AVOIDING PERFORMATIVE CLIMATE JUSTICE

by Katrina Fischer Kuh

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SUMMARY

Today's climate impacts and those on the horizon increasingly infuse mitigation and adaptation efforts with urgency, causing policymakers to contemplate or issue formal declarations of a climate emergency and to streamline review processes to aid rapid development of mitigation and adaptation infrastructure and technology. Yet, this urgency and need have the potential to create injustice and sideline or overwhelm efforts to reduce existing injustice. The key question in the climate justice context is whether the commitment to justice today, and the provisions to protect justice that are adopted to advance that commitment, can and will endure as the pressures of high-level warming intensify. This Article, excerpted from *Adapting to High-Level Warming: Equity, Governance, and Law* (ELI Press forthcoming 2024), proposes a precommitments strategy to help make a present-day commitment to climate justice more enduring.

Open-eyed assessment of the potential for and on-the-ground realities of high-level warming (significantly beyond 2 degrees Celsius (2°C)) supports implementation of extraordinary and immediate mitigation and adaptation measures and portends that even with such measures, climate impacts will strain adaptive capacity to the breaking point and beyond, resulting in significant societal dislocation and loss and damage. In the context of adaptation to high-level warming, societies will transition from a steady state punctuated by the need to manage periodic emergencies to a near-constant state of managing extreme conditions.

Today's climate impacts and those on the horizon increasingly infuse mitigation and adaptation efforts with urgency, causing policymakers to contemplate or issue formal declarations of a climate emergency and to streamline review processes to aid rapid deployment of mitigation and adaptation infrastructure and technology. In both contexts—the implementation of extraordinary mitigation measures and adaptation to high-level warming—urgency and need have the potential to create injustice and sideline or overwhelm efforts to reduce existing injustice.[1]

Emergency as the contextual backdrop for law and policymaking—whether experienced, formally declared, or simply perceived and anticipated—can create or exacerbate injustice. High-level warming will produce successive, deepening domestic climate emergencies (resulting in internal displacement, food insecurity, and political instability), triggering scarcity and struggle that could sap the motivation and capacity to attend to justice. The best intentions—for example, to manage internal migration to support successful relocation by low-income communities, avoid climate gentrification, and prevent receiving locations from adopting discriminatory policies, tricky tasks in the best of times—may yield to the urgency of other, more pressing adaptation needs. Justice may be treated, as described aptly by Clifford Villa in "Environmental Justice Beyond 2°C," as a "luxury that requires letting go."

At least for now, exhortations to climate justice abound. We are in a moment of intense climate policymaking, and

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1. As other chapters in this effort, including those authored by Cinnamon Carlarne and Keith Hirokawa, Robin Kundis Craig, and Clifford Villa attest, it is challenging to precisely define justice and injustice in the context of climate change. Broadly, "climate justice fundamentally is about paying attention to how climate change impacts people differently, unevenly, and disproportionately, as well as redressing the resultant injustices in fair and equitable ways." Farhana Sultana, *Critical Climate Justice*, 188 Geogr. J. 118 (2022).

   Climate change, standing alone, is a profound injustice. Indigenous peoples are being subjected to the unintended, but catastrophic consequences of a colonial system of extraction and capitalism that has already deeply harmed them. In thinking about justice and high-level warming, this Article uses the term "justice" broadly with particular concern for how high-level warming and our responses to it may exacerbate existing injustice—produced by colonization; racial, gender, and other forms of discrimination; and economic inequality—and/or complicate efforts to remedy it.

justice is often central in these discussions and the laws and policies they produce.[2] But today's concern for justice and the adoption of justice provisions may not be sufficient. The key question is whether the commitment to justice today, and the provisions to protect justice that are adopted to advance that commitment, can and will endure as the pressures of high-level warming intensify. Without staying power, justice measures in climate policy may prove to be performative gestures that make us feel better today but do little to substantively advance justice tomorrow—and in particular under high-level warming.

Incorporating precommitments to rough justice into mitigation and adaptation law, triggered and enforceable through automatic processes and made in the relative cool of now as opposed to the heat of later, could help to make a present-day commitment to climate justice more enduring (stickier). Key aspects of a precommitment might include that it should be: (1) sticky (not easily reversed—set out in statute as opposed to an executive order, for example); (2) automatic (trigger a clear and measurable outcome or duty that is not dependent on the exercise of discretion); and (3) early (the commitment should be made prior to the circumstance(s) in which it would be implemented). Such "precommitment strategies"[3] are unlikely to achieve fully just outcomes and should be accompanied by myriad other mechanisms for advancing justice, but they could help to prevent least-just outcomes.

The precommitment strategy discussed here seeks to maximize the effectiveness of efforts to advance justice in climate change policy, while also acknowledging that they are incremental and, standing alone, likely insufficient. Climate change law, the focus here, is an area of rapid and significant lawmaking where the nexus to climate change is obvious and there are serious efforts being made to respect and advance climate justice in new laws. Ultimately, however, the prerogative to gird our laws and policies for the uphill climb for justice under high-level warming extends far more broadly and will need to incorporate broader social policy, such as entitlement reform.[4]

Another approach to limit injustice in the turmoil to come is to strive to enter it with the least amount of carryover injustice, or injustice that we produced and tolerated even in times of relative stability and relative plenty, by focusing on achieving what Robin Kundis Craig refers to as "day-to-day" equity.[5] This suggests the promise of approaching climate change through a social justice lens in the style of the Green New Deal, and also the need for more radical social and legal reforms.

The justice provisions embodied in climate change policy and examined in this Article are incremental in that they attempt to advance justice within traditional legal and policy frameworks. It may be that much stronger medicine is needed to meaningfully advance justice, particularly in the context of high-level warming, and that these incremental approaches have an opportunity cost in that they "forestall[ ] . . . serious consideration" of necessary but deeper change.[6] However, if the justice aspects of current climate policy—incremental though they be—are *also* ineffective, that would compound the harm.

The Article first sketches the contours of precommitment strategies by identifying examples of precommitment strategies in existing climate change law, and contrasting them with other approaches for advancing justice that are not sticky, automatic, and early, and thus would not be considered precommitments. It then contemplates whether and why sticky, automatic, and early precommitments to justice may be an important strategy to advance justice goals in anticipation of and at high levels of warming. It concludes by analyzing the use of precommitments to justice in the context of the expedited siting and construction of renewable energy infrastructure.

I. What Is a Precommitment to Justice?

Many climate change laws and policies reference and seek to advance justice goals.[7] The approaches to incorporating justice goals into climate change law vary widely, however, and not all measures constitute a precommitment to justice. A precommitment to justice should be sticky (not easily reversed—set out in statute as opposed to in an executive order, for example), automatic (trigger a clear and measurable outcome or duty that is not dependent on the exercise of discretion), and early (the commitment should be made prior to the circumstance(s) in which it would be implemented).

2. *E.g.*, Alexandria E. Dolezal, *Power to the People: Distributing the Benefits of a Clean Energy Transition Through Equitable Policy, Legislation, and Energy Justice Initiatives*, 106 Minn. L. Rev. 2441 (2022).
3. Richard Lazarus uses the term precommitment strategies to describe asymmetric institutional design features that he recommends incorporating into federal climate change legislation to prevent the repeal or weakening of mitigation commitments. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 40 ELR 10749 (Aug. 2010). This Article explores the basic concept of a precommitment strategy—making policy commitments harder to overlook or undo in the future—in the context of climate change justice, including at the subnational level.
4. Andrew Hammond, *On Fires, Floods, and Federalism*, 111 Cal. L. Rev. 1067 (2023) (discussing climate adaptation of public benefit programs).
5. Robin Kundis Craig, *Survival Equity and Climate Change Triage: How to Decide Who Lives and Who Dies*, *in* Adapting to High-Level Warming: Equity, Governance, and Law (Katrina Kuh & Shannon Roesler, eds., forthcoming 2024).
6. Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 Vand. L. Rev. 1209, 1226 (1991). *See also id.* at 1221:

   > Most serious reform movements fail because society prefers incremental rather than wide-ranging change. In a version of the maxim that "bad money drives out good," we are almost invariably drawn to doomed, moderate approaches . . . when society needs more sweeping, ambitious ones. We resist precisely the medicine that could save us. We turn to strong solutions only when it is either too late, or when our thinking has advanced so far that the solutions seem commonplace and tame.

7. For example, the legislative findings prefacing New York's Climate Leadership and Community Protection Act exhort that "[a]ctions undertaken by New York State to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities, control potential regressive impacts of future climate change mitigation and adaptation policies on these communities, and prioritize the allocation of public investments in these areas." N.Y. Envtl. Conserv. Law §43-B, art. 75, Refs & Annos (McKinney 2021).

These three attributes—stickiness, automaticity, and earliness—may help to create precommitments to justice that are more likely to endure as we seek to advance justice in laws and policies being designed now to mitigate and adapt to climate change. Each of these attributes is further explained and connected to the climate exigency/justice nexus below.

A. Sticky

The stickier a measure is, the less easily it can be reneged on. This may be important to make it harder to trade off justice to achieve other goals, including mitigation and adaptation, as described more fully *infra*. Evaluating the stickiness of different mechanisms for adopting climate justice policies is easy at a high level of generality and much trickier when examined more closely. In broad strokes, it is easy to see that a statute requires greater time, political will, and process to undo or bypass than an executive order or agency guidance and constrains the scope of permissible agency regulation. Agency regulations are also somewhat enduring, tethered to the permissible interpretation of an authorizing statute and subject to process and judicial review for their amendment.

Even a statute can, of course, be waived or changed, particularly in the face of perceived emergency (see the example of the border wall *infra*). Constitutions are harder to change than statutes. Federal or state constitutions could be amended to explicitly advance climate justice. This is perhaps possible in some states, but extremely unlikely at the federal level. Climate justice might also be advanced through interpretations of existing state or federal constitutional text, although the room for climate justice within existing understandings of the scope of federal constitutional rights is questionable.[8]

On the face of it, a measure designed to advance climate justice would probably be more enduring in a statute than in a regulation and in a regulation than in an executive order. But it is complicated. A statute may be readily undone by new legislation in the face of shifting public priorities after a climate disaster. Are there ways to orient or draft statutes to make it less likely that the political winds will shift against them? Regulations, too, can sometimes be "sticky," or difficult to rescind.[9]

Even executive orders, easily undone with the stroke of a pen by a governor or president, can sometimes prove enduring. No administration, even those the overall posture of which has not seemed particularly supportive of environmental justice, has withdrawn the executive order on environmental justice first issued by President William J. Clinton: Executive Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (EJ EO).[10] And, although the robustness with which the EJ EO has been implemented has waxed and waned significantly over time, it can be understood as an important part of a broader and ongoing instantiation of environmental justice (EJ) principles.[11] In some contexts, measures may be most enduring when they inculcate values, perspectives, and expectations that cannot be readily altered through changes in the text of specific laws or policies.

Thus, while stickiness is an important attribute to aspire to in adopting climate justice measures, understanding what is most likely to be sticky or enduring warrants thoughtful interrogation. One important consideration may be to recognize, pulling from Joshua Galperin's analyses in "4Cs at 4°C: Counting, Contestation, Communication, and Consideration for Collectively Constructing Concepts of Climate Change," the value of democratic process. Although no measure is truly enduring for all time, putting in place processes that surface, define, make clear, and allow for democratic input on trade offs to the greatest extent possible may have great value.[12]

B. Automatic

Automatic measures are clear and concrete. The more automatic a measure is, the less dependent its implementation is on the exercise of discretion. This will make it harder for a measure to be slighted in implementation, both because agencies presumably try to satisfy clear requirements and because noncompliance will be easier to discern and enforce. This may become particularly important as governments and agencies find themselves running to stay in place, stretching budgets and expending significant effort to satisfy minimum obligations in the face of climate chaos.

8. Katrina Fischer Kuh & James R. May, *Can the Constitution Save the Planet?*, *in* Democracy in a Hotter Time: Climate Change and Democratic Transformation (David W. Orr ed., MIT Press 2023).
9. Richard J. Lazarus, *The Super Wicked Problem of Donald Trump*, 73 Vand. L. Rev. 1811, 1836 (2020) (describing various ways in which executive climate action, including agency rulemakings, produced during the Barack Obama Administration had "significant staying power and, unlike presidential executive orders, cannot be so easily reversed"); Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 116 (2018) (explaining how the procedures attendant in rulemaking can make regulations enduring or sticky because "even if the agency wanted to change the scheme in the future, it would be difficult to do so—the same procedures that make it hard to create policy also make it hard to rescind policy") (citation omitted).
10. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 76299 (Feb. 16, 1994): ("[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.") [hereinafter Environmental Justice].
11. For an account of the progressive development and strength of EJ despite a lack of explicit grounding in federal environmental statutes, see Clifford J. Villa, *No "Box to Be Checked": Environmental Justice in Modern Legal Practice*, 30 N.Y.U. Env't L.J. 157, 180 (2022) (describing the "emergence of legal principles for environmental justice, including the requirement for conducting an adequate EJ analysis") [hereinafter Villa, *No "Box to Be Checked"*].
12. Josh Galperin, *4Cs at 4°C: Counting, Contestation, Communication, and Consideration for Collectively Constructing Concepts of Climate Change*, *in* Adapting to High-Level Warming: Equity, Governance, and Law (Katrina Kuh & Shannon Roesler, eds., forthcoming 2024). *See generally* Keith H. Hirokawa & David Dickinson, *The Costs of Climate Disruption in the Trade Offs of Community Resilience*, 41 W. New Eng. L. Rev. 455, 461 (2019) (emphasizing the importance of anticipating and identifying trade offs in the context of ecosystem services).

The federal EJ EO provides a useful example of how discretion in implementation can limit effectiveness. The EJ EO exhorts agencies to "make achieving environmental justice part of its mission," but has few automatic, or clear and substantive, requirements.[13] While EJ principles have continued to develop, increasingly finding a foothold in subnational laws, environmental reviews, statutes, and constitutional law,[14] the EJ EO itself has proved difficult to directly implement and enforce, particularly under less enthusiastic administrations.[15] The U.S. Inspector General lamented in 2004 that "EPA has not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations,"[16] and the U.S. Government Accountability Office (GAO) observed, in 2019, that most agencies "have not shown clear progress toward achieving their environmental justice goals and the purpose of the executive order."[17]

C. Early

And a commitment that is adopted early, before the full pressure of exigency arises, is less likely to bargain-down justice by unfairly weighing it against crisis needs.[18] Requirements to immediately direct funding to EJ communities (like the establishment of mandatory statutory minima in terms of the share of benefits to be provided to disadvantaged communities, as employed in both New York's Climate Leadership and Community Protection Act (CLCPA), discussed below and the Inflation Reduction Act)[19] can be understood to be early in the sense that the funding, and the benefits it creates, happen now and cannot be clawed back. The allocation of such funds advances not only climate justice, but also day-to-day equity. Successful green job uptake that produces economic benefits can help to reduce greenhouse gas (GHG) emissions and make communities more resilient to climate impacts.

Taken together, the criteria of automaticity and earliness caution against relying on balancing tests in implementing approaches designed to protect justice. A statutory provision allowing an agency to forego fulsome EJ participation requirements upon finding that the need for the construction of mitigation infrastructure significantly outweighs potential disparate impacts may grow from a rarely used exception to the default as urgency increases and agencies race to meet statutory deadlines.

Moreover, engaging with justice earlier in time may help forecast future trade offs between justice and other values that—at least in anticipation of crisis as opposed to within it—appear sufficiently unpalatable that simply recognizing the future trade off creates impetus to avoid the need for trade off in the first instance. One important contextual aspect of the timing dynamic here is that it is the fact that we are *already very late* in our mitigation efforts, which creates the need for extraordinary (fast, without fulsome participation and review, reliant on unproven technologies with potential risks) mitigation and adaptation and raises the specter of sacrificing justice to avoid other harms. An even deeper and earlier approach to justice would have been to start mitigating seriously decades ago or to have remedied existing societal injustices because "[t]he best way to prevent social disadvantage from becoming deadly during disasters is to eliminate the disadvantage, rather than merely focusing on the disaster situation."[20]

D. Identifying Precommitments

This section surveys approaches to justice embedded within climate change law and policy from different states to identify and contrast approaches that do and do not constitute precommitments to justice. New York's CLCPA provides both an example of a precommitment to justice and examples of more typical efforts to advance justice that might prove less durable in the face of high-level warming. The statute provides that disadvantaged communities "shall receive no less than thirty-five percent of the overall benefits of spending on clean energy and energy efficiency programs," giving statutory force to the recognition that EJ includes equitable distribution of benefits.[21] This precommitment is automatic, sticky, and early—a clear duty, enshrined in statute, and decided prior to the distribution of funds.[22]

The CLCPA's establishment of mandatory statutory minima in terms of the share of benefits to be provided to disadvantaged communities offers an interesting way of incorporating automaticity into climate justice measures. There can be a tension between clear and objective legal mandates and the need for flexibility in policy to adapt to a

13. *See* Environmental Justice, *supra* note 10, at 76299.
14. Villa, *No "Box to Be Checked," supra* note 11, at 191 ("While there is still no federal regulation that requires agencies to conduct an EJ analysis, courts have invalidated federal and state actions for failure to fully analyze EJ concerns and incorporate EJ analysis into decision-making.").
15. Uma Outka, *Fairness in the Low-Carbon Shift Learning From Environmental Justice*, 82 Brook. L. Rev. 789, 804 (2017) ("The lack of integration between environmental justice and substantive law and policy has allowed EJ to be positioned as a secondary—even cursory—concern, addressed as a matter of procedure.").
16. Office of Inspector General, U.S. EPA, EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice i (Mar. 1, 2004), https://www.epa.gov/office-inspector-general/report-epa-needs-consistently-implement-intent-executive-order (last visited July 21, 2022).
17. U.S. GAO, Environmental Justice Federal Efforts Need Better Planning, Coordination, and Methods to Assess Progress 17 (Sept. 2019).
18. *See generally* Uma Outka, *Fairness in the Low-Carbon Shift Learning From Environmental Justice*, 82 Brook. L. Rev. 789, 792 (2017) ("[E]nvironmental justice can and should inform the transition's trajectory *early* to achieve robust integration of the movement's core principles with legal and physical infrastructures for a low-carbon energy sector.").
19. For a summary of Inflation Reduction Act provisions directing benefits to disadvantaged communities, see Environmental Justice (EJ) Provisions of the 2022 Inflation Reduction Act, Harvard Environmental & Energy Law Program, https://eelp.law.harvard.edu/2022/08/ira-ej-provisions/ (last visited Apr. 4, 2023).
20. Daniel A. Farber, *Disaster Law and Inequality*, 25 Law & Ineq. 297, 320 (2007).
21. N.Y. Envtl. Conserv. Law §75-0117 (McKinney 2021).
22. This is not to say that the statutory command is entirely clear and automatic. For example, it is proving complicated to define which communities are considered "disadvantaged communities" and how to define and count benefits.

changing climate. The CLCPA's mandatory statutory minima, however, preserves significant flexibility in terms of the scope and type of mitigation and adaptation measures, while protecting just distribution of benefits. Below, I raise the possibility of using a similar approach to prevent the disproportionate siting of industrial-scale renewable energy in EJ communities by setting a statutory ceiling.

The CLCPA contains many other mechanisms for incorporating justice into mitigation and adaptation policy, some of which come close to a precommitment to justice by mandating a relatively clear duty and others that require too much judgment or discretion in their application to be considered automatic. For example, in developing regulations to implement statewide GHG emission limits, the New York State Department of Environmental Conservation (NYSDEC) is required to "[e]nsure that activities undertaken to comply with the regulations do not result in a net increase in co-pollutant emissions."[23] Because facilities that produce GHGs and co-pollutants are disproportionately located in EJ communities, this requirement should help to avoid a situation where climate mitigation measures exacerbate existing injustice by exposing those populations to even more non-GHG pollution. The bar on an increase in co-pollutants constitutes a relatively clear statutory command, but the need to evaluate whether and how the department's regulations prompt an increase in co-pollutants introduces some uncertainty about the automaticity of the command—whether its violation would be clear and the command readily enforceable. The provision nonetheless comes close to a precommitment to justice.

The statute also exhorts the department to "[p]rioritize measures to maximize net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities."[24] This charge is not sufficiently clear to constitute a precommitment. (Perhaps use of the statutory minimum strategy described above—requiring that a set percentage of net reductions occur in disadvantaged communities—would be a more reliably effective alternative?) All of the CLCPA's efforts to advance justice through mitigation and adaptation policy are laudatory and welcome; provisions that satisfy the elements of a precommitment may, however, prove especially durable and valuable as we face high-level warming.

Massachusetts' climate statutes provide other examples.[25] Some approaches from Massachusetts do not (at least fully (yet)) satisfy the criteria for a precommitment to justice, but there is a clear trend over time toward strengthening of justice measures and reason to be optimistic that broad, statutory justice commitments may become embedded in more automatic regulatory provisions.

For example, the 2008 Global Warming Solutions Act requires the submission of road map plans for how the state will meet identified emission reduction limits, and in 2021, Massachusetts amended the law through the Next Generation Roadmap Act to require that the plans shall "summarize the steps taken by the commonwealth to improve or mitigate economic, environmental and public health impacts on low- or moderate-income individuals and environmental justice populations."[26] It also directs the Energy and Environmental Affairs secretary to develop programs and issue rules to meet emission limits and implement the road map and provides that these "regulations shall achieve required emissions reductions equitably and in a manner that protects low- and moderate-income persons and environmental justice populations."[27]

These commands reside within statutory text, but they are vague and defer details to development through agency regulation. This renders the statutory justice policy neither sticky nor automatic. The state regulatory process may, of course, lead to the development of rules that implement the statute in a justice-enhancing manner. The *Massachusetts Clean Energy and Climate Plan for 2025 and 2030* includes a full chapter on *Ensuring Just Transition in the Commonwealth*, identifies numerous policies designed to advance climate justice (such as community-based air quality monitoring), and explains that "[e]very policy designed to achieve the GHG emissions reduction targets has been developed with a lens that focuses on delivering positive outcomes for environmental justice populations."[28]

Similarly, the Clean Energy and Climate Plan for 2050 includes as Chapter 2 *Centering Environmental Justice* and outlines an intention to "set a minimum threshold for investments that benefit EJ populations and low- to moderate-income residents."[29] The broad statutory command may ultimately produce a regulatory regime that satisfies more of the criteria of a precommitment to justice; the likelihood of this is increased by the strong justice provisions governing environmental review. Thus, at present, the statutes alone do not create a precommitment but there is reason to be optimistic that the broad statutory commands will sharpen into strong and specific regulation.

Other aspects of Massachusetts' statutory climate law come closer to or could be considered precommitments to justice. The Next Generation Roadmap Act significantly enhances the consideration of EJ in environmental review. It requires the preparation of an environmental impact report for projects likely to cause damage to the environment that are located within one mile of an EJ population (five miles for projects that impact air quality); prohibits categorical exemptions from review for projects "located in a neighborhood that has an environmental justice pop-

23. N.Y. Envtl. Conserv. Law §75-0109 (McKinney 2021).
24. *Id.*
25. Massachusetts passed the Global Warming Solutions Act in 2008, 2008 Mass. Acts ch. 298, and has since built on that statute, including most notably through An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts ch. 28, and An Act Driving Clean Energy and Offshore Wind, 2022 Mass. Acts ch. 179.
26. Mass. Gen. Laws Ann. ch. 21N, §5 (West 2022).
27. *Id.* §6.
28. Massachusetts Clean Energy and Climate Plan for 2025 and 2030, xi (June 30, 2022), https://www.mass.gov/info-details/massachusetts-clean-energy-and-climate-plan-for-2025-and-2030.
29. Massachusetts Clean Energy and Climate Plan for 2050, 12 (Dec. 2022), https://www.mass.gov/info-details/massachusetts-clean-energy-and-climate-plan-for-2050.

ulation"; and mandates that reports consider cumulative impacts (existing unfair or inequitable environmental burdens on the EJ population).[30]

The law augments these enduring, automatic, and early procedural requirements with additional measures related to environmental review which, while not independently rising to the level of precommitments to justice, are strengthened by the fact that they are anchored in the precommitment to conduct EJ-sensitive review. The additional measures include broad exhortations to the secretary to "consider the environmental justice principles . . . [and] reduce the potential for unfair or inequitable effects upon an environmental justice population" and to "establish standards and guidelines for the implementation, administration and periodic review of environmental justice principles by the executive office of energy and environmental affairs and its agencies."[31]

The law also specifies a source and minimum amount of funding (at least $12 million annually) to be directed to the Massachusetts Clean Energy Center (MassCEC), a quasi-public economic development agency.[32] The funding is to be used to implement a clean energy equity workforce and market development program for certified minority-owned and women-owned small business enterprises, individuals residing within an EJ community, and current and former workers from the fossil fuel industry. The source and amount of funding are specified in the statute; thus, despite the necessity of the MassCEC developing details for disbursement, the core justice function is thus largely enduring and automatic because disbursement must conform to the statutory parameters. It is also early in the sense that equitable distribution of the benefits of the green energy transition is considered coincident with the adoption of policy spurring that transition. This provision thus satisfies the prerequisites of a precommitment to justice.

This review of different measures incorporating justice goals into climate change law and policy reveals a variety of approaches. Some measures incorporate justice in a way that is sticky, automatic, and early and can thus be considered precommitments to justice. Other measures reference and seek to advance justice but lack one or more of the attributes of a precommitment. The next section offers reasons why efforts to advance justice in the context of high-level warming may be most likely to endure and produce benefits if structured as precommitments to justice.

II. Why Precommitments Are Important Under High-Level Warming

The three identified attributes of a precommitment to justice—that it be sticky, automatic, and early—may help to protect justice goals from ceding to exigency. Climate exigency will take many forms and, in all of them, will be more pronounced for high-level warming. The prospect of high-level warming, underscored by the dislocation of the climate impacts that will precede it, renders immediate, large-scale, and effective mitigation interventions urgent and paramount. Sudden climate disasters (fires, floods, heatwaves) will become increasingly frequent and severe and generate immediate, overwhelming needs. And slower-moving climate-caused or climate-exacerbated phenomena (such as desertification, drought, migration, sea-level rise) will create other emergencies—conflict, border pressure, famine. We will find ourselves running to stand still, spending ever more time, attention, and resources fixing what we've broken (transplanting individual branches of coral by hand as reefs diminish, fortifying dams to withstand unpredictable and unprecedented snow melts).

High-level warming and the path to it will thus exert pressures on society, resources, and institutions that are acute, intense, and grinding. By the time we reach high-level warming, our society and governing institutions will be under immense strain: "Each disaster compounds pressures on vulnerable populations, fractures the foundations of already weakened social and political systems, exposes the limits of the rule of law, and reveals the cumulative impact of intersecting social, political, economic, and ecological crises."[33] And experience suggests that exigency readily overwhelms justice.

Sacrifice of justice is regularly accepted as a trade off in the context of preparing for, avoiding, or addressing future disaster or emergency, particularly when government action is infused with a sense of urgency. The perceived need for immediate government action to address a pressing policy issue can cause decisionmakers to bypass procedural and other safeguards designed to protect justice values.

For example, the perceived need for border security led to the passage of legislation authorizing the Secretary of the U.S. Department of Homeland Security (DHS) to "waive all legal requirements . . . to ensure expeditious construction of the barriers" along the U.S.-Mexican border,[34] as well as a presidential declaration of emergency "that the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency" because "[t]he southern border is a major entry point for criminals, gang members, and illicit narcotics."[35] DHS has repeat-

30. Mass. Gen. Laws Ann. ch. 30, §62B, E.
31. *Id.* ch. 30, §62K. EJ principles are defined as
> principles that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief or English language proficiency, which includes: (i) the meaningful involvement of all people with respect to the development, implementation and enforcement of environmental laws, regulations and policies, including climate change policies; and (ii) the equitable distribution of energy and environmental benefits and environmental burdens.

Id. ch. 30, §62.
32. *Id.* ch. 23J, §13.
33. Cinnamon P. Carlarne, *From Covid-19 to Climate Change: Disaster & Inequality at the Crossroads*, 12 San Diego J. Climate & Energy L. 19, 27 (2021) [hereinafter *From Covid-19 to Climate Change*].
34. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, §102, 119 Stat. 231, 306.
35. *Declaring a National Emergency Concerning the Southern Border of the United States*, 84 Fed. Reg. 4949 (Feb. 15, 2019), *terminated by Termination of Emergency With Respect to the Southern Border of the United States and Redi-*

edly invoked its authority to waive the requirements of environmental and other statutes when constructing sections of border wall.[36] The construction has caused significant environmental impacts and spurred outcry from Indigenous groups who contend that it interferes with their religious and cultural practices.[37]

When such trade offs in the face of exigency occur, the welfare of marginalized communities and individuals is often the easiest to give up. Disadvantaged communities may be sacrificed to prevent harm to wealthier white communities:

> Putting the vulnerable in harm's way to protect the privileged is a common theme in the history of disasters. During the Great Mississippi Flood of 1927, as floodwaters threatened New Orleans and levees protecting the city faltered, city elders met to devise a plan to save New Orleans. At their urging, Louisiana's Governor ordered levees downstream of New Orleans dynamited, sparing the city by diverting flooding into the predominantly poor, Black communities to the south.[38]

A similar dynamic is at play when communities with greater political voice and means construct sea walls or other flood controls that displace water onto less powerful neighboring communities. Post-disaster, EJ communities are vulnerable to being saddled with hosting debris landfills and other locally undesirable land uses related to cleanup and rebuilding efforts.[39]

More generally, it is easy to imagine that the trade offs occasioned by government resource scarcity will tend to exacerbate injustice. Governments faced with mounting costs to maintain basic infrastructure and services (bridges, roads, power) may see social support programs, crucial to vulnerable populations, as dispensable, or at least more so.[40] And agencies faced with time and resource constraints and struggling to meet core, mandatory tasks may find it easier to neglect or short time-consuming processes aimed at protecting justice, particularly to the extent that they are not mandatory or subject to significant discretion, than to falter on more clearly defined deliverables.

The easy acceptance of trade offs that disproportionately impact disadvantaged communities and individuals mirrors the tacit acceptance of existing inequity, which shapes the disproportionate impacts from disaster and its aftermath and gives rise to other sobering incursions on justice. As has been frequently recognized, poor and historically disadvantaged communities will have fewer resources and opportunities to protect themselves from harm, recover from losses, and/or access government aid. In the words of Cinnamon Carlarne, whose own piece, with Keith Hirokawa, explores justice through the lens of climate dominance, "disaster streams along existing pathways of inequality, deepening those inequalities as it flows."[41]

Breakdowns in civil authority in the immediate wake of disaster can be particularly dangerous for racial minorities. After Hurricane Katrina, town police officers in the majority-white community of Gretna fired their weapons over the heads of evacuees attempting to flee New Orleans on foot by crossing a bridge to Gretna, blocking access to thousands. As described by the *Chicago Tribune*: "Atop the bridge to Gretna, under the strain of an unprecedented crisis, the thin veneer of American civilization peeled back for a moment to reveal the atavistic, tribally protective impulses coursing beneath."[42]

"No one in America today can realize the collapse of civil authority that happened in this area after Katrina," said Ronnie Harris, Gretna's mayor for the past 23 years. "People think, 'That can't happen here.' Well, it did happen. It was a return to basic human nature, a clannish feeling. You clung to people you know, people you trust and what's familiar and comfortable to you."[43] Although officials offered race-neutral explanations for the decision, such as Gretna's lack of supplies, racial geography provides important context:

> [T]he Gretna incident can be understood not simply as intentional discrimination against the evacuees, but as a racially territorial defense of Gretna's white space. . . . [S]patial context helps to structure the social meaning and consequences of race itself. Because at the time of the hurricane, New Orleans was predominantly black and Gretna was mostly white, the officials on the bridge likely

rection of Funds Diverted to Border Wall Construction, Pres. Proclamation No. 9844, 85 Fed. Reg. 8715 (Jan. 15, 2021).

36. *E.g.*, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *as amended*, 83 Fed. Reg. 3012-01 (May 15, 2020): ("Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety, with respect to the construction of roads and physical barriers . . . the following statutes."). The Determination goes on to explicitly waive application of 24 statutes, including the National Environmental Policy Act, Archeological Resources Protection Act, Safe Drinking Water Act, Administrative Procedure Act, Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act.
37. Manzanita Band of Kumeyaay Nation v. Wolf, 496 F. Supp. 3d 257, 269 (D.D.C. 2020) (declining to grant a preliminary injunction to prevent construction of border wall after waiver of statutory review requirements; "[o]n this record, the Court finds no reason to deviate from the clear intent of the IIRIRA to ensure expeditious construction of the barrier projects. The court acknowledges the Kumeyaay's efforts to preserve their culture and religious practices."). *See also* Teo Armus, *"'You Don't Control the Border'": Indigenous Groups Protesting Wall Construction Clash With Federal Agents*, Wash. Post, Sept. 23, 2020, https://www.washingtonpost.com/nation/2020/09/23/border-wall-construction-protests/ (last visited July 5, 2022).
38. Lisa Grow et al., *Disaster Vulnerability*, 63 B.C. L. Rev. 957, 1020 (2022) (citations omitted).
39. *Id.* at 1022: ("Because they typically have less political voice, vulnerable neighborhoods are often targeted for disaster-related, undesirable land uses, such as new landfills necessitated by debris clean-up, which aggravate existing environmental justice issues, or temporary post-disaster housing, which taxes already strained infrastructure.") (citations omitted).
40. Imagine budgetary choices between after school programs and funding needed to upgrade or repair storm-damaged highways. The U.S. Congress already experienced long delays authorizing disaster welfare funding after a series of climate-fueled natural disasters in 2018. *See* Hammond, *supra* note 4 (describing delays in congressional appropriations for disaster relief and the practice of now requiring budget offsets for relief spending).
41. *See From Covid-19 to Climate Change*, *supra* note 33, at 39.
42. Howard Witt, *Katrina Aftermath Still Roils Gretna*, Chi. Trib., Sept. 4, 2008, https://www.chicagotribune.com/nation-world/chi-gretna_wittsep04-story.html (last visited June 29, 2022).
43. *Id.*

> assumed that the black evacuees were not from Gretna. The racial meaning of the two places allowed the police to sort who did and did not "belong" on the bridge according to their racialized spatial grouping and in a way that reinforced cultural norms of white privilege and power.
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> [R]acially identifiable space triggers racial associations that incite a sense of belonging and proprietary power. Space takes on social and cultural meaning that in turn stimulates territorial reactions. Thus, the racialized associations with New Orleans itself helped to construct the image of the evacuees as (poor, black) "looters." Prior to the incident on the bridge, New Orleans was stereotyped by Gretna officials as a site of black poverty and crime. This racial stigma was then mapped onto the Katrina evacuees, creating perceptions that they were a racial horde encroaching on the white space of Gretna, rather than people merely seeking safety and dry land. Coming from a black space that had been stamped as "dangerous," the black evacuees—at least in the eyes of Gretna officials—became presumptively dangerous themselves. Race, therefore, surfaces in the town officials' class-loaded efforts to keep a particular kind of black person out of Gretna—the poor who come from the dangerous black city. The evacuees' racial profile is partially constructed based on their presumed geographical association with (poor, black) New Orleans.[44]

Notably, "[m]uch of the violence that actually occurred following Katrina was committed by individuals [vigilantes and police] who subscribed to the myth that their neighbors and fellow citizens would degenerate into animals and who thus employed violent measures to protect themselves—or their property—against this perceived threat," and who "believed that the largely poor, black survivors of Katrina were all potential looters and rapists."[45] And it is not uncommon for entire groups, often racial minorities, to be scapegoated in the face of societal challenges.

All of this suggests that the strain and exigencies of high-level warming will exacerbate existing injustice, give rise to new challenges to justice, and make it even harder to commit resources and orient law toward preventing and rectifying injustice. That should prompt us to structure institutions, laws, and programs to create a precommitment to justice that is more likely to endure.

III. Expedited Renewables Siting and a Precommitment to Justice

New York adopted the Accelerated Renewable Energy Growth and Community Benefit Act of 2020, also known as "New York's expedited renewables siting law," to expedite the siting of major renewable energy projects, or those with capacity of 25 megawatts or more.[46] The effort to speed the deployment of renewable energy projects is motivated by the recognized urgency of rapid climate mitigation, and exemplifies the types of trade offs that extraordinary mitigation will increasingly reflect.[47] As explained below, the law reflects a clear concern for justice as evidenced by numerous justice provisions, but the nature of those provisions creates some doubt about their durability and strength, i.e., whether they will prove to be empty gestures or meaningful commitments to justice.

To expedite siting and development of major renewable energy projects, New York's expedited renewables siting law creates a streamlined permit process and also establishes a program (the Build-Ready Program) through which a state agency will identify sites, prepare them for renewable energy projects, and auction development rights to private renewable energy developers.[48] With respect to permit application and review, the statute mandates a strict timeline for application review, exempts major renewable energy projects from myriad state laws (including environmental review under New York's environmental review statute), preempts local authority and zoning if the implementing agency (the Office of Renewable Energy Siting (ORES)) determines that it is unduly burdensome "in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility,"[49] and limits judicial review of ORES decisions.[50]

The law directs ORES to promulgate regulations setting installation standards and conditions for similar installations. With respect to government site identification and preparation, the statute authorizes the New York State

44. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. Rev. 401, 408-09, 450 (2010) (citations omitted).
45. Lisa Grow Sun, *Disaster Mythology and the Law*, 96 Cornell L. Rev. 1131, 1148 (2011).
46. L. 2020, c. 58, pt. JJJ, §1, codified as N.Y. Pub. Auth. §1900. (Apr. 3, 2020).
47. *See generally* J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?,* 44 Vt. L. Rev. 693, 718 (2020) (identifying the "trade offs that will be necessary" in the energy transition and admonishing that we "must acknowledge that these trade offs exist and integrate solutions at the front end of the mobilization. Waiting for them to become salient and deciding what to do about them then is simply poor governance."); Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 Harv. Env't L. Rev. 307, 359 (2019) (explaining how expedited siting laws for renewables reduce traditional process methods of protecting EJ).
48. The Build-Ready Program is slated to sunset (expire and be deemed repealed) on December 31, 2030.
49. Section 94-c, Subsection (5)(e)):
    > [T]he office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.
50. N.Y. Exec. Law §94-c (McKinney 2021):
    > Notwithstanding any other provision of law, including without limitation article eight of the environmental conservation law and article seven of the public service law, no other state agency, department or authority, or any municipality or political subdivision or any agency thereof may, except as expressly authorized under this section or the rules and regulations promulgated under this section, require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility with respect to which an application for a siting permit has been filed. . . .

energy research and development authority (NYSERDA) to prepare "build-ready sites," or sites teed up for quick construction of a renewable energy facility because all permits, property interests, agreements, and/or other authorizations necessary have already been obtained.

A. Build-Ready Sites

Large wind and solar installations typically need significant acreage, which would tend to direct them away from some EJ communities in urban areas. Nonetheless, the statute provides that priority shall be given to "previously developed sites, existing or abandoned commercial sites, including without limitation brownfields, landfills, former commercial or industrial sites, dormant electric generating sites, or otherwise underutilized sites," which could encourage the creation of build-ready sites at locations in EJ communities.[51] The long history of siting locally undesirable land uses disproportionately in EJ communities suggests the need for caution. The statute and implementing regulations evidence sensitivity to EJ concerns. The justice-oriented measures are not, however, sufficiently enduring, automatic, or early to constitute a precommitment to justice.

In selecting build-ready sites, the statute provides that one consideration "may include" the "potential impacts of development on environmental justice"[52] and the statement of legislative intent identifies "protect[ing] environmental justice areas from adverse environmental impacts" as a goal of the relevant programs.[53] The statute directs NYSERDA to develop procedures and protocols for the establishment and transfer of build-ready sites which must include "a preliminary screening process to determine, in consultation with the department of environmental conservation, whether the potential build-ready site is located in or near an environmental justice area and whether an environmental justice area would be adversely affected by development of a build-ready site."[54] The statute further directs NYSERDA to "assess the need for and availability of workforce training in the local area of build-ready sites to support green jobs development with special attention to environmental justice communities," but programs and financial support for the local workforce and under-employed populations are left "subject to available funding."[55]

These justice provisions, while laudable in spirit and intent, recognize justice, but it is not clear that they create an enduring commitment to protect it. The provisions are relatively sticky, in the sense that they are contained directly in the statutory text. But they leave significant discretion to the agency in implementation; that is, they are not automatic.

It is perhaps little solace that NYSERDA will identify adverse effects on EJ communities when selecting build-ready sites, since it is only invited (not mandated) to weigh those effects. Fast-forward and imagine an agency pressed to meet increasingly steep deliverables on renewables construction to satisfy ever more urgent mitigation efforts and it is not hard to envision justice falling by the wayside. And the exhortation to give "special attention to environmental justice communities" in providing workforce training is somewhat hollow if contingent upon the availability of funding which, for the reasons discussed above, we can expect to be in increasingly short supply over time.[56]

B. Permit Application and Review

The justice protections are also limited for permitting, which would include sites selected and leased by project developers from willing landowners outside of the build-ready program. The expedited permit rubric set forth in the statute does not mandate EJ constraints, representing a significant change from the preexisting siting regime. Under the siting regime previously applicable to major renewable energy projects, and still applicable to fossil fuel power plants, the underlying statute explicitly required EJ review and cumulative impact analysis for air quality.[57] New York's expedited renewables siting law doesn't have a similar requirement.

Moreover, New York has since significantly strengthened its EJ requirements, both substantively and procedurally,[58] and now prohibits issuance of a permit for a new project if "the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community."[59] But, as noted above, New York's expedited renewables siting law exempts major renewable energy projects from these requirements.[60] This further enlarges the gulf between the limited EJ review required for large renewable projects and that required for other projects subject to SEQRA.

ORES promulgated a *regulation* requiring that an appendix analyzing EJ be included in every permit application.[61] But there isn't anything in the statute compelling EJ review. The code provision setting forth the major renewable energy development program, which instantiates the expedited review process for major renewable energy projects,

51. *See generally* Uma Outka, *Renewable Energy Siting for the Critical Decade*, 69 U. Kan. L. Rev. 857, 866-67 (2021)):
> This kind of development can revitalize areas with long dormant sites, including those with a history of contamination. . . . At the same time, it can have the effect of bringing facilities closer to more populated areas, raising equity considerations in some instances and increasing the likelihood of local opposition, depending on the size and scale of the project proposed.

52. N.Y. Pub. Auth. Law §1902.
53. *Id.* §1900.
54. *Id.* §1902.
55. *Id.*
56. Contrast this with the statute's creation of a dedicated endangered and threatened species mitigation bank fund to be filled with proceeds from "revenues received pursuant to the provisions of section 11-0535-c of the environmental conservation law." N.Y. State Fin. Law §99-hh (McKinney 2021).
57. N.Y. Pub. Serv. Law §164 (McKinney 2021).
58. For an overview of these changes, see Michael B. Gerrard & Edward McTiernan, *New York Adopts Nation's Strongest Environmental Justice Law*, N.Y.L.J. (May 10, 2023), https://scholarship.law.columbia.edu/faculty_scholarship/3936 (last visited May 19, 2023).
59. Environmental Conservation Law (ECL) §70-0118.
60. N.Y. Exec. Law §94-c(6) (McKinney 2021).
61. N.Y. Comp. Codes R. & Regs. tit. 19, §900-2.20.

does not explicitly reference EJ. The statutory text directs ORES to adopt "a set of uniform standards and conditions for the siting, design, construction and operation of each type of major renewable energy facility" and instructs that these standards and conditions "be designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts related to the siting, design, construction and operation of a major renewable energy facility."[62]

The law references a public comment period,[63] and states that judicial review shall be permitted for, among other things, determining whether the siting decision was "[m]ade pursuant to a process that afforded meaningful involvement of citizens affected by the facility regardless of age, race, color, national origin and income."[64] The statute also requires that a "host community benefit" be provided to the host community, but leaves it to the public service commission to establish a procedure that will determine what the host community benefit will be in any particular instance.[65] Protections for EJ communities are therefore anchored in the ORES regulation and specifically the requirement that applicants include an EJ appendix with their application for a permit.

Review of the required EJ appendix prepared and submitted by applicants suffers from a lack of automaticity. Applicants must file an exhibit that identifies and evaluates "significant and adverse disproportionate environmental impacts of the facility on an Environmental Justice (EJ) area"; identifies "specific measures the applicant proposes to take" to avoid, minimize, and offset such impacts "to the maximum extent practicable"; and includes "[a] qualitative and, where possible, quantitative analysis demonstrating that the scope of avoidance, mitigation and offset measures is appropriate given the scope of significant and adverse disproportionate environmental impacts of the facility resulting from its construction and operation."[66] Since there is no justice-specific charge to ORES in the statute, ORES retains wide discretion to decide whether the avoidance, mitigation, and offset measures are "appropriate" and whether and how to weigh impacts on EJ communities in application determinations.

Despite the lack of compulsory statutory protection, there are good reasons to expect that at least in the near-term, NYSERDA and ORES will be attentive to justice considerations. There is a strong culture of concern for EJ in New York, which is reflected in and buttressed by myriad laws and policies. New York adopted the strongest EJ law in the country in 2023 (although major renewable energy projects are exempted from its requirements),[67] New York law calls for the establishment of a permanent EJ advisory group,[68] state agencies in New York have long been required by law to develop and be "guided" by an EJ policy,[69] and the NYSDEC's environmental permit review process and application of the State Environmental Quality Review Act must consider EJ under Commissioner Policy 29 adopted in 2003.[70] A Climate Justice Working Group is advising on implementation of the Climate Leadership and Community Protection Act, New York's core climate mitigation law, which, as explained above, contains important precommitments to justice.

Yet, in the context of siting major renewable energy facilities, the legal anchor for EJ slipped from a statutory mandate to ORES' regulatory discretion. This may be indicative of the tendency, predicted above, that EJ values may cede as concern over global warming grows. Indeed, the slippage occurred—that is, New York's expedited renewables siting law was enacted—at a time when the New York Legislature and the governor were extremely concerned that the existing legal infrastructure for siting renewable energy projects was overly solicitous of local concerns, that valuable time in the renewables build-out had been lost, and that the process was in urgent need of "streamlining."[71] Here, the trade off is reduced community process and, since the adoption of New York's 2023 EJ law, reduced protection from disproportionate impacts in disadvantaged communities in favor of speed of renewables build-out.

This weakening of justice protections in the context of renewable energy siting in New York may not be unduly troubling even to those deeply concerned about preventing environmental injustice for a variety of reasons. There is a widespread sense that the need for justice protections is low in this context because renewables projects, for reasons of geography, are unlikely to gravitate toward traditional EJ communities and, if they do, to have few locally undesirable impacts. There is also confidence in New York's strong culture of concern for EJ and a sense that the political landscape is unlikely to change dramatically. And fast renewables deployment may prove beneficial to EJ communities by causing earlier retirement of fossil fuel-fired plants and limiting the harms of climate change, to which such communities are especially vulnerable.

You do not have to disagree with these intuitions (indeed, I share the sense that expedited renewables siting in New York is ultimately likely to be (overall) beneficial for traditional EJ communities!) to be concerned about how the slippage of justice protections occurred. Instead of setting out the above-described considerations explicitly, thereby allowing the under-

62. N.Y. Exec. Law §94-c (McKinney 2021).
63. *E.g.*, *id.*, §§5(c) and (d).
64. *Id.* §5(g)(2)(F).
65. Accelerated Renewable Energy Growth and Community Benefit Act (AREGCBA) §20(c)(2)) provides:
> Such [Public Service Commission] proceeding shall determine the amount of such discount, credit, compensatory or environmental benefit based on all factors deemed appropriate by the commission, including the expected average electrical output of the facility, the average number of customers within the renewable host community, and the expected aggregate annual electric consumption within such renewable host community, *the potential impact on disadvantaged communities*, and the role of utilities, if any, in implementing any aspect of such program. (emphasis added).

66. N.Y. Comp. Codes R. & Regs. tit. 19, §900-2.20.
67. Cumulative Impacts Bill, ch. 49, 2023 N.Y. Laws; N.Y. Senate Bill No. 8830, §9, 246th Sess. (2023) (enacted); Env't Conserv. §§8-0105, 8-0109, 8-0113, 70-0107, 70-0118.
68. N.Y. Envtl. Conserv. Law §48-0105.
69. *Id.* §48-0109.
70. NSYDEC, Commissioner Policy 29 Environmental Justice and Permitting (Mar. 19, 2003), https://www.dec.ny.gov/regulations/36951.html (last visited May 18, 2023).
71. *See* Frederic M. Mauhs, *Preempting Local Zoning Codes Fuels Opposition to Renewable Energy in New York*, 94 NYSBAJ 44, 45 (Mar./Apr. 2022) (describing how New York's expedited renewables siting law was born out of Albany's frustration with local opposition to renewable energy projects, stymying their buildout).

lying intuitions to be challenged and tested, the adoption and structure of the expedited siting law obscured the loss of justice protections, effectively employing gestures to justice to gloss over the loss of more meaningful protections. This creates a few potential harms, including the possibility that the same justice trade off approach will be uncritically imported into other contexts thereby allowing for the expedited siting (without strong justice protections) of other more worrisome infrastructure; that comfort with this type of approach will encourage misplaced reliance on "soft" justice protections likely to erode over time; and that the failure to acknowledge the loss of justice protections forestalled creative thinking about ways to avoid the need for trade off (in this case, preserve strong justice protections without slowing renewables deployment).

There is a risk that New York might adopt the same exemption approach to the siting of other climate infrastructure without fully recognizing the justice implications of doing so. Even if there is no real on-the-ground harm from the loss of justice protections in the context of renewable energy siting, we should be very careful not to copy and paste this exemption-style approach to other contexts, like the siting of transmission lines, that have far greater local impacts.

Additionally, we should be wary of relying on "soft" protections, grounded in culture and prevailing political commitments, particularly over longer time periods. Even though New York's culture of respecting justice is strong, there are countervailing pressures on agencies facing monumental mitigation tasks on strict deadlines. It is imperative to consider the implementation of mitigation laws in the years and decades to come, as the urgency of the transition to renewables heightens, demands on government multiply, budgets shrink, and on-the-ground conditions deteriorate.

Finally, obscuring the loss of justice protections with gestures toward justice prevents creative thinking about ways to strengthen justice protections without unduly slowing renewable project development. For example, with respect to New York's expedited renewables siting law, the requirement for applicants to describe EJ impacts could, without jeopardizing time and creating undue delay, be enshrined in the statute instead of resting on a requirement set forth in regulation. The statute could also identify a ceiling (indexed to the proportion of build-ready sites or permits authorized in EJ areas), the exceedance of which would automatically trigger review by the Climate Justice Working Group.

After all, if you are *really* confident that these facilities won't be disproportionately sited in EJ communities, this shouldn't slow anything down, right? And there is no drag on renewables deployment that would be created by providing for dedicated funding commitments—the promise of job training could be coupled with identification of a dedicated funding source. We should take advantage of the existence of political will to advance EJ principles in the relative "cool" of now to lock in meaningful precommitments to justice instead of settling for gestures toward justice that may not endure.

IV. Conclusion

Significant lawmaking is underway to build climate change policy, particularly at the state level. Advancing climate justice is often understood as a key goal of these efforts. Mounting climate exigency will, however, make it progressively harder to attend to justice. This suggests the need to pay special attention (now) to designing measures to advance climate justice that will be more likely to endure in the face of increasing urgency, shifting priorities, resource scarcity, and societal strain. Otherwise, we risk adopting climate policy with gestures toward justice that make us feel better today but do little to protect justice tomorrow.

Specific recommendations from applying a precommitment lens include embedding automatic guardrails into statutory text (like the CLCPA's establishment of mandatory statutory minima in terms of the share of benefits to be provided to disadvantaged communities); embracing approaches that provide immediate funding to EJ communities; avoiding balancing tests; and locking in reliable funding streams for justice measures. The precommitment lens would also encourage continued efforts to strengthen justice policies as they evolve over time. Even without a clear statutory command, a well-reasoned rulemaking can produce regulations that endure. As Villa describes, over time, even the most fragile legal foothold (an executive order) can grow and evolve into extensive and more meaningful laws, policies, and practices.[72]

72. *See* Villa, *No "Box to Be Checked," supra* note 11 (describing the legal and practical evolution of environmental justice).