 623,989), *with* U.S. CENSUS BUREAU, *California* (2019), https://www.census.gov/search-results.html?q=California (showing California population estimate 39,512,223).

115. *Compost Bin Voucher Program Application*, CITY OF SAN DIEGO ENV'T SERV., https://www.sandiego.gov/environmental-services/recycling/residential/compostbinvoucher (last visited May 16, 2018).

116. *Backyard Composting,* CITY OF SAN DIEGO ENV'T SERV. https://www.sandiego.gov/environmental-services/recycling/residential/composting (last visited Jan. 22, 2022).

In 2009, San Francisco implemented its own mandatory composting law, which paved the way for other big cities to expand their existing programs.[117] The city took on most of the burden to provide pick-up for its residents because it was dealing with a relatively small area of land.[118] The new composting municipal service was directly integrated into a landfill flat rate, alongside garbage and recycling.[119] Furthermore, apartments, made efforts "to educate residents and install diverting devices (baffles) in the garbage disposal chutes used in older buildings."[120] All of this was part of a broader program to reduce waste by 2020. Similarly, Bakersfield—a more rural municipality—and the adjacent unincorporated area, instituted curbside green waste pickup using green-colored containers provided by the city.[121] Although Bakersfield has not passed a mandatory composting law, it has effectively integrated composting into its waste management program. The success of these Californian cities in providing composting to their residents is impressive, yet beyond the boundaries of these cities those services tend to trickle off.

The drawbacks of California's approach are similar to the broader United States shortcoming. It is a federalism problem. That is, access to composting and the quality of the services depends largely on local California governance. In other words, where you live within the state and whether the municipality sees fit to enact a law, create a program, or support a private company. This has created a patchwork of metro areas with access to curbside composting while rural communities are left to fend for themselves, leaving distribution gaps.[122] However, California recognized the potential environmental injustice of this approach, and proactively developed a specific composting environmental justice initiative to mitigate this unfair treatment.[123] Furthermore, in 2015 California put in place state-wide organic

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117. CAL., ENV'T CODE §§ 1801–1802 (2009); *Recycling & Compositing in San Francisco – FAQs*, SAN FRANCISCO DEP'T ENV'T, http://www.sfenvironment.org/article/recycling-and-composting/mandatory-recycling-and-composting-ordinance (last visited Jan. 22, 2022).

118. Yerina Mugica & Andrea Spacht Collins. *Food to the Rescue: San Francisco Composting*, NRDC (Oct. 24, 2017), https://www.nrdc.org/resources/san-francisco-composting#:~:text=In%201996%2C%20San%20Francisco%20became,and%20zero%20waste%20by%202020.

119. S.F. DEP'T ENV'T, *supra* note 117.

120. Thomas P. Redick & Kimberly Parker Beck, *Composting Codes and Coexistence Issues with Urban Agriculture*, 16 ABA AGRIC. MGMT. COMM. NEWSLETTER, no. 3, at 9 (Aug. 2012).

121. *Green and Wood Waste*, KERN COUNTY PUBLIC WORKS, https://kernpublicworks.com/organics/green-and-wood-waste/#bakersfield (last visited Jan. 22, 2022).

122. Niles, *supra* note 77.

123. Growing Compost, *supra* note 54 (working in conjunction with Berkeley Law School's Environmental Law Clinic, this manual was developed to assist compost facility operators think through environmental justice questions as they implement the state's organic waste reduction targets.); *see* Janaki Jagannath and Dan Noble, *18th Technical Training Series*, ASS'N OF COMPOST PRODUCERS, https://apps.cce.csus.edu/sites/calrecycle/lea_tts18/speakers/uploads/2A.Environmental_Justice%20(Noble).pdf (last visited Jan. 22, 2022).

waste recycling program requirements, exempting jurisdictions that already met the new standard.[124]

Thus far, California seems to have the most comprehensive understanding of maintaining a balance between self-initiative and structural support in order to justly expand composting. It is worth recognizing that California, by and large, is a wealthy state with a bent towards the progressive.[125] Regardless, California's approach is potentially a workable roadmap to help inform the development of national composting programs.

C. Programs at the Municipal Level

The most diverse and innovative programs in the United States are happening at the municipal level. The following municipal examples are only the floor of organic waste management programs. There are many, many more popping up all over the country, experimenting with a variable combination of conveniences, incentives, and mandates.[126] Seattle, New York City, and Austin are a few cities that have managed to implement workable programs that have been running relatively smooth for some time.

One of the first municipalities to start composting at a citywide level was Seattle, which now has a robust curbside pick-up program serving the entire city.[127] Seattle has had mandatory yard waste composting since 1988.[128] In 2003, Seattle passed a municipal ordinance creating mandatory recycling and an accompanying pick-up program both at the commercial and residential levels.[129] Since 2003, Seattle's ordinance has been amended to include mandatory composting of not only yard waste, but also food scraps.[130] Seattle Public Utilities has since interpreted this ordinance to cover food scraps generated by residential properties as well.[131]

What seems to have made Seattle's ordinance effective is the combination of mandatory participation, while simultaneously providing

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124. CAL. PUB. RES. § 42649.82 (2016).

125. U.S. CENSUS BUREAU, *supra* note 114.

126. *See generally* Redick & Beck, *supra* note 120 (detailing four different composting ordinances).

127. *Food Waste Requirements*, *supra* note 10.

128. SEATTLE, WASH., MUN. CODE §21.36.085 (2008) (stating that "yard waste shall not be mixed with garbage, refuse or rubbish for disposal").

129. *Zero Waste Case Study: Seattle*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/transforming-waste-tool/zero-waste-case-study-seattle (last visited Jan. 22, 2022).

130. SEATTLE, WASH. MUN. CODE § 21.36.082 ("B. All commercial establishments that generate food waste or compostable paper shall subscribe to a composting service, process their food waste onsite, or self-haul their food waste for processing. All building owners shall provide composting service for their tenants or provide space for tenants' own food waste containers. [Exception for pre-approved business that don't have room to store this refuse].").

131. *Food & Yard (Compost) Services*, SEATTLE PUB. UTILITIES, http://www.seattle.gov/utilities/your-services/collection-and-disposal/multi-family-properties/for-managers-and-owners/food-and-yard-services (last visited Jan. 22, 2022).

services and infrastructure for folks to meet that requirement. Furthermore, Seattle includes an exception for home composting, which allows folks to opt out of the city program if they are composting themselves.[132] This is important for the purpose of supporting backyard and community composting. To further empower individuals, Seattle has created its Friends of Recycling and Composting steward reward program.[133] If a resident opts into this program, "they may receive a one-time $100 credit."[134] In return this individual takes on the responsibility of educating their community and making sure folks are properly sorting their garbage.[135] Every composting resource available through the city has also been translated into 16 different languages,[136] which allows individuals to communicate effectively with a diverse citizenry. Thinking about Mr. Cole's social change questions, Seattle seems to be moving in the right direction. It is not only thinking about creating infrastructure but also about building a community-empowered movement.

In New York City, the former mayor Michael R. Bloomberg recognized food waste as the "final recycling frontier."[137] In response to this notion, his administration began an ambitious curbside pick-up program in 2013, which has continued to this day.[138] This program has become the largest in the country, serving more than one million residents of all five boroughs in NYC.[139] NYC effectively and innovatively retrofitted existing garbage trucks and modified routes to accommodate organic waste, rather than create additional costs and negative environmental impacts.[140] Instead of adding a whole new waste program, NYC managed to integrate its composting into the wider waste disposal system. This not only benefits the city and

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132. *Composting Yard and Food Waste at Home*, SEATTLE PUB. UTILITIES & SAVING WATER P'SHIP http://www.seattle.gov/Documents/Departments/SPU/EnvironmentConservation/CompostingAtHomeGuide.pdf (last updated Dec. 2016).

133. *Friends of Recycling & Composting Program,* SEATTLE PUB. UTILITIES, https://www.seattle.gov/util/cs/groups/public/@spu/@foodyard/documents/webcontent/01_013851.pdf (last updated Nov. 18, 2014).

134. *Id.*

135. *Recycling Volunteers*, SEATTLE PUB. UTILITIES, http://www.seattle.gov/utilities/services/food-and-yard/bldg-owners/managers/100-credit (last visited Jan. 22, 2022).

136. *See Food Waste Prevention: Composting*, SEATTLE PUB. UTILITIES, https://atyourservice.seattle.gov/2016/09/29/food-waste-prevention-composting/ (providing a food waste composting guide in various languages) (last visited Jan. 22, 2022).

137. Emily S. Reub, *How New York Is Turning Food Waste Into Compost and Gas*, N.Y. TIMES (June 2, 2017), https://www.nytimes.com/2017/06/02/nyregion/compost-organic-recycling-new-york-city.html.

138. *Id.*

139. *Id.*

140. *Can We Have Our Cake and Compost It Too? An Analysis of Organic Waste Diversion in New York City*, CITIZENS BUDGET COMM'N (Feb. 02, 2016), https://cbcny.org/research/can-we-have-our-cake-and-compost-it-too.

environment but also creates an easy way for NYC residents to integrate composting into their lives.

NYC shows how the addition of municipal engagement can greatly expand access to composting and how important community composting programs are for the development and furtherance of organics recycling in general.[141] It took NYC until 2013 to adopt composting as a service the municipality provided, even though tens of thousands of New Yorkers had already been composting for decades.[142] In fact, community composting was always an integral part of community gardening within the city.[143] NYC Compost Project became the first organized iteration of composting in NYC, originally focusing on outreach, education, and technical assistance. Because of its success, particularly the operations component—Local Organics Recovery Program—skeptical lawmakers were convinced that a city-wide composting program could be successful. Over a five-year period from 2007-2013, this little three-bin, community garden composting organization expanded into a city funded program."[144] It is hardly a coincidence that this success story finds its roots in community organizing. Programs like this tend to flourish when communities are actively engaged in the process and invested in the outcome.[145]

The next year (2014) in the middle of the country, the city of Austin, Texas amended its preexisting universal recycling ordinance to include organics.[146] For an easier adjustment, the mandatory recycling of organics was set to come into staggered effect, over four years, from October 2014 to 2018.[147] The flexibility built into this program is one noteworthy aspect of Austin's ordinance. It allows responsible parties to:

> transport the organic material to a composting facility, compost on-site, or contract with a licensed recycling service provider. The responsible party may also divert organic materials to food banks, farms, or other material processors in ways that prioritizes feeding people and animals or industrial uses over composting in the waste diversion hierarchy outlined in the ordinance.[148]

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141. Nora Goldstein, *Community Composting in New York City*, BIOCYCLE (Nov. 18, 2013), https://www.biocycle.net/2013/11/18/community-composting-in-new-york-city/.

142. *Id.*

143 *Id.*

144. Bruce, *supra* note 57.

145. *Id.*

146. AUSTIN, TEX. ORDINANCE 20140612-010 § 15-6-93(E)(3) (2014).

147. *Id* at § 15-6-91 (D).

148. *Austin, TX — Universal Recycling Ordinance*, INST. FOR LOC. SELF-RELIANCE, https:/ilsr.org/rule/food-scrap-ban/austin-tx-universal-recycling/ (last visited Jan. 22, 2022).

Additionally, as part of its initiative, in 2016 Austin added a rebate program for residents to encourage home composting.[149] This includes a potential $75 rebate given to individuals for home composting equipment when they attend a free composting class or watch the class online.[150]

Although there are valuable aspects to Austin's ordinance, it fails to provide the flexibility that NYC or Seattle gives to their residents because the ordinance seems to only apply to property owners or their designees.[151] The burden is on landlords to educate their tenants and provide adequate facilities. This falls short of actively engaging the entire community to build a lasting movement. Furthermore, the ordinance provides that the responsible party[152] must:

> (4) remove the recyclable or organic materials by either: (a) transporting the recyclable and organic materials to a materials recovery or composting facility authorized by law; (b) contracting with a City-licensed recycling service provider to transport the recyclable and compostable materials to a materials recovery or composting facility authorized by law; or (c) transporting recyclable or organic material, as permitted and required by City Code, to a material recovery facility, food bank, processor, material broker, urban farm, urban ranch, rural farm, rural ranch, community garden, or a facility that prioritizes the hierarchy of beneficial use as set out in Subsection (D) of this section.[153]

The major problem with Austin's law is that it treats composting notably like recycling. This is valuable to the extent that people are generally more aware of recycling, and thus more likely to participate in composting if it is like something they already know about. However, when being translated into law, composting is quite a different beast from recycling, and has wholly different implications for community health and involvement. Because

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149. *Curbside Composting Guide,* AUSTINTEXAS.GOV, http://www.austintexas.gov/composting (providing citizens with reasons as to why they should compost, a possible rebate) (last visited Jan. 22, 2022).

150. *Id.* (mentioning filling out a questionnaire as part of the rebate application, which may present a burden for those who cannot read/write. There may also be language barriers. However, adding the option to participate online is valuable because it allows folks who may otherwise have time constraints or transportation limitations to access an option when and where they are able.).

151. AUSTIN, TEX. ORDINANCE 20140612-010 § 15-6-1(13).

152. *See id* at § 15-6-1(19) (defining Responsible Party as: (i) the owner of a premises or an employee of the owner or (ii) the manager of a premises or an employee of the manager).

153. *Id* at § 15-6-92 (A)(4) (presenting the Hierarchy as: (1) feeding hungry people; (2) feeding animals; (3) providing for industrial uses; and (4) composting).

Austin's law seems to gloss over this difference, it fails to provide adequate flexibility for backyard and community composting. In fact, it fails to provide adequate flexibility for composting as a whole.

D. Private Composting Programs

Aside from governmental action on composting, there are many private programs that have sprung up both locally and internationally in the last few years to fill in where the government has yet to provide services. Using a vast array of tools from online technology to conventional small business models, innovative companies are creating new interconnected social webs separate from traditional waste management. In a sense, they are trailblazers of an anarchic reform for these systems.

In Albuquerque, New Mexico, a small company, Little Green Bucket,[154] provides pick-up and drop-off services for a city (and a state) that does not offer any composting as a public utility. Aside from a weekly or bi-monthly food scrap pick-up service,[155] they give their clients the opportunity to collect a seasonal supply of humus created from the accumulated refuse. The major problem with this private company is that it costs $20 a month, which is an unreasonable amount to expect most people to pay, especially considering that New Mexico ranks as one of the poorest states in the nation.[156] Although this company is taking initiative in a relatively community friendly way, it is still bound to the capitalist free-market, and thus must turn a profit to survive.

On the other end of the spectrum is an app, created in 2016, to expand home composting networks.[157] ShareWaste "uses a digital map to connect individuals with food scraps to nearby neighbors who have compost capabilities, like a heap or a bin. Users accepting compost scraps can mark their compost site on the map for other users to find."[158] This app was initially created in Australia but is now available globally with "nearly 6,000 users [sic] currently signed up for ShareWaste across the globe."[159] The brilliance of this novel idea is its ability to connect community members and create a more economical option for organic waste disposal.[160]

Using technology to foster ecological resilience and empower individuals to become more community oriented and self-reliant is important

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154. LITTLE GREEN BUCKET, https://littlegreenbucket.com/ (last visited Jan. 22, 2022).

155. *See id* (providing clean "little green buckets" every pick-up).

156. *Id*; Rachel Moskowitz, *Poverty in New Mexico*, N.M. DEPT. OF WORKFORCE SOLS. (Jan. 9, 2019), https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty_in_NM.pdf.

157. Josie Colt, *Compost Makes an Internet Community Grow, Thanks to an App*, WIRED (June 19, 2018), https://www.wired.com/story/sharewaste-composting-app/.

158. *Id.*

159. *Id.*

160. *Id.* (the app is not limited to composting).

for the continued development of composting systems everywhere. However, the idealist technocrats often forget that with anything digital there are going to be people and communities left out. Not everyone has the money to buy an adequate device to run the app or has the familiarity with technology to use it. For example, many tribal communities still live off the grid and elderly folk tend to have a harder time navigating new technologies.[161] Yet, even taking these vulnerable communities into consideration, ShareWaste is truly the first attempt at bringing one of the oldest technologies known to man into the 21st century,[162] and although it may not be perfect it has the potential to uproot a century old system of waste management.

CONCLUSION

Although composting is a technology that dates back farther than state and municipal responsibility for waste disposal, the United States is seeing an increased interest in this alternative to contend with multiple modern problems. In response to this momentum, yet still conforming with Tenth Amendment state functions, a patchwork of different composting programs has begun to develop nationwide. Within these small laboratories, an opportunity exists to test new and dynamic waste disposal systems, in the form of composting. Additionally, it is valuable to incorporate differing solutions to reflect a truly diverse country, as no one-size-fits-all. However, in composting's nascent stages it is important to hold a critical eye up to each program so that it is comprehensively implemented and effectively serves the intended community without succumbing to injustice.

161. *Id.*
162. *Id.*

NEVER HAD A CHANCE: UNDERSTANDING THE HISTORY OF HOW LOW-INCOME AND PREDOMINANTLY BLACK UNINCORPORATED COMMUNITIES EVOLVED TO BECOME ENVIRONMENTAL JUSTICE COMMUNITIES THROUGH STATE ANNEXATION LAWS AND PROCEDURES

Jameson Christopher Davis

INTRODUCTION

For most Black Americans, the late nineteenth century into the early twentieth century was an era marked by segregation and Black resistance to that segregation. Whether it was the need for a white passenger to grant permission to ride the streetcars or the non-existent freedom of movement, Black Americans consistently found themselves at odds with their white counterparts.[1] Segregation was not just with streetcars, restaurants, water fountains, and theaters; entire communities, cities, and towns were also segregated.[2] Throughout the entire country, Black Americans and other people of color began constructing their own communities and neighborhoods on the outskirts of predominantly white cities and towns.[3] Often, these communities were developed on environmentally unsafe sites due to *de jure* segregation.[4] These communities lacked basic municipal services such as clean water, proper sewage treatment, storm drains, sidewalks, and streetlights.[5]

While communities of color faced these horrendous conditions, white communities—often within sight or short walking distances—did not have these shameful conditions. During this time, white communities thrived—and expanded economically while offering a wide range of public services.[6] In contrast, residents of low-income unincorporated communities and neighborhoods of color could not vote because they were literally mapped out of democracy.[7] Daily life in most unincorporated communities consisted of overflowing backyard pits, strong odors from leaking septic systems,

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1. John Hope Franklin, *Racial Desegregation and Integration—The Background: History of Racial Segregation in The United States*, 304 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2–3, 6–7 (1956); Alana Semuels, *Segregation Had to Be Invented*, ATLANTIC (Feb. 17, 2017), https://www.theatlantic.com/business/archive/2017/02/segregation-invented/517158/.

2. Franklin, *supra* note 1, at 5, 7–8.

3. *See Segregation in the United States*, HISTORY.COM, (Feb. 4, 2021) https://www.history.com/topics/black-history/segregation-united-states (explaining the history of segregation within communities in the United States); *See* Semuels, *supra* note 1 (explaining how Black communities were displaced to the outer edges of town).

4. David D. Troutt, *Localism and Segregation*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 323, 323–24 (2007).

5. Bernice Yeung, *Unincorporated Communities Lack Basic Services*, SFGATE (Aug. 6, 2012), https://www.sfgate.com/news/article/Unincorporated-communities-lack-basic-services-3465042.php; *see* Hannah Gordon Leker & Jacqueline MacDonald Gibson, *Relationship Between Race and Community Water and Sewer Service in North Carolina, USA*, PLOS ONE, Mar. 21, 2018, at 1–3, 12–16, e0193225 (finding racial disparities in community water and sewer services).

6. Leker & Gibson, *supra* note 5; HISTORY.COM, *supra* note 3 ("The [Housing Act of 1949] subsidized housing for whites only, even stipulating that Black families could not purchase the houses even on resale.").

7. *See generally* Michelle W. Anderson, *Mapped Out of Local Democracy*, 62 STAN L. REV. 931, 933 (2010) (discussing the methods in which unincorporated communities are mapped out of democracy).

household greywater collection, and flooded streets.[8] While the Civil Rights Movement began to provide a voice for residents of low-income unincorporated communities (residents who were forced to call these places home), the ability to exclude evolved to make it impossible for them to have adequate living arrangements.[9] Segregation began to appear as a rational, inescapable economic reality.[10]

This research paper will discuss the history of low-income unincorporated communities; analyzing the roles that annexation laws and procedures played in the continued impoverishment and disenfranchisement of people of color. Analyzing unified development patterns and underlying legal dynamics, this paper seeks to expose the impact annexation had in perpetuating structural oppression of an already oppressed group. This paper will also explore the roles annexation procedures and local government structures played in creating current environmental justice communities. To provide sufficient context, this paper will begin with a historical overview of slavery, including the establishment of Freedman communities, the impact of Reconstruction, the history of the Great Migration, as well as examining past and present Native and Latinx low-income unincorporated communities.

I. HISTORY OF SLAVERY

A. Slave Codes and the Organizational Structure Creating the Separation of Blacks and Whites in Residential Areas.

Exactly when the first African slaves arrived in the United States remains a debated topic.[11] Some say it was as early as the 1400's, while others believe the Dutch carried the first African slaves to the shores of what would become the United States in 1619.[12] The status of indentured servitude meant that Africans in America had the same status as white

8. *See generally* Yeung, *supra* note 5 (explaining the various hardships residents of unincorporated communities in California have endured).

9. Anderson, *supra* note 7, at 933, 936.

10. *Id.* at 936.

11. *See* Ciara Torres-Spelliscy, *Everyone is Talking About 1619. But That's Not Actually When Slavery in America Started*, WASH. POST (Aug. 23, 2019), https://www.washingtonpost.com/outlook/2019/08/23/everyone-is-talking-about-thats-not-actually-when-slavery-america-started/ (discussing slavery in America began with Spanish-speaking black slaves that arrived in 1511 rather than in 1619).

12. *The Slave Trade*, *Exploration, American Beginnings: 1492-1690*, NAT'L HUMAN. CTR., http://nationalhumanitiescenter.org/pds/amerbegin/exploration/text7/text7read.htm (last visited Jan. 23, 2023).

servants.[13] Next, what came was court sanctioned customary law that developed the slave status.[14] In 1662, Virginia enacted the first slave codes.[15]

After Virginia established slaves codes, multiple states followed suit; restricting interracial marriages and banishing white women who carried African children.[16] By 1860, Virginia and Maryland began to see changes in the organization of slavery.[17] Large landowners and slave owners divided their estates into smaller units, upon which Africans worked to raise crops under the control of white men.[18] At that time, these white men were seen more as foremen rather than slave masters.[19] However, it was as early as this period that residential segregation moved to the forefront.[20] Often, cities and towns with a high population of Africans would be contained in small areas—away from the white residential areas.[21] These self-contained areas often lacked rudimentary structures and facilities—typically available in white residential communities.[22]

After years of growth, the free Black American population began to decline as the Civil War approached.[23] Lasting from 1861 to 1865, the Civil War began largely because of the enslavement of Black people.[24] On January 1st, 1863, President Abraham Lincoln issued the Emancipation

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13. *Virginia's Slave Codes*, PBS, https://www.pbs.org/wgbh/aia/part1/1p268.html (last visited Jan. 23, 2023) ("The status of blacks in Virginia slowly changed over the last half of the 17th century. The black indentured servant, with his hope of freedom, was increasingly being replaced by the black slave."); E. FRANKLIN FRAZIER, FREE NEGRO FAMILY: A STUDY OF FAMILY ORIGINS BEFORE THE CIVIL WAR 1 (1932); *see* IBRAM X. KENDI, STAMPED FROM THE BEGINNING 66–67, 120 (2016) (highlighting the status of Black Americans as indentured servants in the colonies).

14. *1600-1774: Colonial Authority*, NBC NEWS (May 27, 2008), https://www.nbcnews.com/id/wbna24714556 (Massachusetts legalized slavery in 1641, followed by Connecticut in 1650).

15. *Id.*

16. *Id.*; CARTER G. WOODSON, FREE NEGRO HEADS OF FAMILIES IN THE UNITED STATES IN 1830, 9 (The Association of the Study of Negro Life & History, Inc. 1925); *Colonial Laws*, PBS, https://www.pbs.org/wgbh/aia/part1/1h315.html (last visited Jan. 23, 2022) ("Maryland, 1664: The first colonial "anti-amalgamation" law is enacted [amalgamation referred to 'race-mixing']. Other colonies soon followed Maryland's example. A 1691 Virginia law declared that any white man or woman who married a 'Negro, mulatto, or Indian' would be banished from the colony forever.").

17. FRAZIER, *supra* note 13, at 6.

18. ULRICH B. PHILLIPS, PLANTATION AND FRONTIER DOCUMENTS: 1649–1863, at 89 (1909).

19. *Id.*

20. Daniel C. Vock et al., *How States and Cities Reinforce Racial Segregation in America*, GOVERNING.COM (Jan. 23, 2019), https://www.governing.com/topics/public-justice-safety/gov-segregation-main-feature.html.

21. *Id.*

22. *Id.*

23. FRAZIER, *supra* note 13, at 6.

24. *Slavery: Cause and Catalyst of the Civil War*, U.S. DEP'T INTERIOR, NAT'L PARK SERV., https://www.nps.gov/cuga/learn/historyculture/upload/SLAVERY-BROCHURE.pdf (last visited Jan. 23, 2022).

Proclamation.[25] While over 4 million Black slaves were given their freedom after the enactment of the Emancipation Proclamation and the Thirteenth Amendment, the southern states did not comply without a fight.[26] In many areas, slavery continued—it was business as usual. Meanwhile, whites elsewhere prepared for the free Black Americans to infiltrate their communities by creating laws called the "Black Codes" to control the labor and behavior of former slaves and other Black Americans.[27] These Black Codes played a significant role in the increased separation between blacks and whites in residential areas.[28]

B. History of Freedmen Settlements

After emancipation and the enactment of the Thirteenth Amendment, many former slaves were faced with basic questions like where to reside, how to provide for themselves and their families, and how to endure the uncertainty that awaited them.[29] More often than not, they remained on plantations working as sharecroppers.[30] Many freedmen traveled from white neighborhoods to develop their own settlements away from white control.[31] They also established their own places of worship and civic organizations.[32] Freedmen's communities had a greater measure of security from the direct effects of Jim Crow.[33] "Such places were defensive communities, where Black property owners had circled the wagons against outsiders, a 'fortress without walls.'"[34] "Freedmen's settlements were Black enclaves that kept to

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25. *The Emancipation Proclamation,* NAT'L ARCHIVES.GOV, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation#:~:text=President%20Abraham%20Lincoln%20issued%20the,and%20henceforward%20shall%20be%20free.%22 (last visited Jan. 23, 2022).

26. *See Reconstruction*, HISTORY.COM, https://www.history.com/topics/american-civil-war/reconstruction (last updated Jan. 23, 2022) (discussing the historical context after the Civil War and Emancipation Proclamation).

27. *See id.* (discussing Black Codes passed by southern states to enslave African Americans during Radical Reconstruction).

28. FREEDOM TO THE FREE 1863–1963 CENTURY OF EMANCIPATION: A REPORT TO THE PRESIDENT BY THE UNITED STATES COMMISSION ON CIVIL RIGHTS 60 (1963).

29. *The African American Odyssey: A Quest for Full Citizenship Reconstruction and Its Aftermath*, U.S. LIBR. CONG.: EXHIBITIONS, https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html (last visited Jan. 23, 2022).

30. Spencer R. Crew, *The Great Migration of Afro-Americans: 1915–40*, 110 MONTHLY LAB. REV. 34, 35 (1987).

31. *Id.; Freedman,* MERRIAM-WEBSTER.COM (2019) https://www.merriam-webster.com/dictionary/freedman. Freedman is defined as, a person freed from slavery, *id*.

32. Crew, *supra* note 30.

33. THAD SITTON & JAMES H. CONRAD, FREEDOM COLONIES: INDEPENDENT BLACK TEXANS IN THE TIME OF JIM CROW 178 (Univ. Texas Press 2005).

34. *Id*.

themselves and until the end of Jim Crow, few whites wished—or dared—to live there."[35]

Freedmen's settlements were frequently described as independent rural communities of Black American landowners.[36] Often referred to as "freedom colonies," by those that occupied the space, these were dispersed communities.[37] These "freedom colonies" were unplotted and unincorporated, and usually only unified by sparce community services, and "residents' collective belief that a community existed."[38] The communities established themselves in these areas because the land was either cheap, neglected, or wilderness areas.[39] Many southern historians ignored freedmen's settlements, therefore data is scarce, but numbers were not needed to recognize that all across the South, similar communities continued to form.[40] When the federal government reneged on their promise to provide "40 acres and mule," these communities took matters into their own hands and moved to new lands.[41]

Unfortunately, many of these communities never fully developed—often times due to community members' inability to generate enough wealth and invest in their newly formed communities.[42] Outsiders looking in might not think a community existed in these areas as many of them remained dispersed, and poorly focused areas.[43] Freedmen settlements "remained especially remote, informal, and unofficial."[44] As a result, these communities went largely unnoticed by whites.[45] The records of freedmen's settlements were poorly recorded, and as a result modern historians have little to trace their history.[46] Freedmen settlements were communities of avoidance and self-segregation, maintaining "a culture of dissemblance" to adapt to the Jim Crow era.[47] It is not uncommon for Freedmen's settlements to practice "austerities of landownership, hard work, independence, neighborly cooperation, subsistence farming and avoidance of debt."[48] Many residents and their descendants stayed on the land to this day.[49]

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35. *Id*.
36. *Id*. at 1–2.
37. *Id.* at 2.
38. *Id*.
39. *Id*. at 3.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id.* at 4.
45. *Id*.
46. *Id*.
47. *Id*.
48. *Id.* at 4-5.
49. *Id*. at 5.

C. Reconstruction and the Great Migration Led to the Surge of Freeman Towns

Shortly after the end of the Civil War, the Reconstruction Era began.[50] In 1867, during Radical Reconstruction, newly enfranchised Blacks gained a voice in government for the first time in American history; winning elections to southern state legislatures and even to the United States Congress.[51] Less than a decade later, racist and discriminatory forces, including the Ku Klux Klan, overturned the transformations created by Radical Reconstruction in a violent backlash that rejuvenated white supremacy in the South.[52] These actions, in addition to World War I creating industrial jobs, led to what became known as the Great Migration.[53] From 1916-1970, over 6 million Blacks moved from the rural southern states to the urban northern states including those in the Midwest.[54]

Due to this intense migration of Black Americans, freedmen communities began to expand geographically.[55] Older freedmen settlements were mostly located on Southern rural pieces of land.[56] Due to migration *en masse*, one began to find freedman settlements in the West, Midwest, and across the eastern seaboard.[57] Though the locations differed, the conditions of these communities did improve.[58] These communities, lacking basic services (such as sewage, sidewalks, streetlights, etc.), and legally defined limits, became known as unincorporated communities.[59]

II. UNINCORPORATED COMMUNITIES

While it is true that low-income unincorporated communities have existed throughout human existence across the globe, this paper focuses on the Black experience and how slavery forced many Black Americans to reside in low-income unincorporated communities created by Freedmen. Simply stated, unincorporated communities are settled places not within city

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50. Crew, *supra* note 30, at 34–35.

51. *Reconstruction*, ENCYC. BRITANNICA (Nov. 05, 2021), https://www.britannica.com/print/article/493722.

52. *Id.*

53. Crew, *supra* note 30, at 34.

54. *The Great Migration, 1910 to 1970*, U.S. CENSUS BUREAU (Sept. 13, 2012), https://www.census.gov/dataviz/visualizations/020/.

55. *The Great Migration*, HISTORY.COM (June 28, 2021), https://www.history.com/topics/black-history/great-migration.

56. *Id.*

57. *Id.*

58. Isabel Wilkerson, *The Long-Lasting Legacy of the Great Migration*, Smithsonian Mag. (Sept. 2016), https://www.smithsonianmag.com/history/long-lasting-legacy-great-migration-180960118/.

59. Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 U.C.L.A. L. REV. 1095, 1126 (2008).

limits; they are not legally included under the laws of the state in which they are located.[60] An unincorporated community is not governed by its own local municipal corporation, but rather as part of a larger governmental division, such as a township, county, city, or state.[61]

Unincorporated communities can be found throughout the United States, and though often economically tied to a larger town or city, are excluded from participatory rights such as voting.[62] Additionally, these unincorporated communities find themselves victims of disproportionate environmental injustices.[63] The disproportionately high number of landfills, utility plants, freeways, and other toxic chemical-producing entities in these communities can no longer be ignored.[64] These negative impacts profoundly affect low-income unincorporated community members' health and their ability to increase or maintain housing and land values.[65] These communities, and their lack of basic rudimentary needs, exist in part, because of the laws which govern the distribution of power among agencies and governmental entities at the local, state, and federal level.[66]

A 2007 study, *Unincorporated Communities in the San Joaquin Valley*, identified more than 125 such communities in eight counties (Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus and Tulare) in the state of California.[67] The Mississippi Delta has close to 20% of the total Black population and nearly 40% of the Black rural non-farm population living in low-income unincorporated communities in 1980.[68] Additionally, in 20 of the 22 municipalities with a sizable fringe population,[69] more Black Americans live in low-income unincorporated communities than those who live in cities.[70]The study researched and verified the existence of low-income unincorporated communities in Texas, North Carolina, Florida, Mississippi, California, and multiple states across the Southwest.[71] Many low-income unincorporated communities have remained predominantly Latino or Black

60. Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L. J. 1364, 1368 (2012); Anderson, *supra* note 59, at 1101.

61. Anderson, *supra* note 60, at 1368; Anderson, *supra* note 59, at 1101.

62. Anderson, *supra* note 7 at 933.

63. Anderson, *supra* note 59, at 1124.

64. *Id.* at 1098.

65. *Id.* at 1099, 1101.

66. *Id.* at 1114.

67. VICTOR RUBIN ET AL., UNINCORPORATED COMMUNITIES IN THE SAN JOAQUIN VALLEY: NEW RESPONSES TO POVERTY, INEQUITY, AND A SYSTEM OF UNRESPONSIVE GOVERNANCE 8 (2007).

68. *See* Anderson, *supra* note 7; Charles S. Aiken, *Race as a Factor in Municipal Under bounding,* 77 ANNALS ASS'N AM. GEOGRAPHERS 567 (1987).

69. *Fringe Community Definition*, LAW INSIDER, https://www.lawinsider.com/dictionary/fringe-community (last visited Jan. 23, 2022).

70. Aiken, *supra* note 69.

71. Anderson, *supra* note 7, at 937.

American—often having a history of *de jure* and *de facto* segregation.[72] "Lying just beyond incorporated city and town lines, these neighborhoods remain unincorporated and dependent on county government."[73]

A. Native Americans

Prior to the struggles that Black Americans faced living in low-income unincorporated communities—Native Americans were also forced to reside in unincorporated communities.[74] The courts played a significant role in designating native individuals and the land they reside on as unincorporated.[75] The Lands in Severalty Act of 1887 conferred full and absolute citizenship to Natives.[76] As stated in Dudley O. McGovney's, *Part II. Unincorporated Peoples and Peoples Incorporated with Less than Full Privileges*, "Indian allottee passes out of the status of 'ward of the nation' and over his person the nation Government ceases to have any peculiar jurisdiction."[77] McGovney continues by stating, "[h]e becomes by virtue of the act, as it declares, 'a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens,' and becomes 'subject to the laws, both civil and criminal, of the State or Territory in which…' he resides."[78] This means that Native peoples are incorporated, and receive the rights and privileges granted to them by the constitution. But what of their lands?

Worchester v. Georgia was the seminal case that decided whether native communities should be regarded as unincorporated.[79] Although Native country is geographically located within a State's boundaries, it is not incorporated into the State. Therefore, the State could not extend its laws over the Native country, which at the time remained under the exclusive jurisdiction of the National Government.[80] In a more complex sense, reservations today are still considered unincorporated.[81] Native reservations suffer from the same health, wealth, and environmental issues that plague

72. Troutt, *supra* note 4.
73. Anderson, *supra* note 7, at 937.
74. Dudley O. McGovney, *American Citizenship. Part II.*, 11 COLUM. L. REV. 326, 331 (1911).
75. *See id.* at 327 (illustrating how the court's interpretation of *Elks* caused Native Americans to be considered unincorporated).
76. *Id.* at 331, 332.
77. *Id.* at 332.
78. *Id.*
79. Worcester v. Georgia, 31 U.S. 515 (1832).
80. McGovney, *supra* note 74 at 333.
81. *Id.*

Black and Latinx low-income unincorporated communities across the United States.[82]

B. Latinx Communities

California is recognized as one of the most agriculturally rich regions in America.[83] "During World War I, migration to the U.S. from Europe declined, which increased the demand for Mexican labor to fill the void."[84] To address this, the guest worker program was established, and brought more than 70,000 Mexican workers into the United States.[85] With this influx of workers, communities were developed to house them; often times these communities were unincorporated.[86] According to a study completed by California Rural Legal Assistance. Inc and California Rural Assistance Foundation:

> Among the poorest and most isolated of these communities are places outside of city limits that lack the most basic features of a safe, healthy, sustainable neighborhood— potable drinking water, sewer systems, safe housing, public transportation, parks, sidewalks, and streetlights. People of color make up 54 percent of those living in the San Joaquin Valley, and make up a disproportionate number of those living in underinvested neighborhoods. Historically, these communities have been home to mostly African American and Latinos, and a growing Southeast Asian population. Governed by counties, which were not set up to provide services to dense urban areas, and lacking the representation of a city council, they are systematically underserved in the overall allocation of public resources and are frequently left out of local decision-making processes. Concentrated poverty, institutional and individual racism, and California's systems of public finance and land use

82. Judith Bell & Mary M. Lee, *Why Place & Race Matter: Impacting Health Through a Focus on Race and Place*, at 19, POLICYLINK (2011), https://www.policylink.org/sites/default/files/WHY_PLACE_AND_RACE%20MATTER_FULL%20REPORT_WEB.PDF.

83. GREAT VALLEY CENTER, ASSESSING THE REGION VIA INDICATORS: THE ECONOMY 1999–2004, at 26, (2005).

84. *Timeline of Agricultural Labor in the U.S.*, NAT'L FARM WORKER MINISTRY, http://nfwm.org/farm-workers/farm-worker-issues/slider-test/ (last visited Jan. 23, 2022).

85. *Id.*

86. *See id.* (showing that a large number of workers came into the state of California).

> regulation exacerbate the plight of disadvantaged unincorporated communities.[87]

Often, unincorporated communities in California, (especially San Joaquin Valley) were used purposefully to exclude Mexican and minority workers from participating in matters such as local elections.[88] These tactics placed Mexican migrant workers in very difficult living conditions.[89] The effect of these tactics can still be seen today—2.8 million Californians are "living in unincorporated communities not recognized by the 2000 census."[90] These communities were not recognized by the census due to the fact they were not characterized as Census Designated Places.[91] In California, people of color are disproportionately represented in low-income unincorporated communities in comparison to cities, counties, and other census-designated places.[92] 65% of the population living in low-income unincorporated communities are of color.[93]

C. Pros and Cons of being Unincorporated

While this paper highlights the disparities faced by low-income unincorporated communities; for a select few communities, unincorporated status provides certain freedoms. The author uses his personal knowledge to infer that the usual benefits associated with living in unincorporated communities are by far, unavailable to persons living in low-income unincorporated communities. For a community to take advantage of the benefits that being unincorporated provides, it must be able to economically afford such benefits.[94] Consequently, economic inadequacies cause these benefits to be beyond the reach of many a low-income unincorporated community.[95] The correlation of a community being low-income and mostly minority is one that cannot be ignored.[96] One major benefit of being

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87. CHIONE FLEGAL ET AL., POLICY LINK, CALIFORNIA UNINCORPORATED: MAPPING DISADVANTAGED COMMUNITIES IN THE SAN JOAQUIN VALLEY 7 (2013) http://www.policylink.org/sites/default/files/CA%20UNINCORPORATED_FINAL.pdf.

88. *See id.* at 9–10 (discussing the history of exclusion in San Joaquin Valley).

89. NAT'L FARM WORKER MINISTRY, *supra* note 84.

90. FLEGAL ET AL., *supra* note 88 at 9.

91. *Id.*

92. *Id.*

93. *Id.*

94. Anderson, *supra* note 59, at 1112.

95 Danielle M. Purifoy, *Living Unincorporated*, DUKE HUM. RIGHTS CTR. FRANKLIN HUMANITIES INST., https://humanrights.fhi.duke.edu/living-unincorporated/ (last visited Jan. 23, 2022).

96. *Id.*

unincorporated is that state regulations do not regulate unincorporated areas.[97]

Often corporations benefit more from a community being unincorporated than the actual community itself.[98] Corporations tend to take full advantage of this loophole in regulations.[99] Uniontown, Alabama, is an example of this trend.[100] While Uniontown itself is incorporated, some of its surrounding areas are not. Therefore, resident corporations are able to site pollute and/or conduct toxic operations adjacent to this lower-income Black community with minimal state pushback.[101]

Being unincorporated allows community members to live off the grid. For example, an unincorporated community can live 100% sustainably through energy generated by purchased or leased solar panels.[102] However, taking full advantage of this right is something that only occurs in more affluent neighborhoods. From the writer's personal experience working for Tesla, Inc. in California, communities of color have a difficult time affording solar panels out-right; these communities cannot take advantage of this benefit due to how expensive the transition can be. Often, the costs include much more than the solar system itself. Roof upgrades and trenching are just a few ways the costs of going solar can increase to an unattainable point for many low-income communities.[103]

Affluent unincorporated communities are not bothered by the cons of being unincorporated: their streets are paved and in good shape; sidewalks are present; streetlights work properly; they have access to clean drinking water; and they can afford contracted health care and therefore be independent of local emergency services.[104] They also are not bothered by not having a local governmental structure.[105] The author interprets this to mean that affluent unincorporated communities maintain as much or even more political clout as incorporated communities. However, this is not the case in low-income unincorporated communities of color.

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97. *Id.*

98. *See id.* (discussing the higher cost of living in unincorporated communities)

99. *See, e.g.*, Marianne Engelman-Lado, et al., *Environmental Injustice in Uniontown, Alabama, Decades after the Civil Rights Act of 1964: It's Time for Action*, AM. BAR ASS'N (Apr. 13, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/environmental-injustice-in-uniontown--alabama--decades-after-the/ (discussing the loopholes Arrowhead Landfill used in Uniontown).

100. *Id.*

101. Baker v. Carr, 369 U.S. 186 (1962).

102. *Id.*

103. Jenny Heeter et al., *Affordable and Accessible Solar for All: Barriers, Solutions, and On-Site Adoption Potential*, at 2, Nat'l Renewable Energy Lab'y (2021), https://www.nrel.gov/docs/fy21osti/80532.pdf.

104. Purifoy, *supra* note 95.

105. *Id.*

By contrast, the cons of being unincorporated are more prevalent for most low-income unincorporated communities with a high population of people of color.[106] Lack of local emergency services, such as emergency vehicles and fire departments, is more the norm than the exception.[107] The lack of such services ends up making costs even more exorbitant for individuals when they do require them.[108] Maintenance of local streets is commonly infrequent or nonexistent. Systemic oppression plays a role in the fact that these low-income unincorporated communities end up paying higher insurance rates on homes, cars, and health care due to their community status.[109] This further perpetuates the oppressive tactics that keep these communities in poverty.[110] Lastly, due to a lack of state regulations, these unincorporated communities are consistently at risk of exposure to pollution.[111] The effect of these disadvantages leads to the communities' inability to generate an increase in property value, in return, making them appear less attractive to the communities they would like to be annexed to.[112] Unfortunately, these inequalities though fought in the past through the civil rights movement continue today.

D. Spatial Inequality

Without a path for unincorporated communities to gain wealth and increase property values, they will continually find themselves victims of inequality.[113] "Spatial inequality" means "inequality in economic and social indicators of wellbeing across geographical units within a country."[114] In the 20th century, local political economies, lack of enforced anti-discrimination protections, and annexation kept these communities in very similar conditions as in the 19th century.[115] Unfortunately, in the 21st century we have inherited the issues of spatial inequality in low-income unincorporated

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106. *Id.*

107. *Id.*

108. *Id.*

109. Julia Marie Naman & Jacqueline MacDonald Gibson, *Disparities in Water and Sewer Services in North Carolina: An Analysis of the Decision-Making Process*, 10 AM. J. OF PUB. HEALTH 24 (2015) (describing the impacts on unincorporated communities).

110. Danyelle Solomon et al., *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/.

111. Bell & Lee, *supra* note 82, at 16, 24.

112. Anderson, *supra* note 59, at 1101, 1129.

113. *Id.* at 1130.

114. Ravi Kanbur & Anthony J Venables, *Spatial Inequality and Development: An Overview of UNU-WIDER Project*, GOVERNANCE & SOC. DEV. CTR. (2005) https://gsdrc.org/document-library/spatial-inequality-and-development-an-overview-of-unu-wider-project/.

115. *See* Anderson, *supra* note 7, at 934. (discussing the twentieth-century problem of spatial inequality in unincorporated communities).

communities across the country. Finance-driven local economies make growth management and annexation extremely difficult.[116] Courts, on multiple occasions, have been reluctant to mandate the movement of local borders, which created the exploitative ability of towns and cities to discriminate against communities of color as it concerns annexation.[117]

III. ANNEXATION

Low-income unincorporated communities have a very difficult time becoming incorporated, which would allow them to receive rudimentary services and increase their quality of life.[118] Annexation presents a significant obstacle for these communities; "municipal annexation is the process of legally including within the corporate limits of a city or town an unincorporated area that is outside the municipality."[119] This process has often been abused and unfairly granted to avoid involving communities of color.[120] Annexation is an important process for communities of color because of the benefits it can provide. When granted, annexation provides service improvements to communities deprived of basic services throughout their existence. Bringing unincorporated communities into a city or town that already has municipal services triggers certain requirements for those cities and towns to provide adequate health and safety services to their annexed areas.[121] Additionally, annexation grants voting rights to residents who did not have them previously, increasing political clout and representation for community members of color.[122] Annexation would require accountability of local governments to formerly low-income unincorporated communities, forcing them to support habitability improvements.[123]

A. Annexation Procedures

Because there are no federal regulations specific to annexations happening within state boundaries, annexation is regulated at the state

116. *Id.*

117. *Id.* at 960.

118. *See generally,* CARL VINSON INSTITUTE OF GOV'T: THE UNIV. GA., A BRIEF SUMMARY OF MUNICIPAL INCORPORATION PROCEDURES BY STATE https://www.senate.ga.gov/committees/Documents/CarlVinsonSummaryMunicipalIncorporationProceduresbyState.pdf (listing complex procedures for incorporation) (last visited Jan. 22, 2022).

119. THE MARYLAND MUNICIPAL LEAGUE, MUNICIPAL ANNEXATION HANDBOOK 3 (2013) https://www.mdmunicipal.org/DocumentCenter/View/978/Annexation-Handbook-2013-for-Website?bidId=.

120 Anderson, *supra* note 7, at 943–44.

121. *Id.*

122. *Id.* at 938.

123. *Id.* at 944, 948.

level.[124] There are also no federal regulations that prohibit cities or towns from disapproving an annexation based solely on the wealth of the unincorporated inhabitants.[125] Some state laws encourage or mandate cities and towns to strongly consider a neighborhood's taxable property wealth before annexation.[126] Laws that encourage economic value to be at the forefront of deciding whether to annex a petitioning low-income unincorporated community creates unjustifiable burdens. Economically, a low-income unincorporated community usually has a very difficult time demonstrating to an incorporated community that granting annexation will create benefits for said incorporated community.[127] Note, the factors mentioned earlier: toxics siting; low housing values; pollution; lack of basic services; and possibly high crime rates—are the reasons why a community may petition to be annexed. Therefore, these factors should not count against them in the process.[128] Whatever minimal political pressure low-income unincorporated communities might apply, residents are ultimately at the mercy of the city and regional decisionmakers to assess the desirability of an annexation.[129]

Unincorporated communities that desire to be annexed and willing to go through the process have three ways of doing so: the unincorporated community can petition the city or town directly for annexation; the unincorporated community can lobby the town or city to initiate and approve an annexation; and/or the unincorporated community can lobby the county to pressure the town or city to undertake annexation.[130] Each state has its own regulations regarding the specific procedures necessary for annexation. This paper references the Maryland Municipal League's Municipal Annexation Handbook for guidance.[131] Maryland's annexation handbook was chosen because it is comparable to other models, in addition to being straightforward and accessible.[132]

Maryland requires eight (8) procedural steps to be completed for an annexation to be approved and officially recognized:[133]

1. Minimum Prerequisites: In order to be annexed to an existing municipality, an area must be contiguous and adjoining to the existing municipal corporate area and may not be located within

124. *Id.*
125. *Id.*
126. *Id.*, at 952.
127. Anderson, *supra* note 59, at 1147–48.
128. *Id.*
129. Anderson, *supra* note 7, at 953.
130. *Id.* at 950.
131. MUNICIPAL ANNEXATION HANDBOOK, *supra* note 119, at 4.
132. *Id.*
133. *Id.*

another incorporated municipality. Also, annexation of the area may not create an enclave of unincorporated area that would be surrounded on all sides by land within the municipality upon completion of the annexation.[134]

2. Annexation Petition/Consent: An annexation petition signed by at least 25% of the qualified voters along with the owners of 25% of total assessed property in the area to be annexed may be filed with the municipal legislative body. Alternatively, the legislative body may initiate an annexation by obtaining the consent of a like percentage of qualified voters and property owners.[135]
3. Annexation Resolution: Upon verification that the annexation petition signatures meet the requirements of law and that all other prerequisites of the law have been met, the elected body should promptly introduce a resolution proposing the annexation…. The resolution should describe the area to be annexed together with any conditions or circumstances applicable to the proposed annexation.[136]
4. Annexation Plan: A municipal governing body must prepare, adopt and make available to the public a plan detailing (1) the proposed land use or uses in the area to be annexed, (2) available land that could be used for anticipated public facilities that may be needed, (3) a schedule for extending municipal services to the area to be annexed, and (4) anticipated means of financing the extension of services. The plan must be provided at least 30 days prior to holding the public hearing required by law for an annexation to the county in which the municipality is located as well as to the Maryland Department of Planning and any regional and state planning agencies having jurisdiction within the county.[137]
5. Proposed Annexation Publication, Hearing and Resolution Passage: After introduction of the resolution, a municipality must publish at least four times at a minimum of weekly intervals in one or more newspapers of general circulation a notice of the proposed annexation; notice of the time and place of a hearing on the resolution must also appear in the newspaper advertisements. A copy of the public notice must be provided to the county governing board and regional and state planning

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

agencies as soon as it is initially published. At the hearing itself, the county and planning agencies must be afforded first right to be heard, after which the general public may make comment….[138]

6. Petitions to Referendum: Within the 45 days prior to the effective date of the resolution, any of three groups may petition the annexation resolution to referendum. At least 20% of the registered voters in the existing municipality or in the area to be annexed may petition the resolution to referendum; alternatively, a minimum of two-thirds of the county governing board may petition to call for a referendum on the annexation question. After verification of petition signatures or county governing board compliance with the law's requirements (whichever is applicable), the effectiveness of the resolution is suspended pending results of the referendum.[139]
7. Annexation Referendum: The annexation referendum may be held from 15 to 90 days following newspaper publication of notice of the referendum. The notice must occur a minimum of two times at a minimum of weekly intervals. Should the referendum pass, the annexation will become effective on the fourteenth day following the referendum. Which voters participate in a referendum is dependent upon where the referendum petition emanated. If the petition was submitted by the county governing body or the residents in the area to be annexed, the voters in the area to be annexed may participate in the referendum. If the petition was submitted by residents of the municipality, the voters in the municipality participate. If both circumstances exist, separate elections are held for both the existing municipal voters and for voters in the area to be annexed. In the case of two elections, both sets of voters must approve the referendum in order for the annexation to proceed.[140]
8. Registration of Resolution and Boundaries: Regardless of whether or not the annexation is brought to referendum, the annexation resolution and the new municipal boundaries of the municipality must be promptly sent to (1) the county clerk of courts in the county in which the annexation occurred, (2) the Department of Legislative Services, and (3) where applicable

138. *Id.* at 5
139. *Id.* at 6
140. *Id.*

> the Maryland-National Capital Park and Planning Commission.[141]

While these are the procedures in Maryland, the process changes from state to state. Other states require the unincorporated community to pay for an environmental review that costs roughly $68,000.[142] To expect a low-income unincorporated community to have the ability to afford to pay these high costs for annexation is a tactic used to create separation.

B. Belle Glade, Florida Residents of Okeechobee Center

Annexation is not easy to come by for communities of color. In 1939, Belle Glade, Florida, was home to two identical public housing developments.[143] Despite being in identical housing, there was *de jure* segregation between Black Caribbean farmworkers and low-income whites.[144] These housing projects were built on unincorporated land. Both housing developments sought annexations due to the horrendous conditions that came with being an unincorporated community.[145] In 1961, the city granted annexation to the white development but not to the black housing project.[146] The city did not even give a public explanation for the denial. The Black Caribbean housing development called the Okeechobee Center continued to apply; they were continuously denied annexation for 40 years.[147] The Black housing development would later fold. Subsequently, this forced community members to bring brought legal actions.[148]

Municipal under bounding is when annexation policies and practices allow incorporated cities and towns to grow around or away from low-income unincorporated minority communities.[149] This excludes unincorporated communities from having voting rights in said cities and town elections, in addition to their inability to acquire municipal services.[150] A study of annexation patterns in the nonmetropolitan south in the 1990s showed the impact these annexation denials has on communities of color.[151]

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141. *Id.*
142. Anderson, *supra* note 7, at 951.
143. *Id.*
144. *Id.* at 935
145. *Id.* at 936
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 938
150. *Id.*
151. See Daniel T. Lichter et al., *Municipal Underbounding: Annexation and Racial Exclusion in Southern Small Towns*, 72 RURAL SOC. 47, 52 (2007); JAMES C. CLNGERMAYER & RICHARD C. FEIOCK,

The study found that towns with black populations in unincorporated areas that were disproportionately larger than the black population in the town itself were less likely to annex any fringe areas regardless of whether they are predominately black or white.[152] This is because towns did not want to risk having to include black communities in annexation if they were to grant annexation to a white community.[153] The above information solidifies the narrative that too often annexation is abused, not allowing low-income unincorporated communities of color the equal opportunity to exercise their rights to gain better services and increase their quality of life through annexation. Without federal regulation, low-income unincorporated communities' ability to seek remedy for the harm they suffer is limited. Lawyers must be creative in the ways they bring cases forward to the courts

C. Annexation Used to Increase White Voting Power

As mentioned earlier, one reason annexation is easier for white unincorporated communities was the towns' desire to increase their white political power. A comprehensive economic analysis of annexations during the 1950s, for instance, found that cities used annexation to increase the proportion of white voters and dilute nonwhites' voting power.[154] White

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INSTITUTIONAL CONSTRAINTS AND POLICY CHOICE: AN EXPLORATION OF LOCAL GOVERNANCE 101–05 & tables 6.1, 6.2, 6.3 (2001). Clingermayer and Feiock conducted a multivariate analysis of annexation patterns in the 1980s across most metropolitan cities (as defined by populations greater than 25,000 in 1990) in the country. While their study offered valuable insights with respect to other variables in annexation (such as the annexing city's form of government and expenditures on services), the study's racial demographic variables were so imprecise as to be misleading. Their study accounted for two racial variables: the percent black of the annexing city and the percent black of the surrounding county-the latter measure thus capturing the racial demographics of all unincorporated land in the county as a whole rather than the unincorporated areas eligible for annexation. Yet the racial demographics of non-fringe unincorporated areas in the county (such as scattered rural populations, distant unincorporated subdivisions, the fringe areas surrounding other cities, etc.) are irrelevant to understanding a city's annexation choices. Furthermore, the study failed to compare the racial demographics of the fringe land annexed with the fringe land not annexed in order to capture racial preferences in annexation, and its use of "percent black" as the sole measure of racial diversity is inappropriate for a national study in which other racial groups are overrepresented at the urban fringe. As a result, the authors' claim that race did not significantly influence annexation, is not substantiated, *id*. at 105. Lichter et al. offers a substantially more specific methodology by identifying (using finer census block level data), land "at risk" for annexation, and analyzing the racial demographics of both annexed and non-annexed land in that at risk area, Lichter *supra* at 52.

152. Anderson, *supra* note 7, at 938.

153. *Id.* at 972.

154. D. Andrew Austin, *Politics vs. Economics: Evidence from Municipal Annexation*, 45 J. URB. ECON. 501, 528 (1999) (testing the assumption that cities' desire to expropriate suburban tax bases motivated annexations, and finding that economic considerations alone could not rationally justify annexations during the 1950s); Thomas R. Dye, *Urban Political Integration: Conditions Associated with Annexation in American Cities*, 8 MIDWEST J. POL. SCI. 430, 441 (1964) (investigating the effect of

towns in counties with higher percentages of African Americans were less likely to annex Black low-income unincorporated communities than white ones.[155]

This was so important to some areas that, even when annexations were not in the towns' or cities' best economic interest, city officials still moved forward with annexation for predominantly white communities.[156] Towns ended up spending large amounts of money funding infrastructure in the suburbs following annexation, often leading to financial loss for the town, making the decision irrational from a fiscal outlook.

The study found "modest statistical evidence" that race was the independent motivating factor for annexation decisions.[157] Nationwide empirical evidence suggests that prior to the passage of the Voting Rights Act of 1965, political and racial factors motivated urban annexation decisions in ways that imbedded the urban landscape with segregated municipal boundaries.[158] This is where legal counsel needed to be creative. It would be worth knowing that there are no federal laws that cover annexation. It is equally worth understanding when state laws favor a community's ruling to accept an annex.[159] For example, lawyers sought remedies for members of the unincorporated Okeechobee Center community under the Fifteenth Amendment because they were denied their right to vote and denied annexations.[160]

D. Legal Action by Okeechobee Center

Due to the continued history of annexation not offered to Black low-income unincorporated communities, community members and activists finally took the issue to the courts.[161] In 1995—over 30 years after the initial denial of annexation—community members of Okeechobee Center brought suit claiming racial discrimination and voting rights infringement.[162] Those community members cited *Gomillion v Lightfoot* to argue their case.[163] In *Gomillion*, the Supreme Court found that the "inevitable" and

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"social distance," including socioeconomic differences, between cities and the neighborhoods they annexed, and finding that annexations were much more likely to come to fruition if the central city's population was more "middle class" than the areas it annexed-a finding that undermines any claim that annexations were merely animated by the preference for wealthier communities).

155. Anderson, *supra* note 7, at 939.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 957.
160. Anderson, *supra* note 7.
161. *Id*.
162. *Id.* at 936*;* Burton v. City of Belle Glade, 178 F.3d 1175, 1203-04 (1999)
163. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

unconstitutional effect of redefining a city's boundaries was to remove minority citizens from the city's jurisdiction, thereby discriminatorily depriving them of "the benefits of residence;" including the right to vote in city elections.[164] Even with such strong precedent from the Supreme Court, the *Burton v City of Belle Glade*[165] plaintiffs lost both in the district court and in the Eleventh Circuit Court of Appeals.[166] The court reasoned that the plaintiffs lacked the authority needed to move a city border while focusing on the rationality of the city's contemporary, race-neutral reason for excluding the Black neighborhood—the city's net cost of extending services to the community .[167]

E. Creation of Environmental Justice Communities

After years of annexation denials, infiltration of pollution-generating corporations, lowering property values, and a number of other systemic and institutionalized discriminating factors, communities evolve. [168] Unfortunately, their evolution would not be for the better.[169] Often due to lack of financial gain, families stay in these low-income unincorporated areas for generations.[170] Currently, conditions have not improved for those who continue live in these areas.[171] Grandsons and granddaughters find

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164. *Id.*

165. *Burton*, 178 F.3d at 1203–04. As a general matter, the Court was extremely skeptical that it holds the power to order the annexation of the Okeechobee Center, no matter how egregious the racial climate in Belle Glade. Even though in cases like *Baker v. Carr,* 369 U.S. 186, (1962), the federal courts sometimes redrew political lines, whether those of electoral districts or municipalities; *See, e.g., Baker v. Carr,* 369 U.S. 186, (holding that federal courts may order reapportionment of state electoral districts); *Gomillion v. Lightfoot,* 364 U.S. 339, (1960) (prohibiting act of Alabama legislature to redefine city boundaries in such a way as to cut out primarily black neighborhoods). It is one thing, however, to say that a political unit must structure its voting blocks to secure fair voting, or annex (or deannex) new areas in a racially neutral manner, and quite another thing to say that a political unit must reach outside of its boundaries and grant municipal citizenship to outsiders. The *Burton v. City of Belle Glade* plaintiffs cited no case in which a federal court ordered a municipality to annex property outside of its boundaries, and the Court would be extraordinarily reluctant to establish such a precedent. Fortunately, this case did not require the Court to resolve the broad question of whether it could order Belle Glade to annex the Okeechobee Center pursuant to its Article III powers. For a number of much narrower reasons, the Court concluded that defendants would prevail on summary judgment. Although plaintiff's theories largely overlapped, the Court addressed the statutory and constitutional theories separately, *Burton v. City of Belle Glade*, 178 F.3d 1175 (1999).

166. Anderson, *supra* note 7, at 936.

167. *Id*.; *Burton*, 178 F.3d at 1184.

168. Jim Erickson, *Targeting Minority, Low-Income Neighborhoods for Hazardous Waste Sites*, UNIV. MICH. NEWS (Jan. 19, 2016), https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/.

169. *See* Anderson, *supra* note 59, at 1146–47 (discussing institutional discriminations that forces black people into unincorporated communities).

170. *Id.*

171. Yeung, *supra* note 5.

themselves inheriting more burden than opportunity.[172] These communities often become what are now known as environmental justice communities.[173]

Environmental justice communities are commonly identified as those where residents are predominantly minorities or low-income; where residents have been excluded from the environmental policy setting or decision-making process; where they are subject to a disproportionate impact from one or more environmental hazards; and where residents experience disparate implementation of environmental regulations, requirements, practices and activities in their communities.[174] Tallassee, Alabama, is a prime example of a historic freedman town that remained unincorporated and now finds itself at the forefront of the environmental justice fight.[175]

The Ashurst Bar/Smith Community Organization (ABSCO) alleged that the Alabama Department of Environmental Management (ADEM) discriminated on the basis of race by reissuing a permit to the Stone's Throw Landfill in Tallassee, Alabama.[176] This permit allows the landfill to receive garbage from all 67 Alabama counties and three counties in Georgia.[177] By closing this civil rights complaint, the EPA greenlights the landfill to continue to operate without sufficient public-health and environmental protections in the middle of a historic Black community—one where many residents can trace their land ownership to that of newly freed people who settled the land soon after Emancipation in the 1860s.[178]

While the spotlight may be on Tallassee, Alabama—they are not the only community that find themselves fighting environmental justice issues because of institutionalized discriminatory tactics such as unequal and unfair annexation practices. From the author's personal knowledge gained from residing in Los Angeles, California for ten years; current community members living in East Los Angeles are suffering from identical issues (lack of basic services, sidewalks, streetlights, storm drains, etc.). Low-income unincorporated communities in San Joaquin Valley also continue to suffer

172. Anderson, *supra* note 59, at 1146-47 (explaining why multiple generations of Black American continue to live in unincorporated communities).

173. *See* INDUSTRIAL ECONOMICS, INC., DEFINING ENVIRONMENTAL JUSTICE COMMUNITIES AND DISTRIBUTIONAL ANALYSIS FOR SOCIOECONOMIC ANALYSIS OF 2016 SCAQMD MANAGEMENT PLAN (Nov. 30, 2016), https://www.aqmd.gov/docs/default-source/clean-air-plans/socioeconomic-analysis/scaqmdfinalejreport_113016.pdf?sfvrsn=6 (defining environmental justice communities and highlighting the dangers their residents live through).

174. *Environmental and Social Justice Action Plan*, CA. PUB. UTILITIES COMM'N, https://www.cpuc.ca.gov/esjactionplan/ (last visited Jan. 23, 2022).

175. Jeronimo Nisa, *EPA Slams Door to Justice on Historic Black Community*, EARTHJUSTICE, (Dec. 12, 2018) https://earthjustice.org/news/press/2018/epa-slams-door-to-justice-on-historic-black-community.

176. *Id.*

177. *Id.*

178. *Id.*

the same fate from practices that started when the first migrant workers arrived north from Mexico.

IV. SUGGESTED REMEDIES

At this juncture, the author proposes five recommendations to mitigate and improve the terrible conditions that current low income and predominantly Black unincorporated communities suffer from. First, there must be more Black people elected to official positions at the state and local level. Annexation is not a federal regulation. State and local government remain the most effective avenue. At the local level, individuals in power seem to better understand the assistance that low-income, unincorporated communities require. Far too often, those who make the decisions that affect low-income unincorporated communities have no ties to that community. Very rarely will a person who does not live in an impoverished community, ever visit such a community. Therefore, how can nonresidents relate to the consistent struggles that residents of these vulnerable communities face? In order to create the necessary change to protect citizens' rights, those who make annexation decisions need to be able to relate to the community.

Second, more people of color are needed in locally appointed positions such as zoning and planning commissions. Most annexation laws give significant control of the process to the local municipality. These local municipalities in return, lean on their local experts to help develop a process that will best benefit their community regarding annexation. Often the benefits of the "Black dollar" and the ways in which people of color impact the U.S. economy are not fully understood neither are they supported. Again, if an individual has never been to or interacted with those outside their own race or economic status, when it comes to placing a value on the communities of others, it becomes extremely difficult to do without certain biases. It should therefore come as no surprise that this notion continues to endure in current discriminatory annexation practices happening across this country.

Far too many small towns face the challenge of remaining sustainable. One way to generate a larger and more diverse economic base would be to annex a surrounding low-income unincorporated community into an already thriving town or city. While initially said thriving town or city may need to invest in that annexed community by extending basic services, a consideration often left out (of the equation) is the creation of opportunities from basic services. With basic services creation, new businesses can sprout up in areas that may have previously seemed implausible. With basic services, those who were once without would finally have a chance to do more; creating streams of revenue that did not prior to annexation. Having more people of color on local commissions such as zoning and planning boards, will allow for them to advocate for the creation of these opportunities

Third, we all need to apply pressure on our current elected state and local officials urging them to find a way to assist these unincorporated communities to have the basic services we all take for granted. In addition, education of these officials is necessary so they understand the social and economic impact that ignoring these low-income unincorporated communities has created. From the author's own personal experience as an elected official, it is not uncommon for

representatives to gain knowledge by way of a phone call or letter received from a concerned citizen. One may be surprised to learn just how little time those who serve in office spend in communities. Often, most of the time spent while holding office is in preparing for meetings, taking part in conferences / press releases, and/or completing administrative tasks. Thus, citizens who live in these low-income unincorporated communities and those who advocate on their behalf need to vocalize their concerns with their state and local elected officials as frequently as possible. Representatives learn how best to represent their constituents through conversating with them.

Fourth, Federal/State oversight is necessary to ensure that annexation procedures do not continue to be abused. No longer should cities use annexation as a tool to increase white voting power, neither should they continue to use it to segregate residential neighborhoods. States attorneys must be more aggressive in enforcing the current available laws and regulations. The Belle Glade community took advantage of a voting rights violation to find their way into the courts. States attorney can also be creative in the way they protect their constituents. The Commerce Clause[179] may be one way a state's attorney can hold a town or city accountable if they are abusing annexation procedures. Due Process[180] along with Equal Protection[181] must be enforced, especially for recipients of federal funds, to provide the necessary services for a white annexed unincorporated community while denying the equivalent black unincorporated community adjacent.

Lastly, we need Federal/State oversight for funding annexed communities. Elected officials must undertake aggressive enforcement to ensure that state and/or federal funds are not being used to discriminatorily exclude black unincorporated communities in favor of white unincorporated communities. Both State and Federal representatives must make the necessary amendments needed to regulations to include language outlawing the current discriminatory and abusive practices. Currently, under Title VI,[182] the EPA has a responsibility to ensure that its funds do not subsidize projects that discriminate based on race, color, or national origin.[183] The same should be done at the state level for annexation. Most often when

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179. U.S. CONST. article I, § 8, cl. 3. (authorizing Congress "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.") The commerce clause has traditionally been interpreted both as a grant of positive authority to Congress and as an implied prohibition of state laws and regulations that interfere with or discriminate against interstate commerce (the so-called "dormant" commerce clause). In its positive interpretation the clause serves as the legal foundation of much of the U.S. government's regulatory power, *id*.

180. U.S. CONST. amend. XIV, §1. (providing "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

181. *Id.*

182. 42 U.S.C. § 2000 (d). Provision for the "prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance, *id*."

183. *Id*.

expansion is granted, both state and federal funds are being used to complete the necessary construction.

CONCLUSION

As this paper articulates, low-income unincorporated communities need assistance so they can finally receive equal opportunities to achieve a better quality of life. History has told a story that shows residential segregation has been a part of American culture since the beginning. Black Americans suffered from these discriminatory conditions throughout history, whether it was the unincorporated Freedmen communities of the past or current unincorporated communities of the present. Environmental justice communities are not created overnight. Unfair annexation procedures and laws play a significant role in creating communities where populations are intentionally and/or unintentionally targeted, often systematically, by the economic and/or political power structure to bear an environmental burden (pollution or degradation) because of its racial or ethnic composition, social/economic status of residents, or national origin of its residents.

Latinx and Native Americans also continue to suffer similar fates at the hand of discriminatory practices and procedures designed to maintain white supremacy. Difficult and expensive annexation practices remain a challenge for unincorporated communities. Courts have failed to enforce the laws to protect these vulnerable communities. For low-income communities, the disadvantages significantly outweigh the benefits of being unincorporated. For us to truly progress as a nation, wealth must be distributed equally and fairly. The suggested remedies mentioned above must be implemented. State officials need to do a better job of equally allowing low-income and predominately Black unincorporated communities the opportunity to gain basic services through state annexation procedures.