

# BLUE SKY THINKING IN A RED SKY WORLD

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## SUMMARY

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In 2004, visionary environmental leader Gus Speth’s book *Red Sky at Morning* warned that “[a] global crisis has unfolded quickly . . . but so far we seem unable to step from the path to disaster.” More than 20 years later, we have made great gains, but the fundamental transition Speth envisioned did not come to pass, and global environmental deterioration continues to intensify at an alarming pace. Approaching Speth’s “red sky world” with “blue sky thinking,” members of the 2025 Environmental Law Collaborative explored new strategies for a more sustainable future. This latest in a biannual series of essays covers a wide range of topics, including the MAHA (Make America Healthy Again) movement, monopoly control, the power of local government, reviving international law, encouraging belonging, technology, and more.

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### I. Resist, Restore, Reimagine: Essays From the Environmental Law Collaborative

The Environmental Law Collaborative (ELC) comprises a rotating group of law professors who assemble every other year to think, talk, and write about an important and intriguing theme in environmental law. The goals of this meeting are both scholarly and practical, as ELC seeks to bring together scholars with disparate areas of experience and expertise to collectively engage the complex and potentially existential environmental challenges that define our time, with the ultimate goal of contributing to positive change in our shared world.

In July 2025, participants gathered to engage in what we initially called “Blue Sky Thinking in a Red Sky World.” The theme originated from Gus Speth’s searing 2004 book, *Red Sky at Morning: America and the Crisis of the Global Environment*, the prologue for which warns: “A global crisis has unfolded quickly, and, as in classic Greek tragedy, we have been told what the future may hold, but so far we

seem unable to step from the path to disaster that has been mapped out for us.”<sup>1</sup>

Our hope was that the ELC’s participants would (unlike so many tragic Greek actors) be willing to acknowledge the realities of the ongoing environmental crises (and our own roles in it), and then to think creatively, strategically, and even optimistically about how we might chart a different course and defy the fates. Although the world looks especially bleak today, this creative, strategic, and optimistic vision has motivated the ELC for nearly 15 years.

We began planning the event well before the November 2024 election—when it was easier for most of us to imagine a future of blue skies and environmental progress—but we wanted to keep the focus as much as possible on pathways toward progress. We divided the discussion into six sessions. We hoped that the first, our “Red Sky Rant”—in which participants were invited to discuss their greatest worries about the current state of politics and the planet—would act as a sort of catharsis.

The next four sessions explored different questions about and strategies toward a more sustainable future. Should we double down on existing laws and practices, or chart wholly new directions? Do sub-federal and international laws provide solutions that U.S. federal law no lon-

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1. JAMES G. SPETH, *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT* 1 (2004) [hereinafter *RED SKY AT MORNING*].

ger does? Is the “abundance movement” the solution we’ve been waiting for, or should societies embrace degrowth? And, above all, how can we regain some of the momentum toward justice and democracy during this fraught time of authoritarianism, violent rhetoric and violent deeds, and marginalization of many members of society?

The discussions were enlightening, sobering, energizing, inspiring, and sometimes very funny. The event closed with the “Blue Sky Brainstorm,” where participants reflected on the ideas that resonated most with them. Many of the essays in this series touch on the range of subjects we covered, including the MAHA (Make America Healthy Again) movement, monopoly control, the power of local government, reviving international law, encouraging belonging, and reconceiving our roles as educators and communicators.

At the end of our gathering, we discussed whether the “Red Sky/Blue Sky” theme accurately described our work. While some believed it did, others were unsure about the theme’s meaning. Was it a reference to wildfires, the burning planet, and environmental degradation? (To a large degree, yes, yes, and yes.) Did it refer more figuratively to the turmoil, violence, and disruption communities throughout the globe are experiencing? (Again, yes.) Or was it a reference to U.S. political divisions and the current red/blue divide? (Actually, no.)

Our overarching goal was to find hope and pathways forward amidst this moment of deep worry and despair. For some of us, that means resisting the actions, the actors, and the systems that have left so many of us feeling hopeless as we watch our world in turmoil, our neighbors suffer, and our planet deteriorating. For some, hope comes from engaging in acts of restoration—rebuilding our communities, our societies, our institutions, and even the foundational constitutional principles we want to believe serve as constants in government decisionmaking. For others, finding hope and ways forward means not just resisting and restoring (although both are essential), but also reimagining what a just and healthy society might look like and contemplating how this moment of crisis might actually give us the impetus to think more boldly and creatively about not just how to sustain, but how to flourish as a society.

That does not mean these essays are necessarily all optimistic, however. If we have learned anything from Greek tragedies, the first lesson is to be honest about the risks we face, whether they arise within populism, politics, economics, or science. The second is to recognize that the solutions are rarely simple. Only by directly engaging the complex contours of our reality can we move forward—through resistance, restoration, and reimagining—with our individual and collective efforts to turn the dauntingly red skies of today’s burning world into the hopeful blue skies of the future.

## II. Blue Sky Thinking in a Red Sky World: The Story of Environmental Law

*This section was authored by Cinnamon Carlarne Hirokawa, President and Dean, Albany Law School.*

*Red Sky at Morning* tells a story, and we are its authors. The plot is driven by human propagation and poverty and even more by a vast and growing world economy. There is a beleaguered heroine, Mother Earth. The story’s ending has not yet been written. There are two possible outcomes, one tragic and one not. A global crisis has unfolded quickly, and, as in classic Greek tragedy, we have been told what the future may hold, but so far we seem unable to step from the path to disaster that has been mapped out for us. The last act is about to begin.<sup>2</sup>

The last act has now begun. We stand at the edge of the world (now flat,<sup>3</sup> according to many) staring out across a seemingly endless red sky at morning. A sky that sailors say is a warning of ominous weather.<sup>4</sup> A warning of a sky filled with particulate doom. A warning that sailing or, in our case, living and breathing, is not safe.

More than two decades ago, when visionary environmental leader Gus Speth offered his prophetic warning of the impending global crisis—of the red sky at morning—we had extensive evidence of the intersecting impacts of global environmental deterioration and the primary anthropogenic drivers of this deterioration. At that moment, Speth and others offered a reimagining of global environmental governance—a blue sky vision of how we could lead ourselves off the disastrous path by embracing a broader approach to environmental governance that engaged questions of intersectional social, political, and economic well-being, that widened the purview of players to imagine a more inclusive group of environmental protagonists (e.g., civil society and the private sector), and that advanced a new vision for how we see ourselves in relation to our beleaguered planet. The vision was inchoate but possible, premised on learning from the mistakes of the past and embracing a transformative transition in culture and consciousness.<sup>5</sup>

Over the decades that followed, we made great gains. The climate justice movement blossomed. Links between climate change and human rights were identified.<sup>6</sup> Courts

2. *Id.*

3. Rob Picheta, *The Flat-Earth Conspiracy Is Spreading Around the Globe. Does It Hide a Darker Core?*, CNN (Nov. 18, 2019), <https://www.cnn.com/2019/11/16/us/flat-earth-conference-conspiracy-theories-scli-intl>.

4. Library of Congress, *Question: Is the Old Adage “Red Sky at Night, Sailor’s Delight. Red Sky in Morning, Sailor’s Warning” True, or Is It Just an Old Wives’ Tale?*, <https://www.loc.gov/everyday-mysteries/meteorology-climatology/item/is-the-old-adage-red-sky-at-night-sailors-delight-red-sky-in-morning-sailors-warning-true-or-is-it-just-an-old-wives-tale/>.

5. *See generally* RED SKY AT MORNING, *supra* note 1.

6. *See, e.g.*, Human Rights Council Res. 10/4, Human Rights and Climate Change (Mar. 25, 2009), [https://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf). *See also* MARGARETHA WEWERINKESINGH, STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW (2019).

all over the world began to recognize legal rights<sup>7</sup> and obligations<sup>8</sup> with respect to climate change, rights of nature,<sup>9</sup> and more. Despite notable points of progress, however, the fundamental transition that Speth envisioned did not come to pass, and global environmental deterioration continues to intensify at an alarming pace.

Biodiversity loss is accelerating at unprecedented rates.<sup>10</sup> Patterns of deforestation<sup>11</sup> and pollution burdens<sup>12</sup> (air, water, plastics) persist. And looming over us all is the harsh reality of unabated anthropogenic climate change<sup>13</sup> and the associated slow- and sudden-onset disasters<sup>14</sup> and extreme events<sup>15</sup> that, by now, are inevitable. One by one, we are surpassing our planetary boundaries<sup>16</sup> and narrowing the spaces deemed safe for human existence.

Which is all to say that we are now in the midst of the Greek tragedy of which Speth warned. We live today in full vision of the political, economic, and environmental crises that were mapped out for us decades ago. Only now, the contours of the tragedy are even more extreme than Speth could have imagined in 2004. Few could have foreseen the specter of the current

political administration's rejection<sup>17</sup> of science,<sup>18</sup> rollback<sup>19</sup> of environmental governance, and denunciation of tolerance, transparency, and participation.

These are the contours of our contemporary crisis. A crisis where the extreme challenges of global environmental deterioration meet the calamitous social, political, and economic challenges of our time to create an absurdly existential tragedy of our own making. As we stand staring into the void of what could be our last act, hope seems distant and joy even more so.

But when the 2025 ELC came together,<sup>20</sup> there was little doubt that despite great fears, frustrations, and uncertainty, there was a unifying commitment to resistance and reimagining. Embracing a plot of resistance and reimagining means working together to resist the erosion of our environment and our democracy. It also means coupling these efforts with a commitment to reimagining what it would mean to create a world where Mother Earth is not beleaguered and where all her inhabitants are able not merely to survive, but to flourish.<sup>21</sup>

These commitments echo the story of environmental law—a story grounded in optimism amidst adversity and heralded by protagonists of resistance and positive change. A story where courageous scientists such as Rachel Carson melded science with storytelling<sup>22</sup> to motivate change against powerful industrial opposition<sup>23</sup>; where bold and persistent leaders such as Wangari Maathai<sup>24</sup> overcame great odds to revolutionize action at the intersection of economic progress, social change and environmental protection<sup>25</sup>; where environmental law pioneers such as Joe Sax,<sup>26</sup>

7. See, e.g., Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot* (June 2024), <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf>.
8. See, e.g., Maria A. Tigre & Margaret Barry, *Sabin Center Report Highlights Key Climate Cases and Litigation Themes in 2024* (Jan. 2025), <https://blogs.law.columbia.edu/climatechange/2025/01/21/sabin-center-report-highlights-key-climate-cases-and-litigation-themes-in-2024/>.
9. See, e.g., Center for Democratic and Environmental Rights, *Rights of Nature Law Library*, <https://www.centerforenvironmentalrights.org/rights-of-nature-law-library>.
10. See, e.g., World Economic Forum, *6 Charts That Show the State of Biodiversity and Nature Loss—and How We Can Go “Nature Positive”* (Oct. 17, 2022), <https://www.weforum.org/stories/2022/10/nature-loss-biodiversity-wwf/>; World Health Organization, *Fact Sheets: Biodiversity* (Feb. 18, 2025), <https://www.who.int/news-room/fact-sheets/detail/biodiversity>.
11. See, e.g., Global Forest Watch, *Dashboard: Global* (last visited Mar. 20, 2026).
12. See, e.g., ERIN McDUFFIE ET AL., GLOBAL BURDEN OF DISEASE FROM MAJOR AIR POLLUTION SOURCES (GBD MAPS): A GLOBAL APPROACH, HEALTH EFFECTS INST. (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9501767/>.
13. See, e.g., Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers, in CLIMATE CHANGE 2023: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 4* (Core Writing Team, Hoesung Lee, and José Romero eds. 2023), [https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) (“Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020.”).
14. See, e.g., Daniel A. Farber, *The Intersection of International Disaster Law and Climate Change Law*, 2 Y.B. INT’L DISASTER L. ONLINE 87 (2021), [https://brill.com/view/journals/yido/2/1/article-p87\\_5.xml](https://brill.com/view/journals/yido/2/1/article-p87_5.xml).
15. See, e.g., National Aeronautics and Space Administration, *Extreme Weather and Climate Change*, <https://science.nasa.gov/climate-change/extreme-weather/> (last visited Mar. 20, 2026).
16. Stockholm Resilience Centre, *Planetary Boundaries*, <https://www.stockholmresilience.org/research/planetary-boundaries.html> (last visited Mar. 20, 2026).

17. See, e.g., Bob Sussman, *Defending the Indefensible: Climate Science and the Trump Era’s Repudiation of the Endangerment Finding*, VIBRANT ENV’T BLOG (Aug. 7, 2025), <https://www.eli.org/vibrant-environment-blog/defending-indefensible-climate-science-and-trump-eras-repudiation>.
18. Steven Cohen, *The Impact of the Trump Administration’s Destruction of Earth Observation Science*, COLUM. SCH. PRO. STUD. (June 30, 2025), <https://sps.columbia.edu/news/impact-trump-administrations-destruction-earth-observation-science>.
19. Press Release, U.S. Environmental Protection Agency (EPA), EPA Launches Biggest Deregulatory Action in U.S. History (Mar. 12, 2025), <https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history>.
20. See Pace University, *“Blue Sky Thinking in a Red Sky World”: Environmental Law Scholars Chart a Path Forward* (July 29, 2025), <https://www.pace.edu/news/blue-sky-thinking-red-sky-world-environmental-law-scholars-chart-path-forward>.
21. See, e.g., Xavier Symons & Tyler VanderWeele, *Aristotelian Flourishing and Contemporary Philosophical Theories of Wellbeing*, 25 J. HAPPINESS STUD. no. 26 (2024), <https://link.springer.com/article/10.1007/s10902-024-00723-0> (providing a discussion of the Aristotelian idea of flourishing). See also WILLIAM M. THROOP, *FLOURISHING IN THE AGE OF CLIMATE CHANGE* (Cornell Univ. Press 2024).
22. See, e.g., Natural Resources Defense Council, *Explainer: The Story of Silent Spring* (Aug. 13, 2015), <https://www.nrdc.org/stories/story-silent-spring>.
23. See, e.g., Mark Stoll, *Industrial and Agricultural Interests Fight Back, in RACHEL CARSON’S SILENT SPRING, A BOOK THAT CHANGED THE WORLD* (Environment and Society Portal 2020), <https://www.environmentandsociety.org/exhibitions/rachel-carsons-silent-spring/industrial-and-agricultural-interests-fight-back>.
24. See, e.g., The Goldman Environmental Prize, *The Legacy of Wangari Maathai* (Dec. 1, 2021), <https://www.goldmanprize.org/blog/the-legacy-of-wangari-maathai/>.
25. See, e.g., Green Belt Movement, *Home Page*, <https://www.greenbeltmovement.org> (last visited Mar. 20, 2026).
26. See, e.g., Fred Krupp, *The Legacy of Professor Joe Sax*, 4 MICH. J. ENV’T & ADMIN. L. 179 (2014), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1035&context=mjeal>.

David Sive,<sup>27</sup> Gus Speth,<sup>28</sup> and Robert Bullard<sup>29</sup> drove the creation of an extensive system of environmental law and centered thinking around essential questions of environmental justice; where, now, a new generation of courageous youth and climate justice leaders are advancing transformative change against all the odds.<sup>30</sup> The story of environmental law has always been one of courage, innovation, and persistence against seemingly intractable structures of power and opposition.

We are at a point in the story of environmental law where the plot may have thickened, but as ever, the end is not inevitable. In this moment, environmental law protagonists must embrace the imperative of blue sky thinking<sup>31</sup>—that is, thinking that is creative, ambitious,<sup>32</sup> and not bound by external parameters such as those the current administration seeks to impose. It is thinking that reflects the optimism and vision upon which environmental law was founded and emphasizes the continuing imperative of creativity and innovation. It is thinking that embraces the possibility of vision-imbued resistance that simultaneously seeks to curb the erosion of existing systems of environmental governance while also planning for a more positive, equitable, and sustainable future. It is thinking that sees the looming red skies and envisions courage and a positive pathway forward.

As one of our great protagonists of change, Wangari Maathai, stated “[i]t is the people who must save the environment. It is the people who must make their leaders change. And we cannot be intimidated. So, we must stand up for what we believe in.”<sup>33</sup>

### III. A Blue Sky Future Owned by Private Equity?

*This section was authored by Kristen van de Biezenbos, Professor of Law, California Western School of Law, and Melissa Powers, Jeffrey Bain Faculty Scholar & Professor of Law, Lewis & Clark Law School.*

In July 2025, the *New York Times* reported on moves by two major private equity companies, BlackRock and Blackstone, to acquire electric utility companies.<sup>34</sup> BlackRock had proposed purchasing Minnesota Power, which primarily serves business and residential customers in the northern part of the state,<sup>35</sup> while Blackstone had already acquired TXNM Energy, which serves customers in New Mexico and Texas.<sup>36</sup> Both companies appear to be scooping up the utilities in anticipation of a major increase in energy demand driven by data centers, artificial intelligence (AI), and cryptocurrency mining.<sup>37</sup>

While experts have long predicted a stagnation or decrease in future U.S. electricity demand, the explosion of interest in AI and crypto has dramatically revised those estimates.<sup>38</sup> Some models now forecast that these technologies will cause demand to surge where the data centers and crypto facilities are located, and private investment companies want in on what some believe will be a “gold rush” in the electricity sector.<sup>39</sup> This gold rush has threatened the U.S. electricity system’s progress in decarbonizing<sup>40</sup>—progress that had demonstrated to many that blue skies are possible. It also raises profound concerns

27. See, e.g., Sive, Pagett & Reisel P.C., *Dave Sive Environmental Law Pioneer: The Father of Environmental Law*, <https://sprlaw.com/david-sive/> (last visited Mar. 20, 2026).

28. See, e.g., Yale Environment 360, *They Knew: How the U.S. Government Helped Cause the Climate Crisis* (Sept. 15, 2021), <https://e360.yale.edu/features/they-knew-how-the-u-s-government-helped-cause-the-climate-crisis>.

29. See, e.g., Dr. Robert D. Bullard: Father of Environmental Justice, *Home Page*, <https://drobertbullard.com> (last visited Mar. 20, 2026).

30. See generally Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental Law*, 41 STAN. ENV’T L.J. 125 (2022).

31. See, e.g., MIT School of Distance Education, *What Is the Blue Sky Thinking Strategy?* (Aug. 7, 2023), <https://blog.mitsde.com/what-is-the-blue-sky-thinking-strategy/>.

32. See, e.g., Chris Malley & Karen Brandon, *Blue Sky Thinking: Tackling Air Pollution to Increase Ambition for the Climate Change Agenda*, STOCKHOLM ENV’T INST. (Sept. 4, 2020), <https://www.sei.org/perspectives/blue-sky-thinking-tackling-air-pollution-to-increase-climate-ambition/>.

33. See Lindsey J. Schueman, *Climate Hero: Wangari Maathai*, ONE EARTH (Mar. 8, 2023), <https://www.oneearth.org/conservation-hero-wangari-maathai/>.

34. Ivan Penn, *Wall St. Firms Are Buying Utilities to Tap Into the A.I. Boom*, N.Y. TIMES (July 17, 2025), <https://www.nytimes.com/2025/07/17/business/energy-environment/blackrock-minnesota-power.html>. Since then, another private equity firm, Bernhard Capital Partners, has sought to purchase a regulated natural gas utility in New Mexico. See Keriann Conroy, *New Mexico Gas Company Latest Utility Facing Private Equity Takeover*, ENERGY & POL’Y INST. (Nov. 13, 2025), <https://energyandpolicy.org/new-mexico-gas-company-facing-private-equity-acquisition/>.

35. See Penn, *supra* note 34. A Minnesota administrative law judge (ALJ) determined the approval would not be in the public interest and recommended the state deny the request, but the Minnesota Public Utilities Commission overrode the ALJ’s recommendation and authorized BlackRock’s purchase. *Id.*

36. Press Release, Blackstone, TXNM Energy Enters Agreement to be Acquired by Blackstone Infrastructure (May 19, 2025), <https://www.blackstone.com/news/press/txnm-energy-enters-agreement-to-be-acquired-by-blackstone-infrastructure/>.

37. Penn, *supra* note 34; see also Derek Seidman, *Data Centers Devour Electricity. Private Equity Is Buying Utilities to Cash In*, TRUTHOUT (Nov. 11, 2025), <https://truthout.org/articles/data-centers-devour-electricity-private-equity-is-buying-utilities-to-cash-in/>.

38. Mark Schipper & Tyler Hodge, *After More Than a Decade of Little Change, U.S. Electricity Consumption Is Rising Again*, U.S. ENERGY INFO. ADMIN. (May 13, 2025), <https://www.eia.gov/todayinenergy/detail.php?id=65264>.

39. THOMAS SPENCER & SIDDHARTH SINGH, ENERGY AND AI 20, INT’L ENERGY AGENCY (2025), <https://www.iea.org/news/ai-is-set-to-drive-surge-in-electricity-demand-from-data-centres-while-offering-the-potential-to-transform-how-the-energy-sector-works> (“[r]apidly growing investment in data centres is already straining grids in some places and raising concerns about the ability of the electricity system to meet a surge in demand.”).

40. See David Nutt, *“Roadmap” Shows the Environmental Impact of AI Data Center Boom*, CORNELL CHRON. (Nov. 10, 2025), <https://news.cornell.edu/stories/2025/11/roadmap-shows-environmental-impact-ai-data-center-boom>.

about who will profit and who will pay as private asset managers buy up utilities.

To understand these risks, it helps to have a very brief background on utility regulation. Energy utility companies, like other “public utilities” (a term that, confusingly, refers primarily to *privately* owned companies with a duty to provide services in the public interest), are authorized to operate energy monopolies that would otherwise be illegal under U.S. law.<sup>41</sup> In exchange for the government allowing them to maintain their monopolies, energy utility companies are subject to various legal requirements, including a duty to provide nondiscriminatory service to customers within their service territories, regulation of the rates the companies charge, and regulatory oversight of the utilities’ expenditures.<sup>42</sup>

State regulators set the rates by first determining how much a utility needs to earn annually and then dividing that amount by anticipated energy sales to different customer classes, which typically include residential customers, industrial customers, and commercial customers (each of which can be subdivided into more specific groupings).<sup>43</sup> The annual earning requirement is established through a “cost-plus” formula that allows the utilities to earn a rate of return on their capital expenditures (i.e., to profit from building infrastructure) and to recover—but not directly profit from—their operating expenses, including the cost of fuel and customer service.<sup>44</sup> In concept, this ratemaking structure allows utilities to earn enough profit to be able to maintain their financial integrity and attract sufficient capital to build the infrastructure we need while keeping rates affordable for consumers. And, again in theory, regulatory oversight ensures that customers get adequate service and are protected against utility risk-taking.

In practice, the regulatory system has always been vulnerable to regulatory capture and, perhaps more insidiously, a power imbalance that favors electric utility companies.<sup>45</sup> Their rates of return are excessive—and not because the market has over-valued utility companies but because rate regulators set the returns too high, requiring customers to pay excessive rates to the utilities.<sup>46</sup> According to one analysis, energy utilities’ rates of return (and thus returns on equity) are twice their cost of capital, and the average return on equity for the utility sector is 43% higher than the average return of Wall Street investment firms.<sup>47</sup> No wonder Blackstone and BlackRock want in on the utilities’ action!

And when things go wrong—if past investments become unnecessary before they are fully paid off (i.e., they get “stranded”) or fuel prices become higher than expected—customers, rather than utilities or their shareholders, end up paying the price.<sup>48</sup> Worse, when better and cheaper alternatives to the utility’s service become available, customers are legally prohibited from choosing the alternatives.<sup>49</sup> Imagine how much worse that power imbalance will be when asset managers like Blackstone and BlackRock—which are experts at extracting income from infrastructure that we, the public, have paid for—gain ownership over the electricity system and benefit from monopoly power.<sup>50</sup>

It does not take too much imagination to identify the risks. Consider, for example, the current AI, cryptocurrency, and data center boom. Utilities want to build new power plants (and earn elevated rates of return) to serve the growing energy demand, but they want to spread the costs of those plants among all ratepayers—in essence, their customers would subsidize the tech industry’s AI dreams but also be responsible for stranded assets if AI and cryptocurrency operations go under.<sup>51</sup> Some states have refused this gambit,<sup>52</sup> but the Federal Energy Regulatory Commission (FERC) has already denied one utility’s attempt to protect its wholesale customers from the stranded cost risks associated with speculative cryptomining operations.<sup>53</sup> For now, state and federal policies are working in parallel, but one could easily imagine a global asset management firm insisting upon a uniform federal policy that overrides state attempts to prevent this cross-subsidization.

Increased ownership of utilities by Wall Street asset managers could also interfere with states’ climate goals,

41. 16 U.S.C. §824(f); *City of Redding, California v. Federal Energy Regul. Comm’n*, 693 F.3d 828 (9th Cir. 2012).

42. See Alison Gocke, *Public Utility’s Potential*, 133 YALE L.J. 2773, 2778 n.12 (2024) (citing ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 3 (5th ed. 1993)).

43. See JOEL B. EISEN ET AL., *ENERGY, ECONOMICS, AND THE ENVIRONMENT* 456 (Robert C. Clark et al. eds., 4th ed. 2015).

44. See *id.* at 456-57; William C. Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REG. 721, 729-49 (2018).

45. See William Boyd, *Public Utility and the Low-Carbon Future*, 16 UCLA L. REV. 1614, 1651-58 (2014).

46. See Karl D. Werner & Stephen Jarvis, *Rate of Return Regulation Revisited* (Haas Energy Inst. Working Paper Aug. 2023).

47. MARK ELLIS, *RATE OF RETURN EQUALS COST OF CAPITAL: A SIMPLE, FAIR FORMULA TO STOP INVESTOR-OWNED UTILITIES FROM OVERCHARGING*

THE PUBLIC 6 (2025), <https://www.economicliberties.us/wp-content/uploads/2025/01/20250102-aelp-ror-v5.pdf> (“Utilities have been awarded ROEs approximately twice their actual, market-based cost of equity—in other words, twice what is ‘just and reasonable’—for over a decade.”).

48. See Emily Hammond & Jim Rossi, *Stranded Costs and Grid Decarbonization*, 82 BROOK. L. REV. 645, 659-63 (2017) (discussing cost recovery for stranded assets); Anel Kovvali & Joshua Macey, *Hidden Value Transfers in Public Utilities*, 171 U. PA. L. REV. 2129, 2139 (2023) (discussing fuel adjustment clauses).

49. See generally Sharon Jacobs & Dave Owen, *Community Energy Exit*, 73 DUKE L.J. 251 (2023).

50. See Brett Christophers, *Our New Financial Masters*, NEW STATESMAN (Apr. 27, 2023), <https://www.newstatesman.com/ideas/2023/04/our-new-financial-masters>; William Boyd, *Renewable Power: Who Will Own the Clean Energy Future?*, L. & POL. ECON. PROJECT (June 6, 2023), <https://lpeproject.org/blog/renewable-power-who-will-own-the-clean-energy-future/> [hereinafter Boyd, *Renewable Power*].

51. See ELIZA MARTIN & ARI PESKOE, *EXTRACTING PROFITS FROM THE PUBLIC: HOW UTILITY RATEPAYERS ARE PAYING FOR BIG TECH’S POWER 5* (2025), <https://eelp.law.harvard.edu/wp-content/uploads/2025/03/Harvard-ELI-Extracting-Profits-from-the-Public.pdf>.

52. Monica Samayoa, *Oregon Legislature Passes “Power Act,” Targeting Industrial Energy Users Like Data Centers*, OPB (June 5, 2025), <https://www.opb.org/article/2025/06/05/oregon-data-centers-cryptocurrency-business-environment-power-electricity/> (“HB 3546 creates a new classification for data centers, cryptocurrency and other large industrial energy users using more than 20 megawatts, or 20 million watts of power, to pay for their share of electricity use and costs.”).

53. Ethan Howland, *FERC Rejects Basin Electric’s Cryptocurrency Mining Rate Proposal*, UTIL. DIVE (Aug. 21, 2024), <https://www.utilitydive.com/news/ferc-basin-electrics-cryptocurrency-bitcoin-mining-rate-proposal/724811/> (“Specifically, Basin [Electric Power Cooperative] has not provided adequate evidence to support its assertion that all crypto loads pose a greater stranded asset risk than other loads of similar size”).

particularly since the U.S. Congress rescinded most of the Inflation Reduction Act's clean energy subsidies.<sup>54</sup> As William Boyd noted, large multinational companies (the so-called "Clean Energy Supermajors"), large financial institutions, and large asset managers were poised to "extract substantial profits" from these subsidies while figuring out ways to keep our energy prices high.<sup>55</sup> When the subsidies go away, profit opportunities will lie in building massive projects as quickly as possible to serve the tech industry's energy appetite, which means building or restarting fossil fuel plants.<sup>56</sup> Some of these power plants will also supply electricity to wholesale markets. The firms will have every incentive to keep marginal wholesale prices high by ensuring that wholesale energy markets are designed to exclude competing low-cost renewable energy sources.<sup>57</sup> The disturbing retreat from corporate climate commitments,<sup>58</sup> we believe, will only accelerate if Wall Street firms, which are isolated from communities clamoring for decarbonization, become the owners of energy utility companies.

And, finally, there is the risk that increased Wall Street ownership will threaten grid reliability and increase prices due to the change in leadership. Companies focused on arbitrage opportunities over the public interest have engaged in market manipulation and economic withholding, exposing consumers to elevated prices as companies intentionally make their energy supplies scarce.<sup>59</sup> It was only 25 years ago when Enron's economic withholding and other corrupt acts, which a network of other private and public actors enabled,<sup>60</sup> crashed California's economy. While regulations and market rules have aimed to limit the risks of future illegal acts, research indicates the risks are still very present.

But even as the risks of investment firm takeovers of public utilities are rising, the guardrails to prevent abuses of regulated rates and utility monopolies have been dismantled. The first (and strongest) line of defense was

the Public Utilities Holding Companies Act of 1935 (PUHCA).<sup>61</sup> Congress enacted PUHCA after holding company conglomerates monopolized ownership of local electricity utilities and used the corporate structure to extract value for investors while loading the utilities with risk and debt. After one of the largest holding companies—owning electric utilities in 39 states—went bankrupt, leaving thousands without power and wiping out the savings of its investors, Congress recognized the need for much more oversight of utility owners.<sup>62</sup> PUHCA gave the Securities and Exchange Commission the ability to review any purchase of more than 10% of public utility shares, to impose strict limitations on holding company ownership, and even to impose a "death sentence" by breaking up a holding company's ownership of a public utility.<sup>63</sup> PUHCA instituted numerous regulatory reforms, including restrictions on complex businesses and financial arrangements between regulated and non-regulated affiliate companies. But despite its success in preventing holding company manipulation of public utilities, PUHCA was repealed in 2005.<sup>64</sup>

Since the repeal, there has been an increase in holding company acquisition of utilities<sup>65</sup> and an uptick in utility fraud, corruption, and bribery charges.<sup>66</sup> More broadly, evidence suggests that regulators cannot or will not adequately regulate corporate conduct that impermissibly extracts value from and shifts risks onto regulated utilities.<sup>67</sup> Risks to utilities and their customers will only increase when private equity firms take over regulated utilities because private equity is subject to almost no regulatory oversight.<sup>68</sup> It is little wonder that private equity acquisitions have raised red flags.

With respect to the BlackRock deal, ratepayer advocates and environmental groups opposed the acquisition, fearing it would drive up rates and slow progress on decarbonization.<sup>69</sup> It also came to light that many Minnesota

54. See Jack A. Cavanaugh et al., *Assessing the Energy Impacts of the One Big Beautiful Bill Act*, CTR. ON GLOB. ENERGY POL'Y (July 14, 2025).

55. Boyd, *Renewable Power*, *supra* note 50 (citing Brian Eckhouse et al., *The Energy Giants Are Renewable Companies*, BLOOMBERG (Nov. 29, 2020), [bloomberg.com/graphics/2020-renewable-energy-supermajors/?ref=lm3Ka5Fp&srnd=green](https://www.bloomberg.com/graphics/2020-renewable-energy-supermajors/?ref=lm3Ka5Fp&srnd=green)).

56. See Miguel Yañez-Barnuevo, *Data Center Energy Needs Could Upend Power Grids and Threaten the Climate*, ENV'T & ENERGY STUDY INST. (Apr. 15, 2025), <https://www.eesi.org/articles/view/data-center-energy-needs-are-upending-power-grids-and-threatening-the-climate> ("It is safe to assume that the new centers built to meet the additional demand will primarily source their energy from fossil fuels").

57. Ethan Howland, *PJM's Capacity Market Faces Pushback From Market Monitor, Generators*, UTIL. DIVE (Jan. 13, 2025), <https://www.utilitydive.com/news/pjm-capacity-market-off-cap-must-offer-ferc/737144/>.

58. David Gelles, *How Wall Street Turned Its Back on Climate Change*, N.Y. TIMES (Jan. 17, 2026), <https://www.nytimes.com/2026/01/17/climate/how-wall-street-turned-its-back-on-climate-change.html>.

59. See Richard D. Cudahy & William D. Henderson, *From Insult to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35 (2005).

60. Adam Nix et al., *Enron and the California Energy Crisis: The Role of Networks in Enabling Organizational Corruption*, 95 BUS. HIST. REV. 4, 765-802 (Jan. 12, 2022), <https://www.cambridge.org/core/journals/business-history-review/article/enron-and-the-california-energy-crisis-the-role-of-networks-in-enabling-organizational-corruption/457B1E245C6E6DE8903F531DD768D3F4>.

61. Public Utility Holding Company Act, 15 U.S.C. §§79-79z-6.

62. Cudahy & Henderson, *supra* note 59, at 76-77.

63. See generally *id.*

64. Energy Policy Act of 2005, Pub. L. No. 109-58, §§1261-1277, 119 Stat. 594.

65. See SCOTT HEMPLING, REGULATING MERGERS AND ACQUISITIONS OF U.S. ELECTRIC UTILITIES: INDUSTRY CONCENTRATION AND CORPORATE COMPLICATION (2020) [hereinafter HEMPLING, REGULATING MERGERS]; Scott Hempling, *Inconsistent With the Public Interest: FERC's Three Decades of Defiance to Electricity Consolidation*, 39 ENERGY L.J. 233 (2018) [hereinafter Hempling, *Inconsistent*].

66. Mario Alejandro Ariza & Kristi E. Swartz, *Fraud and Corruption on Rise at U.S. Utilities, Threatening Energy Transition*, FLOODLIGHT (Mar. 1, 2024), <https://floodlightnews.org/fraud-and-corruption-on-rise-at-us-utilities-threatening-energy-transition/>.

67. See Kovvali & Macey, *supra* note 48, at 2139.

68. William W. Clayton, *High-End Bargaining Problems*, 75 VAND. L. REV. 703, 705 (2022) (describing contract law as the foundational principle governing business transactions); *id.* at 717-21 (briefly describing the relevant laws and noting that "the securities laws have traditionally been completely hands-off when it comes to private offerings and private companies").

69. See Jana Hollingsworth & Walker Orenstein, *Allete Meets Tough Hometown Crowd Over Pending Sale of Duluth Company*, MINN. STAR TRIB. (Mar 25, 2025), <https://www.startribune.com/allete-meets-tough-hometown-crowd-over-pending-sale-of-duluth-company/601243560>; see also Press Release, Judge Sides With Consumers and the Environment, Slams Proposed BlackRock Buyout of Minnesota Power, Sierra Club North Starr Chapter (July

Power employees and board members who voiced support for the takeover were provided with financial compensation from the utility, likely fueled by the financial incentives offered by BlackRock.<sup>70</sup> Despite the opposition and indications of shady dealing, the Minnesota Public Utility Commission (PUC) approved the acquisition.<sup>71</sup> We believe it erred. When companies seek to acquire utilities to realize financial gains without having to internalize the risks, we should rightly be concerned about the potential harm to ratepayers who have no choice about whether to patronize their electricity provider.

So, what can be done to stop these takeovers? First, it is time for Congress to restore PUHCA in full. Second, states have the authority to deny merger requests that they deem to not be in the public interest. In fact, an administrative law judge recommended the state deny BlackRock's takeover of Minnesota Power because of the risks it presents to ratepayers.<sup>72</sup> Time will tell whether the PUC made the right choice. In the meantime, we hope other regulators will closely scrutinize proposed acquisitions and recognize that the electricity system is both too fragile and too important to be treated like other assets that asset management firms have gobbled up. Finally, to the extent local electric utilities are vulnerable to outside acquisition, that may signal a need for states to step in and support public ownership of their own electric utilities. Allowing local electric utilities to become just another holding in asset managers' massive investment portfolios is a way to lose even more control of an essential service.

More broadly, private equity's entry into the electricity system should lead us to question how we pursue our blue sky future. Private equity firms have become enormously wealthy, often employing a "plunder" business model of buying companies, loading them with debt, stripping them of their value, and then reselling them or liquidating them through bankruptcy.<sup>73</sup> Through their profit-extraction model, private equity firms have destroyed storied businesses; delayed investments in infrastructure; cut services, wages, and employment; reduced tax bases for local communities; and refused to provide health care and other essential services. Utilities and utility regulators may be tempted by the capital that private equity investment

could provide—some of which could presumably facilitate quicker decarbonization. Is this capital worth the risks? Electricity consumers in Minnesota, New Mexico, and Texas may soon find out.

#### IV. Staring Into the Legal Void

*This section was authored by Rebecca Bratspies, Oliver Houck Professor of Environmental Law, Tulane University.*

[D]own the winding cavern we groped our tedious way, till a void boundless as a nether sky appeared beneath us, and we held by the roots of trees, and hung over this immensity; but I said: "If you please, we will commit ourselves to this void, and see whether Providence is here also."<sup>74</sup>

When the Environmental Law Collaborative gathered in New York in July 2025, it was under a very red sky. The Donald Trump Administration was busy dismantling our collective life work. Indeed, just weeks after our meeting, UCLA Law Prof. Alex Camacho called Trump the "worst president for the environment in U.S. history."<sup>75</sup> And that was *before* the Administration, among other things, halted all offshore wind projects,<sup>76</sup> withdrew from the United Nations Framework Convention on Climate Change and the associated Paris Agreement,<sup>77</sup> or announced it would abandon its long-standing practice of calculating the economic benefits related to human health when setting air pollution standards.<sup>78</sup>

There we were, a group of law professors gathered at the Edith Macy Center<sup>79</sup>—a Girl Scout retreat center—staring at the wreckage. We were attempting some blue sky thinking and were trying to recommit to the void that had been environmental policy. We decided to go back to first principles and to rethink law entirely. I was part of the "Rethinking Business" group, which convened in a room named in honor of management consultant Peter Drucker. Since Drucker is widely proclaimed as a "visionary whose ideas reshaped management, business and society,"<sup>80</sup> this seemed either propitious or ironic, depending on one's inclinations. I confess mine tended toward the cynical.

15, 2025), <https://www.sierraclub.org/minnesota/blog/2025/07/judge-sides-consumers-and-environment-slams-proposed-blackrock-buyout>.

70. Karlee Weinmann, "Financial Support" From Minnesota Power May Have Influenced Backers of Utility Acquisition, Judge Says, ENERGY & POL'Y INST. (July 24, 2025), <https://energyandpolicy.org/financial-support-influenced-allete-blackrock-comments/>.

71. Ethan Howland, *Minnesota PUC Approves \$6.2B Allete Sale to Private Equity*, UTILITY DIVE (Oct. 6, 2025), <https://www.utilitydive.com/news/minnesota-puc-allete-private-equity-blackrock-gip/802006/> [hereinafter Howland, *PUC Approval*].

72. Press Release, Judge Sides With Consumers and the Environment, Slams Proposed Blackrock Buyout of Minnesota Power, Sierra Club North Starr Chapter (July 15, 2025), <https://www.sierraclub.org/minnesota/blog/2025/07/judge-sides-consumers-and-environment-slams-proposed-blackrock-buyout>.

73. EILEEN APPELBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 46 (2014); BRENDAN BALLOU, PLUNDER: PRIVATE EQUITY'S PLAN TO PILLAGE AMERICA 20-21 (2023); MARYANN P. FELDMAN & MARTIN F. KENNEY, PRIVATE EQUITY AND THE DEMISE OF THE LOCAL 12-13 (2024).

74. William Blake, *The Marriage of Heaven and Hell* (1790). available at <https://www.arthistoryproject.com/artists/william-blake/the-marriage-of-heaven-and-hell/>.

75. Alejandro E. Camacho, *Donald Trump's Record-Breaking Race to Wreck the Planet*, THE HILL (Aug. 25, 2025), <https://thehill.com/opinion/energy-environment/5469235-trump-administration-environmental-assault/>.

76. Jennifer Hiller, *Trump Administration Halts All Offshore Wind Projects*, WALL ST. J. (Dec. 22, 2025), <https://www.wsj.com/business/energy-oil/rump-offshore-wind-construction-cancel-129ee6ec>.

77. *Full List as Trump Announces Shock Move That Will See US Leave 66 Key International Organizations*, AP (Jan. 8, 2026), <https://www.independent.co.uk/news/world/americas/us-politics/trump-climate-treaty-us-leave-b2896597.html>.

78. Jake Spring & Amudalat Ajasa, *EPA Says It Will No Longer Consider Health Costs in Pollution Regulations*, WASH. POST (Jan. 12, 2026), <https://www.washingtonpost.com/climate-environment/2026/01/12/epa-public-health-pollution-costs/>.

79. Edith Macy Center, <https://www.edithmacy.com/>.

80. *About Peter Drucker: The Father of Modern Management*, <https://drucker.institute/about-peter-drucker/>.

Was it even possible to rethink business in a room named for a management “guru” whose claim to fame was as the father of modern business management?<sup>81</sup>

And yet, it turns out that there was much more to Drucker than efficiency. Drawing on his early exposure to Nazi fascism,<sup>82</sup> Drucker wrote extensively about the rise of Nazism as the product of converging social, economic, and political crises that exposed Weimar institutions as a façade.<sup>83</sup> When “the people” discovered that the official façade hid only a vacuum, the resulting fear and trauma led to the rise of what Drucker called “the abracadabra of fascism”<sup>84</sup>—that substituted creed and order for freedom and equality.<sup>85</sup> As Drucker described it, fascism was an end-run around the hard work of building a new, better society. Sound familiar?

For Drucker, the antidote to this kind of social breakdown was recognizing that institutions, including corporations, wielded social power and therefore had social responsibilities that extended beyond making a profit for shareholders.<sup>86</sup> Indeed, his commitment to a kind of industrial democracy seems almost radically progressive by today’s standards.<sup>87</sup> Contrast Drucker’s condemnation of corporate greed, and his assertion that a CEO’s salary should not exceed more than 20 times what their workers make,<sup>88</sup> with today’s self-important billionaires busily dismantling higher education, functioning government, and most social institutions in search of tax cuts<sup>89</sup> (and because they believe it when their mommies declare them to be geniuses).<sup>90</sup>

Drucker despised shareholder primacy and its attendant focus on profit maximization. He viewed that kind of extractive capitalism as both antisocial and immoral.<sup>91</sup> When asked if big business was a role model for good government, his response was “no, of course not.”<sup>92</sup> Drucker instead believed that the end goal of management, of business, should be “to satisfy social needs and to restore

a meaningful sense of citizenship and community.”<sup>93</sup> To that end, he emphasized the need for a vibrant civil society<sup>94</sup> and rejected as “pure delusion” the proposition that markets alone can create a functioning society—or even a functioning economy.<sup>95</sup>

Drucker may have made his reputation and fortune in business management, but he considered himself a social ecologist<sup>96</sup>—someone who “envisions a moral economy that moves beyond scarcity and hierarchy, toward a world that reharmonizes human communities with the natural world, while celebrating diversity, creativity and freedom.”<sup>97</sup> He cautioned against the popular version of the market’s invisible hand, which assumes that “selfishness unwittingly and automatically turns into the common good.”<sup>98</sup> That sounded a lot like what we were struggling with in our breakout group.

Unfortunately, even as we embraced Drucker’s social ecology, we seemed unable to free ourselves from his limitations. Drucker’s free-market corporatism and his belief in the dominance of the consumer constricted us—even as his clear-sighted anti-fascism inspired us. We struggled to shed the neoliberal straitjacket that allowed corporate persons to become unaccountable transnational actors spouting grandiose but unenforceable environmental, social, and governance measures. Perhaps it was no surprise that our Drucker Auditorium brainstorming session produced ideas that Prof. Melissa Powers charitably described as “modest.”

To get beyond Drucker’s vision of a kinder and gentler capitalism, we need another inspiration. To find that, it might be worth remembering that our meeting took place at the Edith Carpenter Macy Center. Like Drucker, Macy is not an obvious candidate for social justice inspiration. A staggeringly wealthy woman with a fortune derived from fossil fuel, Macy and her husband V. Everit lived lives of immense privilege, vacationing on Jekyll’s Island and hobnobbing with the rich and mighty.<sup>99</sup>

And yet, as active progressives, Macy and her husband also worked closely with the Henry Street Settlement<sup>100</sup> and were deeply involved in local poverty alleviation efforts.<sup>101</sup> Both served on multiple community organization boards,

81. *Id.*

82. *Controlling the Universities*, FACING HISTORY & OURSELVES (Aug. 2, 2016), <https://www.facinghistory.org/resource-library/controlling-universities>.

83. PETER DRUCKER, *THE END OF ECONOMIC MAN* 24 (1939).

84. Jack Beatty, *The Education of Peter Drucker*, THE ATLANTIC (Dec. 2005), <https://www.theatlantic.com/magazine/archive/2005/12/the-education-of-peter-drucker/304484/>.

85. *Id.*

86. Peter F. Drucker, *The New Society of Organizations*, 70 HARV. BUS. REV. 95 (Sept.-Oct. 1992).

87. PETER F. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 370 (1973).

88. Peter Schwartz & Kevin Kelly, *The Relentless Contrarian*, WIRED 183 (Aug. 1996).

89. See, e.g., Michael Ettliger, *Trump Megabill Will Give \$117 Billion in Tax Cuts to the Top 1% in 2026. How Much in Your State?*, INSTITUTE FOR TAX & ECON. POL’Y (July 7, 2025), <https://itpep.org/trump-megabill-billions-in-tax-cuts-top-1-percent-by-state/> (describing who gets the tax cuts); see also Ralph Ranalli (host), *Oligarchy in the Open: What Happens Now as the US Is Forced to Confront Its Plutocracy Problem?*, POLICYCAST, Feb. 13, 2025, at <https://www.hks.harvard.edu/more/policycast>.

90. Theo Burman, *Elon Musk’s Teenage Test Results Shared by His Mom: Boy Genius*, NEWSWEEK (May 19, 2025).

91. PETER F. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 810 (1973).

92. Schwartz & Kelly, *supra* note 88, at 183.

93. Peter F. Drucker, *The Theory of Business*, HARV. BUS. REV. 167 (Sept.-Oct. 1994).

94. PETER F. DRUCKER, *A NEW INTRODUCTION TO THE FUTURE OF INDUSTRIAL MAN* 10 (1995).

95. Schwartz & Kelly, *supra* note 88, at 183.

96. *Make It New*, BENNINGTON MAG. (Jan. 18, 2017).

97. Institute for Social Ecology, *What Is Social Ecology?*, <https://social-ecology.org/wp/about/what-is-social-ecology/>.

98. PETER F. DRUCKER, *THE PRACTICE OF MANAGEMENT* 465 (1955).

99. National Register of Historic Places Inventory. Nomination Form at 2 (describing inter alia V. Everit Macy’s Moss Cottage Moss), <https://www.douglascountyga.gov/DocumentCenter/View/3419/Jekyll-Island-Historic-District-National-Register-Listing>.

100. *Two Autos for Settlement*, N.Y. TIMES (Oct. 31, 1916).

101. See, e.g., *The Deadening Influence of Charitable Institutions*, THE SUN (July 26, 2014) (describing V. Everit’s role as Westchester Superintendent of the Poor, and (accounting for the language of the era) his belief that the people his organization aided were afflicted by structural forces rather than just individual flaws).

volunteering their time as well as their money.<sup>102</sup> In eulogizing her at the 1925 International Girl Scout Conference that opened the Edith Macy Center, Dr. James Russell, dean of Columbia's Teachers College, remarked "it is said you know that some of us are born with silver spoons in our mouths. And I suppose it could be said of her [Macy] but there are not many in this world who use those spoons to feed the hungry multitude."<sup>103</sup>

While there was an overwhelming *noblesse oblige* flavor to some of her activities, Macy seems to have really made a difference. Her involvement with the Girl Scouts began with a generous monetary donation.<sup>104</sup> That first contribution led her headlong into the hard work of building and leading the new organization.<sup>105</sup> Herself a suffragist,<sup>106</sup> Macy's first act as leader of the Girl Scouts (a position she held from 1919 until her death in 1925) was to get girls and young women involved in the campaign to pass the 19th Amendment.<sup>107</sup>

Unlike so many of the ultra-rich today, Macy turned her privilege into a tool—leveraging her wealth and influence toward building a better, fairer society with more opportunities for more people. When Macy died suddenly in 1925, her husband created the Macy Center in her honor—donating the land and funds so the Girl Scouts would have a world-class training center.<sup>108</sup> To this day, the Macy Center provides that service.

A generation after Macy's death, Drucker became an avid supporter of the Girl Scouts. He viewed the organization as "remarkable."<sup>109</sup> In a society "that pretends to care about its children but does not," Drucker saw the Girl Scouts giving every girl the chance to learn and grow and thrive.<sup>110</sup> The Girl Scouts, in turn, incorporated Drucker's leadership ideas into their mission and have long extended their welcome to "anyone who identifies as a girl."<sup>111</sup> Today, Girl Scout Troop 6000 reaches girls living in New York City shelters, as well as immigrant and asylum-seeking

girls—enfolded them into wider the Girl Scout community and offering them the same activities, opportunities, and training available to other New York girls.<sup>112</sup>

A collaboration between Drucker and former Girl Scout CEO Francis Hesselbein resulted in an initiative intended to "redefin[e] the social sector as an equal partner in business and government."<sup>113</sup> This organization, now called the Francis Hesselbein Leadership Institute, involved melding their missions in an attempt to transform the world by "developing responsible leaders, caring citizens, and a healthy, diverse and inclusive society."<sup>114</sup> That sounds a lot like the same questions we were grappling with in July 2025.

Hmmm. Focusing on youth involvement, leveraging privilege for social change, rejecting fascism, and emphasizing commitment to social institutions? Maybe meeting in the Drucker Auditorium at the Edith Macy Center was less ironic and more inspirational after all. While we need to rethink their solutions, we can certainly learn from their commitment to building a better world. In a time when we so desperately need hope, Drucker and Macy provide a welcome reminder that individual creativity and vision paired with social solidarity can make a real difference—even in times of great social turmoil. As we try to recreate environmental law in this era of federal lawlessness, this reminder is both timely and inspiring. As we stare at this void, perhaps "here is Providence also."

## V. Pragmatic Climate Advocacy

*This section was authored by Paul Rink, Associate Professor, Seton Hall University School of Law.*

The climate movement is facing a reckoning. Time is running out to prevent catastrophic outcomes from the climate crisis,<sup>115</sup> prompting advocates to reevaluate long-standing approaches,<sup>116</sup> propose ambitious new ones,<sup>117</sup> and even consider triaging strongly held environmental priorities.<sup>118</sup>

Attempts to revamp advocacy methods in the face of increasing urgency are understandable and even admirable. However, such efforts will only be successful if they account for both our decreasingly egalitarian society<sup>119</sup> and

102. *Low Joins in Appeal to Help Tuskegee*, N.Y. TIMES (Jan. 25, 1910) (noting Macy's involvement).

103. Dr. James E. Russell, *Edith Macy as a Girl Scout*, in REPORT OF THE INTERNATIONAL CONFERENCE AND WORLD CAMP 16 (1926).

104. *Id.*

105. *Id.* at 15.

106. Walter Schwartz, *V. Everit Macy: A Man for All Good Reasons*, 11-13 (2023), available at <https://www.briarcliffhistory.org/whats-new>.

107. *Edith Carpenter Macy—Philanthropist, Leader of Girl Scouts*, Ossening on the Run (Mar. 18, 2023), available at <https://osseninghistoryontherun.com/2023/03/18/edith-carpenter-macy-philanthropist-leader-of-girl-scouts/> (last visited Apr. 15, 2025); Indiana University Tobias Leadership Center, *Oral History: Interview With Francis R. Hesselbein*, <https://tobiascenter.iu.edu/research/oral-history/audio-transcripts/hesselbein-frances.html> (Mar. 4, 2011).

108. *\$100,000 Girl Scout Fund: V. Everit Macy Aids Move to Train Leaders in Westchester*, N.Y. TIMES 32 (May 17, 1927); *Young Women Open First World Camp*, N.Y. TIMES 10 (May 12, 1926).

109. Elizabeth Hass Edersheim, *Leadership Icons Francis R. Hesselbein and Peter F. Drucker—A Legacy of Shared Leadership*, DRUCKER FORUM (Dec. 20, 2022), at <https://www.druckerforum.org/blog/leadership-icons-frances-r-hesselbein-and-peter-f-drucker-a-legacy-of-shared-leadership-by-elizabeth-haas-edersheim/>.

110. *Id.*

111. Girl Scouts of Eastern Massachusetts, *Our Commitment to Diversity, Equity, Inclusion, and Racial Justice*, <https://www.gsema.org/en/discover/about-gsema/diversity-equity-inclusion-racial-justice.html>.

112. Girl Scouts, *Troop 6000*, <https://www.girlscoutsnyc.org/en/discover/girl-scouting-nyc/troop-6000.html>.

113. Edersheim, *supra* note 109.

114. Hesselbein Institute, *About the Institute*, <https://hesselbeininstitute.org/about/index.html>.

115. UN News: Climate and Environment, "Climate Crunch Time Is Here," *New UN Report Warns*, UNITED NATIONS (Oct. 24, 2024), <https://news.un.org/en/story/2024/10/1156071>.

116. Fiona Harvey et al., *COP Summits "No Longer Fit for Purpose," Say Leading Climate Policy Experts*, GUARDIAN (Nov. 14, 2024), <https://www.theguardian.com/environment/2024/nov/15/cop-summits-no-longer-fit-for-purpose-say-leading-climate-policy-experts>.

117. Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. 109, 116th Cong. (2019).

118. Michael B. Gerrard, *A Time for Triage*, 39 ENV'T F. 38 (Nov./Dec. 2022).

119. See Daniel Currell, *Disney and the Decline of America's Middle Class*, N.Y. TIMES (Aug. 28, 2025), <https://www.nytimes.com/2025/08/28/opinion/disney-world-economy-middle-class-rich.html>.

our increasingly polarized political system.<sup>120</sup> Given these considerations, the most tactical path forward is to lean away from convincing people to care about climate change and instead work toward strategically capitalizing on disparate individual interests that align with climate action.

To many in the United States and globally, weighing strategic approaches may feel like whistling past the graveyard as the Trump Administration leads core climate laws and policies to slaughter. Since taking office in January 2025, the president has rejected long-standing scientific consensus on the existence of climate change<sup>121</sup>; doubled down on fossil fuel production<sup>122</sup>; withdrawn the United States from the Paris Agreement,<sup>123</sup> the United Nations Framework Convention on Climate Change, and the Intergovernmental Panel on Climate Change<sup>124</sup>; revoked federal approval for wind farm projects<sup>125</sup>; eliminated policies promoting electric vehicles<sup>126</sup>; rescinded the U.S. Environmental Protection Agency's (EPA's) ability to regulate greenhouse gas emissions<sup>127</sup>; and much more. Amidst this blitz of politically entrenched rollbacks, one could easily dismiss proposals to adjust efforts aimed at securing a climate-responsive future as exercises in fool-hardy optimism.

Yet, climate advocates *should* be thinking optimistically about the future. After all, hope persists. High demand for electricity and the relatively rapid process for developing profitable wind and solar projects has ensured that renewable energy continues to expand in the United States despite the Trump Administration's opposition.<sup>128</sup> Indeed, courts have repeatedly overturned President Trump's attempts to obstruct progress on wind farm development.<sup>129</sup> Efforts to repeal EPA's ability to regulate greenhouse gases have encountered serious roadblocks.<sup>130</sup>

State and local initiatives aimed at bolstering climate change mitigation and resiliency continue to move forward.<sup>131</sup> Notwithstanding the current federal antagonism toward such activities, political tides can shift quickly and unexpectedly. (Just ask 2016).<sup>132</sup> It behooves the environmentally engaged to aim for bringing about and taking advantage of such an eventuality by strategically erecting a broader tent of support,<sup>133</sup> courting allies who may even be climate deniers but who are willing to support climate-responsive initiatives out of pure self-interest.

Like it or not, climate change is a highly divisive topic. The position you take on climate change is one of the best predictors for which political party you support in the United States, with three times more Democrats than Republicans considering it a priority issue.<sup>134</sup> In our modern era of identity politics, just mentioning the word "climate" can turn someone whose incentives align with environmental protection initiatives into a disinterested or even antagonistic opponent of such policies.

Looking at the country as a whole, about half the population sees climate change as a major threat, while a little over one-third considers it a top priority.<sup>135</sup> However, two-thirds of the United States feels that the government should prioritize the development of renewable energy through tax incentives and regulatory streamlining.<sup>136</sup> Studies have shown that Republicans are more likely to support adaptation policies and programs intended to address the tangible impacts of "extreme weather" rather than the seemingly distant concept of climate change (although, notably, the opposite is true for Democrats).<sup>137</sup> Relatedly, further evidence suggests that communities garner higher levels of bipartisan support for adaptation projects after they experience damaging weather events.<sup>138</sup>

120. Klaus Desmet et al., *Latent Polarization*, NAT'L BUR. ECON. RSCH. (Sept. 2025), <https://www.nber.org/papers/w34229>.

121. Melina Walling & Seth Borenstein, *Trump Called Climate Change a "Con Job" at the United Nations. Here Are the Facts and Context*, PBS NEWS (Sept. 25, 2025), <https://www.pbs.org/newshour/politics/trump-called-climate-change-a-con-job-at-the-united-nations-here-are-the-facts-and-context>.

122. Peter Stone, *Trump Fossil-Fuel Push Setting Back Green Progress Decades, Critics Warn*, GUARDIAN (July 20, 2025), <https://www.theguardian.com/us-news/2025/jul/20/trump-energy-environment-agenda>.

123. Exec. Order No. 14162, 90 Fed. Reg. 8455 (Jan. 20, 2025).

124. Memorandum No. 2026-00976, 91 Fed. Reg. 2281 (Jan. 7, 2026).

125. Brad Plumer & Lisa Friedman, *With Little Explanation, Trump Throws Wind Industry Into Chaos*, N.Y. TIMES (Aug. 26, 2025), <https://www.nytimes.com/2025/08/26/climate/trump-wind-farms-energy.html>.

126. Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

127. Recission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Emissions Standards, 91 Fed. Reg. 7686 (Feb. 18, 2026) (codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, and 1039) [hereinafter Recission of 2009 Endangerment Finding].

128. Michael Copley, *America's Clean-energy Industry Is Growing Despite Trump's Attacks. At Least for Now*, NAT'L PUB. RADIO (Mar. 12, 2025), <https://www.npr.org/2025/03/12/nx-s1-5319056/trump-clean-energy-electricity-climate-change>.

129. Maxine Joselow, *Judge Hands Trump a Fifth Loss in His Effort to Halt Offshore Wind Projects*, N.Y. TIMES (Feb. 2, 2026), <https://www.nytimes.com/2026/02/02/climate/judge-offshore-wind-sunrise.html>. *But see* Jennifer McDermott, *Trump Administration's \$1B Deal to Stop Offshore Wind Shows an Evolution in Its Anti-Wind Strategy*, AP (Mar. 24, 2026), <https://apnews.com/article/trump-offshore-wind-energy-climate-totalenergies-interior-9e7d909510473f9eb13904c8035fe047>.

130. Mark Drajem, *NRDC and Coalition Sue Over Endangerment Finding Rollback and Climate Protections*, NRDC (Feb. 18, 2026), <https://www.nrdc.org/press-releases/nrdc-coalition-sue-endangerment-rollback-climate->

protections; Lisa Friedman, *24 States Sue the E.P.A. for Renouncing Its Power to Fight Climate Change*, N.Y. TIMES (Mar. 19, 2026), <https://www.nytimes.com/2026/03/19/climate/epa-endangerment-states-lawsuit.html>; *see also* Lisa Friedman, *A Secret Panel to Question Climate Science Was Unlawful, Judge Rules*, N.Y. TIMES (Jan. 30, 2026), <https://www.nytimes.com/2026/01/30/climate/energy-department-climate-ruling.html>.

131. Corinne Grinapol, *Green Transition Goes Local: States and Cities Tackle Climate Change as U.S. Protections Relax*, ENG'G NEWS REC. (Sept. 24, 2025), <https://www.enr.com/articles/61421-green-transition-goes-local-states-and-cities-tackle-climate-change-as-us-protections-relax>.

132. *See* Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016), <https://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070>.

133. *See* Katie Glueck, *These Younger Democrats Are Sick of Their Party's Status Quo*, N.Y. TIMES (July 10, 2025), <https://www.nytimes.com/2025/07/10/us/politics/majority-democrats.html#:~:text=Already%2C%20there%20are%20groups%20and,%2C%20and%20Kansas%20City%2C%20Mo>.

134. Brian Kennedy & Courtney Johnson, *More Americans See Climate Change as a Priority, But Democrats Are Much More Concerned Than Republicans*, PEW RSCH. CTR. (Feb. 28, 2020), <https://www.pewresearch.org/?p=10177>.

135. Alec Tyson et al., *What the Data Says About Americans' Views of Climate Change*, PEW RSCH. CTR. (Aug. 9, 2023), <https://www.pewresearch.org/?p=7902>.

136. *Id.*

137. *E.g.*, Jennifer P. Carman et al., *Measuring Americans' Support for Adapting to "Climate Change" or "Extreme Weather"*, 16 ENV'T COMM'N 577, 581 (2022) ("[W]e found that using the term 'climate change' resulted in lower support for most adaptation behaviors and policies among Republicans, [sic] but made little difference among Independents and resulted in higher support for some behaviors and policies among Democrats.").

138. Bruce E. Cain et al., *Getting Bipartisan Support for Sea Level Rise Adaptation Policies*, 197 OCEAN & COASTAL MGMT. 1, 1 (2020) ("We find that experi-

These trends reveal that there are many who are not inclined to prioritize climate change per se but who are nonetheless willing to support climate-responsive actions and policies that align with their more front-of-mind concerns such as electricity prices and weather resilience. Environmental advocates should focus on these non-climate-based incentives, encouraging people with wide-ranging interests to join an inclusive coalition in opposition to federal policies that are harmful to more than just the climate.

Opportunities in this arena abound. For example, the Trump Administration's decision to cancel funding for and otherwise obstruct offshore wind farm development<sup>139</sup> comes at a time when stagnating job creation has pushed the unemployment rate upward,<sup>140</sup> pushing those without a consistent, full-time job into an elevated state of precarity.<sup>141</sup> Opposing these construction projects undermines the Administration's promise to promote well-paid industrial positions for the U.S. workforce.<sup>142</sup> In addition, higher demand for energy has pushed up electricity prices<sup>143</sup> at more than twice the rate of inflation,<sup>144</sup> leaving many households struggling to pay for essential utilities. Completing new wind farm development projects would provide an influx of energy and bring utility costs down.<sup>145</sup> These observations provide fodder for environmentalists attempting to convince even the most climate-skeptical households that supporting wind and solar power projects

is tantamount to supporting job creation and more affordable monthly expenses.

Similar opportunities exist to persuade specific demographics that climate action projects are worthwhile. For example, AI data centers represent a large slice of the increasing demand for electricity in the United States.<sup>146</sup> In addition to pressuring those in charge of these centers to consciously and equitably mitigate their environmental impacts,<sup>147</sup> climate advocates should enlist the AI industry's support for renewable energy development projects and policies, highlighting the benefits that will ensue from expanded sources of electricity.

To persuade people to get behind specific climate action projects (such as wind and solar farms) as well as larger climate action policies (such as subsidies for wind and solar farms), advocates must tailor their advocacy approach to each context. For climate-denying individuals and groups, even mentioning climate change at all may be counterproductive. Yet, as discussed above, there is a chance to persuade these skeptics without reference to "the topic that must not be named" by focusing on the cost-saving and labor-friendly aspects of renewable energy. Alternatively, some may be less averse to hearing about climate benefits, but community-centric, household-based, or bottom-line concerns will be more pertinent—and, thereby, more persuasive—for them. In such scenarios, advocates can lay out all advantages, including climate action as one item on a long list of reasons to back renewable energy (for example) and framing climate-related advantages as reinforcing those more closely held interests.

Advocates should use this tailored approach to promote a wide array of climate mitigation and adaptation initiatives. For example, environmentalists can advocate for seawalls to protect communities from storm surges and sea-level rise while either carefully tailoring or completely eschewing information about how climate change is exacerbating these problems. Public officials that are already facing shoreline flooding will likely have enough buy-in for such solutions based on their lived experiences and the desire to protect property in their locality.<sup>148</sup> Instead of pressuring such elected representatives to care about climate change, advocates should pressure them to enact efficient and effective adaptation policies that align with their political incentives while simultaneously solving infrastructure problems holistically and with sufficient foresight.<sup>149</sup>

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encing extreme events does lessen the partisan gap in many instances offering hope that communities can find bipartisan solutions to climate change threats." *But see* Brittany S. Harris & Peter D. Howe, 5 ENV'T RSCH. COMM'N 1, 9 (2023) ("As climate change impacts continue to increase in frequency and magnitude, however, public support for adaptation policy is unlikely to shift due to experience with extreme weather events alone.").

139. Brad Plumer, *Transportation Dept. Cancels \$679 Million for Offshore Wind Projects*, N.Y. TIMES (Aug. 29, 2025), <https://www.nytimes.com/2025/08/29/climate/transportation-dept-cancels-679-million-wind-industry.html>; Plumer & Friedman, *supra* note 125; Maxine Joselow & Brad Plumer, *Trump Administration Will Pay More Energy Firms to Cancel Wind Farms*, N.Y. TIMES (Apr. 27, 2026), <https://www.nytimes.com/2026/04/27/climate/trump-administration-wind-farms.html>.
140. Mary Cunningham, *Employers Added 73,000 Jobs in July, Falling Short of Forecasts*, CBS NEWS (Aug. 1, 2025), <https://www.cbsnews.com/news/jobs-report-today-july-2025-economy-tariffs-trump-dogel/>.
141. Te-Ping Chen, *Slowest Labor Market in Years Leaves Job Seekers Stuck*, WALL ST. J. (Jan. 9, 2026), [https://www.wsj.com/economy/jobs/job-market-cooling-labor-department-6d4204ed?reflink=desktopwebshare\\_permalink](https://www.wsj.com/economy/jobs/job-market-cooling-labor-department-6d4204ed?reflink=desktopwebshare_permalink).
142. Brittney Melton, *Has Trump Kept His Campaign Promises to American Workers? Here's What Some Say*, NAT'L PUB. RADIO (Sept. 1, 2025), <https://www.npr.org/2025/09/01/g-s1-86336/labor-day-trump-administration-policies>; Gordon Ebanks, *Canceled Wind Project Puts Thousands of Jobs at Risk*, CNN (Aug. 26, 2025), <https://www.cnn.com/2025/08/26/business/wind-project-cancel-trump-jobs>.
143. Tracy J. Wholf, *Why Utility Bills Are Rapidly Rising in Some States*, CBS NEWS (Aug. 23, 2025), <https://www.cbsnews.com/news/why-utility-bills-are-rapidly-rising-in-some-states/> ("[H]igher rates are largely a result of higher demand, and that's being driven by the rapid expansion of artificial intelligence, oil and gas drilling, space heating and electrified forms of transportation[.]").
144. Scott Horsley, *Electricity Prices Are Climbing More Than Twice as Fast as Inflation*, NAT'L PUB. RADIO (Aug. 16, 2025), <https://www.npr.org/2025/08/16/nx-s1-5502671/electricity-bill-high-inflation-ai>.
145. See Natural Resources Council of Maine, *New Report: Offshore Wind Would Have Lowered Electricity Prices 11% Last Winter*, <https://www.nrcm.org/news/report-offshore-wind-would-have-lowered-electricity-prices/> (Sept. 4, 2025).

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146. Helen Kou, *Power for AI: Easier Said Than Built*, BLOOMBERGNEF (Apr. 15, 2025), <https://about.bnef.com/insights/commodities/power-for-ai-easier-said-than-built/>.

147. See Emma Woollacott, *The Environmental Campaigners Fighting Against Data Centres*, BBC (Nov. 3, 2024), <https://www.bbc.com/news/articles/cz0mlrx0jxno>.

148. See, e.g., Reagan Ryan, *Gov. DeSantis Recommends More Than \$200 Million for Coastal Resiliency and Restoration*, SPECTRUM NEWS 13 (Dec. 5, 2023), <https://mynews13.com/fl/orlando/news/2023/12/05/200-million-proposed-for-coastal-resiliency-in-florida>.

149. See *id.* But see Craig Pittman, *Hurricane Ian Proved Why Ron DeSantis's Version of Climate Resilience Is a Disaster*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/opinion/environment/ron-desantis-hurricane-ian-climate-change.html> ("Expensive resilience projects like the ones the governor has supported can only be a temporary fix. . . . They don't

Focusing on how climate actions and policies assuage specific local difficulties will require a large amount of community buy-in and engagement. As such, national organizations will be most successful if they locate, fund, and empower regional and city-based advocacy groups with the requisite authenticity and credibility to communicate effectively with their neighbors and local leaders.

This bottom-up advocacy has the potential to build out a robust coalition of supporters for renewable energy projects with a broad range of political beliefs on both environmental and non-environmental issues. To maintain such alliances, climate advocates must leave behind a purity-test mentality<sup>150</sup> in favor of big-tent thinking.<sup>151</sup> Individuals, including voters and politicians, do not need to agree on every issue to provide meaningful, and even essential, support for climate action policies and programs.<sup>152</sup> If bringing many of them into allyship means not preaching about the dangers and moral imperative of climate change, so be it.

The Joseph Biden Administration capitalized on this realization when it enacted the 2022 Inflation Reduction Act.<sup>153</sup> Focusing almost exclusively on carrots rather than sticks, this law established government-backed incentives for development programs with real potential to create jobs, reduce energy prices, and build more resilient infrastructure in addition to combating climate change.<sup>154</sup> Although the Trump Administration has taken large steps to undermine this legislation, the instinct behind it was right on target for rapidly responding to climate change through market mechanisms that align with numerous other widely shared priorities across society, such as economic prosperity and disaster risk reduction.

Currently, there is a lot of justifiable concern over the Trump Administration's efforts to reverse the endangerment finding that enables EPA to regulate greenhouse gas emissions.<sup>155</sup> If the Trump Administration successfully rolls back this policy, important restrictions on greenhouse gas pollution from motor vehicles, power plants, waste landfills, and more will be vulnerable to repeal.<sup>156</sup> Many advo-

cates are taking various legal approaches to contest this action.<sup>157</sup> That said, the 21st century calls for more than defending and reinforcing the regulatory strategies that defined the 20th-century environmental movement.

Because climate change is an issue that impacts everyone, advocates need to recruit and work with a wide swath of constituents, meeting each community and interest group on its own terms. This means providing people with localized reasons to care and vote for the policies and programs necessary to address the problem, whether that involves calling such initiatives “climate action” or not. Twenty-first century climate advocacy must make this crucial pivot, lest we all suffer the consequences of failed cooperation amidst the fundamental collective action problem of our time.

## VI. From Jim Crow to the Climate Crisis

*This section was authored by Camila Bustos, Assistant Professor of Law, Elisabeth Haub School of Law at Pace University.*

Over the past two years, the obligations of states under international climate law have crystallized with unprecedented clarity. In a groundbreaking case brought by elderly women challenging the Swiss government's climate inaction, the European Court of Human Rights found for the first time in its history a human rights violation resulting from climate change.<sup>158</sup> In 2025, two landmark advisory opinions further clarified that states bear a fundamental duty not to cause climate-related harm.

The International Court of Justice (ICJ) recognized the “duty to prevent significant harm to the environment” as a principle of customary international law.<sup>159</sup> Meanwhile, the Inter-American Court of Human Rights issued its own advisory opinion on climate change, affirming that the principle of prevention imposes an obligation on states to prevent harm and follow a standard of “enhanced due diligence.”<sup>160</sup> In 2024, the International Tribunal for the Law of the Sea recognized that climate change “represents an existential threat,” raising human rights concerns.<sup>161</sup> Yet,

address the cause of climate change, only the symptoms, and only for a little while.”).

150. Gabriel Debendetti, *A Long Talk With Cory Booker*, INTELLIGENCER (Apr. 27, 2019), <https://nymag.com/intelligencer/2019/04/cory-booker-on-purity-tests-and-his-work-with-jared-kushner.html> (noting Cory Booker's objection to the fact that “progressive purity tests are fashionable now” during his 2020 presidential campaign).

151. Stuart Malec, *There Should Be More Tough Talk Under the Democrats' Big Tent*, THE HILL (Apr. 6, 2025), <https://thehill.com/opinion/campaign/5232552-democrats-big-tent-strategy/>.

152. See ADAM SMITH & BRUCE YANDEL, *BOOTLEGGERS AND BAPTISTS: HOW ECONOMIC FORCES AND MORAL PERSUASION INTERACT TO SHAPE REGULATORY POLICY* (2014) (noting that public policies are more likely to endure if they satisfy multiple interest groups motivated by distinct incentives such as securing private benefits or promoting the public interest).

153. Pub. L. No. 117-169, 136 Stat. 1818.

154. Molly Hanson, *Two Years Ago, We Passed the Biggest Climate Spending Bill Ever. Here's What It Achieved*, EARTHJUSTICE (Aug. 20, 2024), <https://earthjustice.org/article/the-biggest-climate-spending-bill-ever-just-turned-two-heres-what-it-has-achieved>.

155. See Recission of Endangerment Finding, *supra* note 127.

156. See Environmental Protection Agency, *Climate Change Regulatory Actions and Initiatives*, U.S. EPA (Sept. 25, 2025), <https://www.epa.gov/climate-change/climate-change-regulatory-actions-and-initiatives#:~:text=Carbon%20Pollution%20Standards%20for%20New,gas%2Dfired%20stationary%20>

combustion%20turbines (listing numerous programs, standards, and determinations that are based on the 2009 endangerment finding regarding greenhouse gases).

157. See sources accompanying note 130; see also Adam Orford et al., *Comments on Draft U.S. Department of Energy's July 2025 Report Titled "A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate,"* REGULATIONS.GOV (Aug. 21, 2025), <https://www.regulations.gov/comment/EPA-HQ-OAR-2025-0194-0296>.

158. Greenpeace International, *Victory for Swiss Senior Women for Climate Protection: Climate Protection Is a Human Right*, GREENPEACE (Apr. 9, 2024), <https://www.greenpeace.org/international/press-release/66344/victory-for-swiss-senior-women-for-climate-protection-climate-protection-is-a-human-right/>.

159. Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 I.C.J. ¶ 273 (July 23, 2025).

160. Climate Emergency and Human Rights, Advisory Opinion AO-32/25, Inter-Am. Ct. H.R. (ser. A), ¶ 233 (May 29, 2025).

161. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, Case No. 31, ITLOS Rep. ¶ 66 (May 21, 2024). The African Court on Human and People's Rights is currently considering an advisory opinion as well. Yusra Suedi, *Africa's Turn: The African Court's Advisory Opinion on Climate Change*, EJIL TALK! (May 22, 2025), <https://www.ejiltalk.org/africas-turn-the-african-courts-advisory-opinion-on-climate-change/>.

even as international consensus builds, the U.S. government has withdrawn from the Paris Agreement, dismantled climate-friendly programs domestically and internationally, and rescinded EPA's finding that greenhouse gas emissions are harmful and thus can be regulated under the Clean Air Act (CAA).

I've been thinking about the many events that led us here—climate denialism, rebuke of international law and cooperation, rejection of scientific expertise, and blatant disregard of the United States's historic responsibility for the largest net share of greenhouse gas emissions. This stark contradiction forces us to confront an uncomfortable question: How did the United States—once hailed a champion of environmental and international law—become one of its most prominent skeptics?

### A. A Brief Summary of U.S. History

The United States was not always hostile to the United Nations and international law. In the aftermath of World War II, it played a pivotal role in establishing the international legal order as we know it today.<sup>162</sup> Eleanor Roosevelt herself is often credited as one of the key architects of the U.N. Declaration of Human Rights.<sup>163</sup>

But the 1950s marked a turning point. As segregation remained entrenched across the United States, civil rights groups like the NAACP recognized that the emerging human rights regime could serve as a powerful tool to expose white supremacy and Jim Crow on the global stage. In 1951, the Civil Rights Congress submitted a petition charging the United States of genocide, documenting instances of violence, police brutality, and racial discrimination against Black Americans.<sup>164</sup> The document argued that the U.S. government's actions fulfilled the legal requirements of genocide under international law.

The potential of international law to challenge domestic racial hierarchies became starkly apparent in a 1951 California case. A state court initially found a domestic law restricting the property rights of non-citizens unconstitutional because it violated the U.N. Charter's anti-discrimination provisions. The California Supreme Court quickly overturned this part of the decision, reasoning that the U.N. Charter could not supersede domestic legislation by declaring its preamble and subsequent articles were not self-executing.<sup>165</sup>

What followed has been thoroughly documented by historians like Carol Anderson: segregationists mounted a fierce campaign against the United Nations and introduced

a series of constitutional amendments designed to give Congress greater power over international agreements.<sup>166</sup> Their motivation was transparent—a deep-seated fear that legitimizing the United Nations and international law would subject America's racial hierarchy under Jim Crow to scrutiny by what they derided as a “world government.”

While these amendments ultimately failed, they fundamentally shaped the persistent hostility of the U.S. legal system toward international law. This legacy persists today, influencing U.S. treaty practice through the systematic attachment of reservations to human rights treaties. Remarkably, the last human rights treaty the United States ratified was more than 20 years ago.

### B. Why These Climate Rulings Matter

As my colleague Anthony Moffa asks, do these recent developments in climate law actually matter? Outside the United States, they clearly do. An increasing number of courts worldwide have held that subnational and national governments bear legal obligations to address climate change.<sup>167</sup> The number of climate lawsuits will undoubtedly continue to increase following the guidance from the ICJ and Inter-American Court.<sup>168</sup>

It is precisely in these moments of intersecting crises that we must think ambitiously and look beyond our borders for inspiration and solidarity. We must abandon American exceptionalism to embrace the progress of international climate law.<sup>169</sup> These landmark opinions reflect a broader global consensus built on four foundational principles.

#### 1. Every Government Must Act

The ICJ definitively rejected the frequent argument that individual states cannot meaningfully address climate change on their own. The court acknowledged that while cumulative emissions cause climate change, “it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions.”<sup>170</sup>

162. *Creation of the Bretton Woods System*, FED. RESERVE HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/bretton-woods-created>.

163. Penny Ehrhardt, *Eleanor Roosevelt and the Universal Declaration of Human Rights*, BONAVERO INSTITUTE HUM. RTS., <https://www.law.ox.ac.uk/centres-institutes/bonaveroinstitute-human-rights/eleanor-roosevelt-and-universal-declaration-human> (last visited Oct. 8, 2025).

164. *We Charge Genocide*, BLACKPAST.ORG (July 15, 2011), <https://blackpast.org/global-african-history/we-charge-genocide-historic-petition-united-nations-relief-crime-united-states-government-against/>.

165. *Sei Fuji v. State*, 242 P.2d 617, 724-25 (Cal. 1952) (the court invalidated the discriminatory law on other grounds).

166. Carol Anderson, *From Hope to Disillusion: African Americans, the United Nations, and the Struggle for Human Rights, 1944-1947*, 20 DIPOMATIC HIS. 531 (1996); Graham M. Glusman, *The Long Afterlife of the Bricker Amendment: Jim Crow, Human Rights, and the Genocide Convention*, COLUM. J. TRANSNAT'L L., BULL. BLOG (Dec. 2, 2021), <https://www.jtl.columbia.edu/bulletin-blog/the-long-afterlife-of-the-bricker-amendment-jim-crow-human-rights-and-the-genocide-convention>.

167. Lucy Maxwell et al., *Future Trends in Climate Litigation Against Governments*, SABIN CTR. FOR CLIMATE CHANGE L., CLIMATE L. BLOG (Apr. 4, 2024), <https://blogs.law.columbia.edu/climatechange/2024/04/04/future-trends-in-climate-litigation-against-governments/>.

168. Joe Udell & Floris Tan, *New Standards in Government Framework Litigation: Legal Implications of the ICJ Advisory Opinion on Climate Change*, SABIN CTR. FOR CLIMATE CHANGE L., CLIMATE L. BLOG (Aug. 5, 2025), <https://blogs.law.columbia.edu/climatechange/2025/08/05/new-standards-in-government-framework-litigation-legal-implications-of-the-icj-advisory-opinion-on-climate-change/>.

169. Burton Mack, *A Brief History of American Exceptionalism*, YALE UV. PRESS (Feb. 28, 2017), <https://yalebooks.yale.edu/2017/02/28/a-brief-history-of-american-exceptionalism/>.

170. Obligations of States in Respect of Climate Change, *supra* note 159, ¶ 429.

Crucially, the ICJ clarified that state responsibility can be determined even when multiple states contribute to environmental damage, and that cumulative impact does not preclude applying the duty to prevent significant harm to each individual state.

## 2. We Must Transition Away From Fossil Fuels

The ICJ affirmed that a state's failure to take appropriate action to protect the climate system from greenhouse gas emissions—"including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies"—may constitute an internationally wrongful act attributable to that state.<sup>171</sup>

The court clarified that "relevant conduct" for assessing state obligations includes not only activities directly resulting in greenhouse gas emissions, but also "all actions or omissions of States which result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions."<sup>172</sup>

The Inter-American Court of Human Rights similarly emphasized that states have obligations to reduce greenhouse gas emissions from fossil fuels and regulate business conduct accordingly. Specifically, the court assigned differentiated obligations to higher-emitting companies.<sup>173</sup> The opinion further declared that human conduct causing irreversible harm to "the common ecosystem that makes the life of the species possible" violates a non-derogable norm of international law (*jus cogens*).<sup>174</sup>

## 3. Human Rights Are Interlinked With Nature's Rights

The Inter-American Court explained how rights of nature approaches align with existing obligations under international environmental law. The court stated that the right to a healthy environment, as an autonomous right, protects environmental components such as forests, rivers, and seas as legal rights in themselves.<sup>175</sup>

The court emphasized that nature's rights "represents a contemporary expression of the principle of the interdependence between human rights and the environment."<sup>176</sup> It underscored that "States must not only refrain from acting in a way that causes significant environmental damage, but have the positive obligation to adopt mea-

asures to guarantee the protection, restoration and regeneration of ecosystems."<sup>177</sup>

While the ICJ did not explicitly recognize the rights of nature, it acknowledged the importance of integrating the "interests of nature" in climate actions and built upon the "harmony with nature" principle of the Rio Declaration.<sup>178</sup>

## 4. Migration Justice Is Climate Justice

Both decisions recognized that climate change is displacing people worldwide. The ICJ reaffirmed that states have obligations under the principle of *non-refoulement* to prevent irreparable harm to the right to life when individuals face real risk upon return to their country of origin. The Inter-American Court observed that states bear an obligation to prevent migration and forced displacement resulting directly and indirectly from climate change impacts.

Both courts reaffirmed the duty to cooperate not only for environmental protection, but also in addressing climate displacement.

### C. Breaking the Cycle

The historical thread from Jim Crow-era resistance to international oversight to today's climate obstruction reveals a troubling pattern. America's reflexive hostility to international law, born partly from a desire to protect racial hierarchy and avoid international scrutiny, now threatens global climate action when we can least afford delay.

These landmark international climate opinions represent more than legal precedent—they embody a global recognition that the climate crisis demands coordinated action grounded in shared legal obligations. As the world moves forward with this consensus, the United States faces a choice: continue clinging to an exceptionalism rooted in historical injustice, or join the international community in building a sustainable future governed by law.

The path forward requires not just policy changes, but a fundamental reckoning with why America fears international accountability. Only by confronting this history can we hope to break free from patterns that now threaten not just justice, but survival itself.

## VII. The Pessimism of MAHA

*This section was authored by Margot J. Pollans, Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law, Elisabeth Haub School of Law at Pace University.*

There is an indelible appeal to opting out. In every generation since industrialization, pockets of back-to-the-landers, homesteaders, and commune members have rejected some aspects of modern technology, mass production, and the

171. *Id.* ¶ 427.

172. *Id.* ¶ 94.

173. Rodrigo da Costa Sales, *Enhanced Due Diligence: A New Legal Standard for Climate Action in the Inter-American System*, SABIN CTR. FOR CLIMATE CHANGE L., CLIMATE L. BLOG (July 25, 2025), <https://blogs.law.columbia.edu/climatechange/2025/07/25/enhanced-due-diligence-a-new-legal-standard-for-climate-action-in-the-inter-american-system/>.

174. Climate Emergency and Human Rights, *supra* note 160, ¶ 8.

175. *Id.* ¶ 273.

176. *Id.* ¶ 282.

177. *Id.* ¶ 283.

178. See Obligations of States in Respect of Climate Change, *supra* note 159, ¶¶ 387-393.

complexity of modern life.<sup>179</sup> Participants have described a variety of motivations, including a desire to “live close to the land and simplify [ ] lives”<sup>180</sup> or to “heal[ ] the physical and mental maladies caused by congestion, pollution, and the stresses of everyday urban life.”<sup>181</sup> For some homesteaders and some back-to-the-land communities, religion provides the core moral framework. In others, it is environmentalism, itself a religion of sorts.<sup>182</sup> For some, red-sky thinking is a driver—society is beyond repair and the only solution is to opt out. The draws of retreat are obvious: simplicity, transparency, belonging in a tightknit community. So are the drawbacks: arduous physical labor, vulnerability, isolation from broader society.

Homesteading is currently on the rise in the United States.<sup>183</sup> It is part of a broader cultural moment emphasizing traditional gender roles, DIY living, fear of modern science and technology, and personal responsibility. These values have also found a home in a much more mainstream movement: “Make America Healthy Again” (MAHA), which coalesced around Robert F. Kennedy, Jr.’s 2024 presidential campaign. Consisting of a loose coalition of anti-vaxxers, homesteaders, wellness gurus, and conservative moms, MAHA draws on two key “opting out” themes.

First, skepticism about modern technology (and medicine in particular) drives many proponents.<sup>184</sup> Second, many MAHA advocates emphasize self-reliance and personal responsibility.<sup>185</sup> Tying declining children’s health to the industrialized food system, chronic toxic exposure, increased use of technology, and overprescription of medication (including vaccines), the May 2025 report *Make Our Children Healthy Again Assessment* (MAHA report) calls for a “coordinated national lifestyle-medicine initiative that embeds real-world randomized trials—covering integrated interventions in movement, diet, light exposure,

and sleep timing.”<sup>186</sup> The message is clear. To be healthy, people must opt out of the modern industrialized food and health care systems.<sup>187</sup>

As a long-time critic of the modern food system, there is, at first glance, a lot for me to like in MAHA. The May 2025 MAHA report and the follow-up August 2025 strategy document call attention to a number of concerns that I and others have been writing about for years: the inability of the modern environmental apparatus to address cumulative toxic exposures,<sup>188</sup> the failure of the U.S. Food & Drug Administration’s food additives regime,<sup>189</sup> and corporate capture of nutrition science and regulation,<sup>190</sup> among other things.

Yet, MAHA terrifies me. Why?

There are the obvious concerns: The conspiracy theories dressed up as science.<sup>191</sup> The science rejected as a conspiracy.<sup>192</sup> The ableism.<sup>193</sup> The mischaracterization of statistics to exaggerate the plight of chronically ill children (often by ignoring the role of improved disease detection and monitoring).<sup>194</sup> The emphasis on the risks of toxic chemical exposure at the same time that other branches of the Trump Administration are gutting environmental regulation. But there are two additional structural features of the movement that I find particularly troubling.

First, MAHA is a marketing vehicle, embracing a framework in which the “good life” is available for purchase only for those with sufficient time and money. Many of its proponents are selling something<sup>195</sup>: a supplement,<sup>196</sup> a home

179. Raydient Rural, *What Is Homesteading?*, RETHINK:RURAL (Jan. 2023), <https://rethinkrural.raydientrural.com/blog/what-is-homesteading> (providing a brief primer to this history from within the movement). There is a wealth of literature on these trends. To begin, see T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920* (1994), ELEANOR AGNEW, *BACK FROM THE LAND: HOW YOUNG AMERICANS WENT TO NATURE IN THE 1970S, AND WHY THEY CAME BACK* (2005), and JULIE GUTHMAN, *AGRARIAN DREAMS* (2014).

180. Paul Salstrom, *The Neotatives: Back-to-the-Land in Appalachia’s 1970s*, 30 *APPALACHIAN J.* 308 (2003). See also REBECCA KNEALE GOULD, *AT HOME IN NATURE: MODERN HOMESTEADING AND SPIRITUAL PRACTICE IN AMERICA* (2005).

181. Ryan H. Edgington, “*Be Receptive to the Good Earth*”: *Health, Nature, and Labor in Countercultural Back-to-the-Land Settlements*, 82 *AGRIC. HIST.* 279 (2008).

182. THOMAS DUNLOP, *FAITH IN NATURE: ENVIRONMENTALISM AS RELIGIOUS QUEST* (2005); see also NOA BEN-ASHER, *SECULAR CHRISTIAN SOCIAL JUSTICE* (forthcoming 2026).

183. Homesteaders of America, *Making America Agrarian Again, One Homestead at a Time*, <https://homesteadersofamerica.com/a-look-at-the-homesteaders-of-america-community-in-2022-statistics/> (last visited Jan. 22, 2026) (providing some statistics).

184. Camilla Cecannacchia, *Make America Healthy Again: A Medico-Legal and Public Health Analysis of a Politicized Health Initiative*, 5 *FRONT. HEALTH SERV. SEC. HEALTH POLICY & MGMT.* 1632180 (2025), <https://doi.org/10.3389/frhs.2025.1632180>

185. Stephanie Armour, *RFK Jr., MAHA Rhetoric Put Health Responsibility on Individuals. Some Patients Feel Blamed for Illnesses*, CBS NEWS (July 30, 2025), <https://www.cbsnews.com/news/rfk-jr-maha-health-responsibility-patients-feel-blamed/>.

186. MAHA COMMISSION, *THE MAHA REPORT: MAKE OUR CHILDREN HEALTHY AGAIN ASSESSMENT* (May 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/05/MAHA-Report-The-White-House.pdf> [hereinafter *THE MAHA REPORT*].

187. Jonathan Jarry, *The MAHA Report Is Mostly “Data Vibes.”* OFFICE FOR SCIENCE & SOCIETY: *SEPARATING SENSE FROM NONSENSE* (May 29, 2025), <https://www.mcgill.ca/oss/article/medical-critical-thinking-health-and-nutrition/maha-report-mostly-data-vibes>.

188. Margot J. Pollans & Matthew F. Watson, *FDA as Food System Steward*, 46 *HARV. ENV’T L. REV.* 1 (2022).

189. Emily Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 *CAL. L. REV.* 1173 (2019).

190. Dave Chapman (host), *Marion Nestle: Follow the Food Money*, REAL ORGANIC PROJECT, June 2, 2025, at <https://realorganicproject.org/marion-nestle-follow-the-food-money-229/>.

191. Michael Hobbes & Aubrey Gordon (hosts), *Bonus: MAHA’s First 90 Days, MAINTENANCE PHASE*, May 1, 2025, at <https://podcasts.apple.com/us/podcast/bonus-mahas-first-90-days/id1535408667?i=1000705671226>.

192. Press Release, Dept. Health & Human Servs., *HHS Winds Down mRNA Vaccine Development Under BARDA*, (Aug. 5, 2025), <https://www.hhs.gov/press-room/hhs-winds-down-mrna-development-under-barda.html>.

193. Bridgette Hamstead, *Autism Is Not an Epidemic: The Dangerous Implications of the “Make America Healthy Again” Executive Order*, LINKEDIN (Feb. 19, 2025), <https://www.linkedin.com/pulse/autism-epidemic-dangerous-implications-make-america-hebert-hamstead-txjoc/>.

194. See *MAINTENANCE PHASE*, *supra* note 191.

195. Tina Reed, *The Businesses Hoping to Boom Under an RFK Jr.-Led HHS*, AXIOS (Feb. 24, 2025), <https://www.axios.com/2025/02/24/supplements-alternative-health-rfk-hhs>.

196. Ballerina Farm, *Farmer Protein Powder*, [https://ballerinafarm.com/products/farmer-protein-powder?selling\\_plan=690731581810](https://ballerinafarm.com/products/farmer-protein-powder?selling_plan=690731581810) (last visited Apr. 21, 2026). For commentary on Ballerina Farm, see Kathryn Jezer-Morton, *You’ll Never Really Know Ballerina Farm*, *THE CUT* (Aug. 1, 2024), <https://www.thecut.com/article/ballerina-farm-hannah-neeleman-culture-war-response.html>, and Ann Helen Peterson, *Ballerina Farm Goes Full Wellness Brand*, *CULTURE STUDY* (Oct. 19, 2025), <https://annehelen.substack.com/p/ballerina-farm-goes-full-wellness>.

in an intentional community,<sup>197</sup> diet and lifestyle advice.<sup>198</sup> U.S. Health & Human Services Secretary Kennedy even sought to trademark the term MAHA in December 2024.<sup>199</sup> In other words, MAHA is not really about opting out of an industrialized health care and food system. It is instead about buying in. The movement is fundamentally consumerist, operating within instead of rejecting the economic structures of modern life. The “good life” is expensive and exclusive. It is a for-profit opportunity.

The U.S. health system is already highly dichotomized along racial and socioeconomic lines.<sup>200</sup> Claiming to identify the “root causes” of chronic disease and to “spur a conversation about how we can build a world—together—where . . . disease is prevented and reversed, not just ‘managed,’” the MAHA Report barely acknowledges this reality.<sup>201</sup> By grounding health in individual responsibility, particularly in ways that are time-consuming and expensive, MAHA seems poised to exaggerate these existing disparities. Likewise, the movement seeks to embed traditional gender roles by relying on significant gendered care work<sup>202</sup> and rejecting modern birth control.<sup>203</sup>

Second, MAHA purports to offer a refreshing liberation from the status quo broken health care system (and don’t get me wrong, our current health care system is atrocious in so many ways). MAHA is dangerous not because it challenges the status quo but because, having assumed control of the federal public health apparatus, it seeks to *force* everyone to opt out of the existing health care system. The September 2025 *Making Our Children Healthy Again* strategy report describes a variety of policies—making vaccines and certain medications harder to get, limiting fluoride in drinking water, etc.—that take fringe ideas about health and make them national policy.<sup>204</sup>

The strategy document also emphasizes the need to shift research dollars from things that seem promising (e.g., mRNA vaccines) into investigation of marginal risks (e.g., electromagnetic radiation and seed oils). As the federal government winds down decades of environmental and public

health law in the name of economic growth, MAHA withdraws federal support for the medical technologies that have kept so many people safe—from, among other things, Covid-19, measles, and cavities (which neuroscientists are increasingly linking to neural decline<sup>205</sup>). In other words, just as our environments are poised to become even more dangerous, MAHA seeks to dismantle the frameworks that have, for decades, helped people face danger.

This is no longer about a small group of individuals opting out to seek simplicity. Nor is this about fringe conspiracy theorists deciding not to hold cell phones to their ears. This is the U.S. national health apparatus forcing these views on the rest of us. And it does so in the name of freedom.<sup>206</sup> As the “MAHA moms” explain, “parents must have the right to make health decisions for their children—not governments or corporations”<sup>207</sup> (never mind that many of the self-identified MAHA moms and RFK Jr. himself have spoken up in favor of state bans of gender-affirming care to minors<sup>208</sup>).

But getting to choose if my children will be vaccinated or not does not make me feel more free. It feels overwhelming. I have no medical training; I am not versed in reading and assessing the quality of scientific journals; and I have four children and a full-time job. I am fortunate that none of my children are immunocompromised, and they are all old enough to be fully vaccinated, so I do not face the horrific decision of isolating them from society because so many communities no longer have herd immunity.<sup>209</sup>

A primary purpose of investing in public health expertise and infrastructure is to free people from these kinds of burdens. That is the world I want to opt into. As one legal scholar pointed out, MAHA’s populism is not truly libertarian; instead, it seeks to shift power from one set of elites (the older public health infrastructure) to another (the religious right).<sup>210</sup> And I suspect that at least some of the architects of this movement are counting on the fact that many people will be too distracted by their new part-time jobs as health care researchers to notice.

197. Caroline Kitchener & Maddie McGarvey, *This Ohio Farm Community Is a Mecca for the “MAHA Mom,”* N.Y. TIMES (Aug. 12, 2025), <https://www.nytimes.com/2025/08/11/us/politics/ohio-maha-moms-farms.html>.

198. Vani Hari, *How-To Guides*, FOOD BABE, <https://foodbabe.com/shop/how-tos/> (last visited Jan. 21, 2026).

199. Martin Pengelly, *RFK Jr. Sought “Make America Healthy Again” Trademark for Vaccine Marketing*, GUARDIAN (Jan. 30, 2025), <https://www.theguardian.com/us-news/2025/jan/30/rfk-maha-trademark#:~:text=Robert%20F%20Kennedy%20Jr%20applied,to%20use%20Maha%20brand%20marks%E2%80%9D>.

200. E.g., DAVID C. RADLEY ET AL., ADVANCING RACIAL EQUITY IN U.S. HEALTH CARE: THE COMMONWEALTH FUND 2024 STATE HEALTH DISPARITIES REPORT (Apr. 18, 2024), <https://www.commonwealthfund.org/publications/fund-reports/2024/apr/advancing-racial-equity-us-health-care>.

201. THE MAHA REPORT, *supra* note 186, at 8.

202. Margot J. Pollans, *Legalizing Inundations: How Law Produces Exposure and Undermines Democracy* (draft on file with author) (describing how MAHA and related health care movements place labor burdens on cis hetero women).

203. Adrian Daub & Moira Donegan (hosts), *Birth Control Misinformation*, IN BED WITH THE RIGHT, Jan. 21, 2026, <https://podscan.fm/player/in-bed-with-the-right/episode-117-birth-control-misinformation>.

204. STRATEGY REPORT: MAKING OUR CHILDREN HEALTHY AGAIN (Sept. 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/09/The-MAHA-Strategy-WH.pdf>.

205. Columbia College of Dental Medicine, *CDM Researcher Finds Link Between Oral Health and Dementia* (Feb. 15, 2024), <https://www.dental.columbia.edu/news/cdm-researcher-finds-link-between-oral-health-and-dementia>.

206. Samuel R. Bagenstos, *Health Populism, Health Freedom, and State Power* (July 3, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5337698](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5337698).

207. MAHA Mom Coalition, *The Trunk of a Nation: Protecting Families, Defending Freedom, Securing the Future*, <https://www.maha-mom-coalition.com/the-trunk-of-a-nation> (last visited Jan. 21, 2026).

208. Savannah Kuchar, *“Sometimes Love Leans Saying No”: RFK Jr. on Gender-Affirming Care for Minors*, USA TODAY (Jan. 30, 2025), <https://www.usatoday.com/story/news/politics/2025/01/30/rfk-jr-gender-affirming-care-minors/780529880071>.

209. For one take on the concerns of immunocompromised children, see “*Vaccination Is a Form of Kindness: Mom of Immunocompromised Child Slams RFK Jr’s Anti-Vaccine Agenda*,” MSNOW (Sept. 5, 2025), <https://www.ms.now/the-weekend-primetime/watch/vaccination-is-a-form-of-kindness-mom-of-immunocompromised-child-slams-rfk-jr-s-anti-vaccine-agenda-247031365696>.

210. Bagenstos, *supra* note 206.

## VIII. MAHA and Ingroups of the New Right

*This section was authored by Sarah Matsumoto, Associate Professor of Clinical Law, University of Colorado Law School.*

In his 2008 TED Talk, social psychologist Jonathan Haidt outlined research about the moral foundations of human behavior and how these five foundations mapped onto conservative and liberal political ideologies.<sup>211</sup> These foundations include care/harm, fairness/reciprocity, ingroup/loyalty, authority/respect, and purity/sanctity.<sup>212</sup> Haidt explained that across cultures and countries, liberal-identifying people tended to prioritize care/harm and fairness/reciprocity much higher than the other three foundations, while conservative-identifying people tended to hold a more evenly distributed prioritization of all five foundations, with a sharp increase in the importance of ingroup/loyalty, authority/respect, and purity/sanctity.<sup>213</sup>

Highlighting this increase, Haidt observed that while every country and culture tended to agree that care/harm and fairness/reciprocity were important, the “moral arguments within cultures are especially about ingroup, authority, and purity.”<sup>214</sup> To the last foundation (purity/sanctity), Haidt offered a quick point about how it manifests on both the political right and political left: while the political right may moralize about sexuality, in his view, the political left is increasingly moralizing food with “ideas about what you’re willing to touch or put into your body.”<sup>215</sup>

Haidt’s understanding of the dimension of purity as motivating the political left in the United States rang true when he delivered his TED Talk amidst rising concerns about genetically engineered foods and a 2007 statement from Barack Obama about food labeling (“Americans have a right to know what they’re buying[.]” said the candidate during a campaign stop in Iowa).<sup>216</sup> But along with so much in the political landscape, the ability to successfully discern a person’s political ideology based on any stated ideas about food has become more complicated.

Two decades ago, expressed skepticism about “Big Ag” and food additives more reliably signaled a left-leaning speaker or Democrat; in 2025, these statements could just as easily come from a two- or three-time Trump voter.<sup>217</sup> When the aperture is widened to define “purity” to include health and wellness values in addition to food,

the vision that forms in the viewfinder is of a growing political coalition unified in its rejection of establishment institutions and embrace of a “crunchy” lifestyle.<sup>218</sup> This, of course, is MAHA.

MAHA, or “Make America Healthy Again,” is at once a hashtag, a campaign slogan, and a mini-movement within American culture and politics. Its origins can be traced to a rebrand of Robert F. Kennedy Jr.’s presidential campaign—he attempted to run as a Democrat—converted into an endorsement of President Trump’s campaign.<sup>219</sup> Kennedy, an environmental lawyer, had been gaining a following among people who shared his opposition to the influence of large pharmaceutical and agricultural corporations<sup>220</sup> or were searching for a viable alternative to the two main party candidates.<sup>221</sup> While some MAHA views, like support for removing or reducing coloring in food, offer fairly widespread appeal, others wade directly into conspiracy theory waters.<sup>222</sup>

After Trump won reelection in 2024, MAHA followers were optimistic that Kennedy would play a prominent role in his Administration and elevate the issues that they felt mattered most. MAHA’s hopes have been partially satisfied; Kennedy was confirmed as Trump’s Secretary of Health and Human Services.<sup>223</sup> The White House’s recent MAHA Report identified a number of areas of concern affecting the health of America’s children (at a 30,000-foot view), including: so-called ultra-processed foods, environmental chemical exposure, childhood behavior in the digital age, and overmedicalization.<sup>224</sup>

Notably, the report excluded or deemphasized certain focal points of the official MAHA Political Action Committee, including advancing regenerative agriculture and protecting natural habitats.<sup>225</sup> Critics of MAHA and Kennedy, including the conservative-leaning Cato Institute, have not been shy in pointing out the report’s inaccurate statements and errors,<sup>226</sup> or the MAHA Commission’s subsequent Strategy Report as having a friendly eye toward industry.<sup>227</sup>

211. Jonathan Haidt, *The Moral Roots of Liberals and Conservatives*, TED TALK (Mar. 2008), [https://www.ted.com/talks/jonathan\\_haidt\\_the\\_moral\\_roots\\_of\\_liberals\\_and\\_conservatives](https://www.ted.com/talks/jonathan_haidt_the_moral_roots_of_liberals_and_conservatives).

212. Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions That Liberals May Not Recognize*, 20 SOC. JUST. RSCH. 98, 99 (2007).

213. Haidt, *supra* note 211, at 8:20-9:15.

214. *Id.* at 9:35-9:40.

215. *Id.* at 7:35-7:38.

216. April Fulton, *Politics Heating Up Over Labeling Genetically Modified Foods*, THE SALT (NPR) (Oct. 17, 2011), <https://www.npr.org/sections/thesalt/2011/10/17/141414866/politics-heating-up-over-labeling-gmo-foods>.

217. Ruth Graham, *Robert F. Kennedy, Jr. Has an Excited Fan Club: Conservative Christian Moms*, N.Y. TIMES (Jan. 28, 2025), <https://www.nytimes.com/2025/01/28/us/rfk-jr-fans-christian-parents.html?searchResultPosition=1>.

218. *Id.*

219. *Id.*

220. *Id.*

221. Adrian Carrasquillo, *RFK Jr Voters on “Frustrating” Suspension of Campaign: “He’s Playing Politics”*, GUARDIAN (Aug. 23, 2024), <https://www.theguardian.com/us-news/article/2024/aug/23/rfk-suspends-campaign-supporters>.

222. Maya Goldman, *How RFK Jr.’s MAHA Movement Could Shake Up Public Health*, AXIOS (Nov. 14, 2024), <https://www.axios.com/2024/11/14/maha-movement-federal-health-agencies>.

223. Press Release, U.S. Dept. of Health and Human Services, Robert F. Kennedy, Jr. Sworn in as 26th Secretary at HHS, President Trump Signs Executive Order to Make America Healthy Again (Feb. 13, 2025), <https://www.hhs.gov/press-room/eo-maha.html>.

224. THE MAHA REPORT, *supra* note 186, at 20-66.

225. MAHA Political Action Committee, *Key Issues and Priorities*, <https://www.maha.vote/> (listing “Advancing Regenerative Agriculture” and “Protecting Natural Habitats” as two of five key priorities).

226. Jeffrey A. Singer et al., *Premade Conclusion, Post-Hoc Data: The Problem With the MAHA Report*, CATO INSTITUTE (May 28, 2025), <https://www.cato.org/blog/premade-conclusions-post-hoc-data-problem-maha-report>.

227. Rachel Shin, *We Got a Draft MAHA Report. It’s Quite Industry-Friendly*, POLITICO (Aug. 18, 2025), <https://www.politico.com/newsletters/weekly-agriculture/2025/08/18/we-got-a-draft-maha-report-its-quite-industry-friendly-00513281>.

MAHA devotees have found ways to connect with one another in furtherance of their health and wellness priorities, and in doing so, offer a surface-level illustration of Haidt’s moral foundation of both “purity” and “ingroup.” According to Haidt and his colleagues, the “ingroup” foundation evolved from living in kin-based groups where dissent and criticism of the group are immoral.<sup>228</sup> Rituals that reinforce or strengthen group solidarity, like reciting the Pledge of Allegiance, are considered virtuous.<sup>229</sup>

The *New York Times* recently profiled Aberlin Springs, a MAHA “agri-community” in southwest Ohio.<sup>230</sup> Aberlin Springs attracts homesteaders with a vision of “familial utopia,” in which a series of families live in homes surrounding a shared, working farm.<sup>231</sup> In keeping with the nuanced politics of MAHA more broadly, Aberlin Springs residents include married couples with children, single women, and LGBTQ families.<sup>232</sup> As the *Times* reports, political signs are prohibited, and neighbors are instead drawn together by their shared interests in healthy food and the feeling of being part of an extended community.<sup>233</sup> Consistent with Haidt’s articulation of the ingroup/loyalty foundation, group selection here is by unrelated people with a shared adherence to certain ideas and ideals. Rituals, like the required participation in a Community Supported Agriculture subscription, reinforce the group’s chosen identity.<sup>234</sup>

Is there anything new or unique about MAHA as an ingroup that has united the political left and political right? Recent cracks in MAHA’s foundation may reveal the answer to that question or whether MAHA can even tell us anything new about modern partisan politics. MAHA supporters (including those at the Aberlin Springs community) disagree about vaccines.<sup>235</sup> Further, many of the deregulatory actions undertaken or promoted by the Trump Administration are in direct conflict with MAHA goals of a healthy environment and sustainable food systems.

Some MAHA supporters have been disappointed by Kennedy’s relative silence on pesticide use, especially given his past crusade against glyphosate.<sup>236</sup> U.S. Department of Agriculture Secretary Brooke Rollins cancelled more than one billion dollars in funding that would have supported food programs benefitting regenerative and organic

farms.<sup>237</sup> Although more frequent and intense extreme weather events can shorten growing seasons and cause crop and livestock loss, the Trump Administration is actively seeking to remove any efforts to mitigate climate change or better prepare for its negative consequences, including consequences for domestic agriculture.<sup>238</sup>

President Trump announced that the United States is withdrawing from the Paris Agreement and the U.N. Framework Convention on Climate Change.<sup>239</sup> While MAHA favors action to protect against exposure to microplastics and polyfluoroalkyl substances (PFAS), the Administration terminated EPA and National Institutes of Health grants supporting research in those areas.<sup>240</sup> And MAGA backlash to MAHA was recently ignited when Trump nominated wellness influencer Casey Means as surgeon general.<sup>241</sup>

The internal conflict within MAHA and between MAHA and the Trump Administration shows the strain that this new ingroup is experiencing as it is confronted with dissent from within and disappointment stemming from perceived betrayals by its leadership. It is possible that these strains will cause MAHA to splinter into factions. Some members may search for a new ingroup, although many traditionally left-leaning MAHA supporters would likely feel less welcome in other growing movements on the political right.

In rural Arkansas, another group of homesteaders is hard at work building residences and a community center. The Return to the Land movement seeks to build a community of only white, heterosexual people; its potential residents must answer questions about ancestral heritage, and its founders openly espouse discriminatory, white nationalist views.<sup>242</sup> In the Pacific Northwest, a region with a long history of far-right enclaves, the Greater Idaho movement<sup>243</sup> and American Redoubt<sup>244</sup> promote communities united less overtly by race and more by a rejection of government, traditional Christian values, and gun ownership. Former Washington state representative Matt Shea sought to sever

228. Haidt & Graham, *supra* note 212, at 105.

229. *Id.*

230. Caroline Kitchener, *This Ohio Farm Community Is a Mecca for the “MAHA Mom,”* N.Y. TIMES (Aug. 11, 2025), <https://www.nytimes.com/2025/08/11/us/politics/ohio-maha-moms-farms.html>.

231. *Id.*

232. *Id.* Although, notably, there are other limiting factors that influence the community’s membership. Even though Aberlin Springs’ founder insists that everyone is welcome, the price tag—the *Times* lists home sale prices ranging from \$525,000 to \$1.5M, and residents must pay \$850 to participate in the Community Supported Agriculture program—is doing some heavy lifting in selecting who can join the ingroup and who is left out.

233. *Id.*

234. *Id.*

235. *Id.*

236. Liz Essley White & Natalie Andrews, *The Turmoil Inside MAHA Is About More Than Just Vaccines*, WALL STREET J. (Sept. 1, 2025), <https://www.wsj.com/politics/policy/maha-kennedy-vaccines-hhs-cdc-f5c0a6a8>.

237. Lisa Held, *The MAHA Movement’s Climate Conundrum*, CIVIL EATS (Aug. 12, 2025), <https://civileats.com/2025/08/12/the-maha-movements-climate-conundrum/>.

238. *Id.*

239. Somini Sengupta & Lisa Friedman, *Trump Pulls Out of Global Climate Treaty*, N.Y. TIMES (Jan. 7, 2026), <https://www.nytimes.com/2026/01/07/climate/trump-un-climate-treaty.html>.

240. Will Stone, *Trump Administration Actions Contradict MAHA Rhetoric on Toxic Chemicals*, SHOTS (NPR) (June 18, 2025), <https://www.npr.org/sections/shots-health-news/2025/06/18/nx-s1-5436960/maha-rfk-toxic-chemicals-trump-hhs-epa>.

241. Sophie Gardner, *The MAGA Backlash to Trump’s MAHA Surgeon General Pick*, POLITICO (May 8, 2025), <https://www.politico.com/news/2025/05/08/the-maga-backlash-to-trumps-maha-surgeon-general-pick-00336417>.

242. Debra Kamin, *The Founders of This New Development Say You Must Be White to Live There*, N.Y. TIMES (Aug. 19, 2025), <https://www.nytimes.com/2025/08/19/realestate/arkansas-white-housing-return-to-land.html>.

243. Leah Sottile, *Oregon’s Greater Idaho Movement Echoes a Long History of Racism in the Region*, HIGH COUNTRY NEWS (Aug. 1, 2023), <https://www.hcn.org/issues/55-8/north-extremism-oregons-greater-idaho-movement-echoes-a-long-history-of-racism-in-the-region/>.

244. Heath Druzin (host), *The 51st State*, EXTREMELY AMERICAN (Boise State Public Radio & NPR Feb. 9, 2022), <https://www.npr.org/2024/05/23/1250558724/extremely-american-redoubt-alex-baarron-guns-survivalist>.

the state at the Cascade Mountains and form a new state, Liberty, which would be governed by biblical law.<sup>245</sup>

Members of MAHA, Return to the Land, Greater Idaho, and American Redoubt all value some degree of ingroup loyalty and group selection centered around specific values. But with three years remaining in the second Trump Administration, it is possible that the gap between MAHA's expressed interests and the Administration's environmental and food-related policies will continue to widen. Whether MAHA can exist beyond Trump 2.0 and maintain its political influence as a movement will depend, at least in part, on the ability of its members to decide that loyalty to the group—and the group's values—transcends support for a specific political figure or party.

## IX. Is the MAHA Report's Food Focus an "Aha Moment" for Food Systems and Environmental Progress?

*This section was authored by Laurie Jamile Beyranevand, Pescosolido Professor of Food and Agricultural Law and Policy, Vermont Law School.*

While there are deep divides across the United States on nearly every issue, one thing that nearly everyone agrees on is that food should be safe.<sup>246</sup> This is particularly true when it comes to what we feed our children.<sup>247</sup> Over the past year, the Trump Administration has issued reports, proposed regulations, and taken bold action on food safety challenges that have plagued public health advocates for decades. Within a few weeks of taking office, President Trump issued an executive order forming the Make America Healthy Again Commission to study and make policy recommendations on the "childhood chronic disease crisis."<sup>248</sup>

Portions of the May 2025 MAHA report outline some ambitious goals for food safety that could radically transform the U.S. food system.<sup>249</sup> In short, the MAHA Commission imagines a food system that limits our consumption of additives, chemicals, and ultra-processed foods (UPFs), which are closely linked with our industrialized agricultural system. While the report and the policies that have come from it are largely focused on public health, the Administration's stated priorities present a critical opportunity—to find bipartisan support and agreement

on major food system challenges that impact public health beyond nutrition and diet-related disease.

Historically, the environmental movement has largely overlooked the food system—for example, food was only recently added to the agenda at the Conference of the Parties (COP28) to the United Nations' Framework Convention on Climate Change. Many environmentalists have long considered food system policy as adjacent rather than integral to climate, biodiversity, and pollution-related goals. Only recently have environmental advocates truly realized the importance of engaging in discussions over the Farm Bill, arguably a major environmental policy.

The MAHA report, its stated goals related to food safety, and the Administration's actions in response offer an opportunity for systems change with impacts far beyond nutrition, particularly since most Americans support more government intervention to ensure food safety.<sup>250</sup> The Administration's recent efforts offer a compelling example of how one seemingly narrow issue—a policy shift away from ultra-processed foods—could yield not only significant public health benefits, but major environmental ones as well.

UPFs are food products that include ultra-processed grains, sugars, and fats. They are high in additives and synthetic ingredients and use a significant amount of plastics from farm to plate.<sup>251</sup> UPFs are central to the modern global food economy—they're cheap to produce and shelf-stable, which makes them easy to transport and store. Currently, UPFs account for more than half of caloric consumption in the United States.<sup>252</sup> The production of these ubiquitous foods results in significant environmental harms, including threats to agrobiodiversity<sup>253</sup> due to monocropping and pesticide use, increased use of plastics and other packaging materials<sup>254</sup> and the resulting waste,<sup>255</sup> and a large percentage of food-related energy use and fossil fuel emissions.<sup>256</sup> These environmental harms compound the diet-related harms associated with UPFs and are cause for concern given that UPFs are unnecessary in our diets.

Essentially, UPFs are designed for shelf stability, palatability, and scale—not for health or sustainability. And yet, there has been little discussion of the significant connection between the proliferation of UPFs in the United

245. Chad Sokol, *Rep. Matt Shea Takes Credit, Criticism for Document Titled "Biblical Basis for War,"* SPOKESMAN-REVIEW (Oct. 26, 2018), <https://www.spokesman.com/stories/2018/oct/26/rep-matt-shea-takes-credit-criticism-for-document-1>.

246. Ipsos, *Ipsos Data Drops: Unpacking U.S. Attitudes on Food, Health, and Regulation* (July 31, 2025), <https://www.ipsos.com/en-us/ipsos-data-drops-unpacking-us-attitudes-food-health-and-regulation> (last visited Jan. 20, 2026).

247. Stephen W. Patrick et al., *Voter Support for Policies Associated With Child Health as National Campaign Priorities*, 5 JAMA HEALTH FORUM 1, 2 (2024).

248. Exec. Order No. 16212 (2025).

249. THE MAHA REPORT, *supra* note 186, at 3.

250. Ipsos, *supra* note 246.

251. Joe Yates et al., *A Toxic Relationship: Ultra-Processed Foods and Plastics*, 20 GLOBALIZATION & HEALTH 1, 2 (2024) ("Approximately 83% of flexible food packaging and 45% of all rigid food packaging is made from plastics, with UPFs commonly encased in these materials.")

252. John Sanford, *Ultra Processed Food: Five Things to Know*, STANFORD MEDICINE: NEWS CTR. (July 15, 2025), <https://med.stanford.edu/news/insights/2025/07/ultra-processed-food-five-things-to-know.html>.

253. See generally Fernanda Helena Marrocos Leite et al., *Ultra-Processed Foods Should Be Central to Global Food Systems Dialogue and Action on Biodiversity*, 7 BMJ GLOBAL HEALTH 1 (2022).

254. Yates et al., *supra* note 251.

255. Laila Benkrima, *Ultra-Processed Foods Are Not Only Bad for Our Bodies, Their Production Damages Our Environments*, THE CONVERSATION (Sept. 24, 2023), <https://theconversation.com/ultra-processed-foods-are-not-only-bad-for-our-bodies-their-production-damages-our-environments-211815>.

256. Emine Merve Ekici et al., *Association Between Ultra-Processed Food Consumption, Carbon Footprint Awareness and Healthy Eating Behaviors in Adults: A Cross-Sectional Study*, 25 BMC PUBLIC HEALTH 1, 2 (2025).

States, the lack of regulation to address them, and the resulting environmental harms in mainstream environmental discourse. Moreover, for the countries attempting to regulate UPFs, few have addressed the issue from a systems perspective, which is needed to account for both the harmful production practices<sup>257</sup> associated with them and the public health concerns.

The MAHA report calls for tighter regulations on UPFs through clearer labeling, advertising restrictions, and changes to procurement policy. It also acknowledges several other issues that contribute to the proliferation of UPFs, like the consolidation of the food system, crop insurance targeted solely at commodity crops rather than specialty crops (fresh produce), and the industry's heavy reliance on hazardous substances. Most recently, the *2025-2030 Dietary Guidelines for Americans* (DGAs), which direct federal procurement decisions and major nutrition programs in the United States, stated that Americans should “eat real food” that is, “whole nutrient dense foods” rather than highly processed ones.<sup>258</sup> While many have expressed concerns about the new DGAs' heavy emphasis on protein, the resounding pushback against highly processed foods has the potential to impact not only eating patterns, but production methods.

If policymakers take the next step and begin to consider a systems approach to regulating UPFs that goes beyond labeling, marketing, and procurement and start to account for inputs and production practices, we could realize significant environmental outcomes while providing tremendous public health benefits. For one, we could see a dramatic increase in financial support through programs and subsidies for specialty crops, also commonly known as fresh produce, nuts, and floriculture. This sector only recently began to receive federal support through farm bill programs and receives far less financial support than the commodity sector.<sup>259</sup> Support for specialty crops would in turn improve biodiversity, create opportunities for strong local food economies, and increase the potential for healthy soil and water outcomes.

It's worth considering what has made these issues so palatable across the aisle, and how can we use that momentum to drive larger systems change? Many of these seemingly narrow food issues represent opportunities for tangible environmental gains because they relate to something most Americans can agree on—the ability to eat and feed our children safe, nutritious food. Food has often been siloed within smaller more specialized movements and never fully integrated into climate or environmental agendas, but engaging with recent efforts to “get back to

basics” and create healthier, safer food requires radical transformation of the system that produces food.

This represents a tremendous environmental opportunity. While the environmental movement has made strides in addressing the global food system in relation to industrial animal agriculture and deforestation, it has mostly neglected the highly industrialized food products that fill grocery shelves, fuel chronic disease, and contribute significantly to environmental degradation. Aspects of current federal food policy efforts offer an opportunity for strategic alignment on issues that people on both sides of the aisle not only agree on, but feel passionate about.

## X. Norms All the Way Down

*This section was authored by Josh Galperin, Associate Professor of Law, Elisabeth Haub School of Law at Pace University.*

We can finally take international law seriously. While much international law stands merely as a symbol of international norms and falls short of enforceable law, now domestic law, in the United States at least, has also ceased to have the force of law, putting the two on equal footing.

If you disagree with my caricature of international law, don't fret. I don't really know anything about it. I'm not in a position to make a serious assessment. Indeed, these are the first words I have ever written about international law. If we are to believe AI (and we emphatically should not), GPT 4o says I have never used the word “international” or the phrase “international law” in any of my published work, while Gemini 2.5 Pro says I have used these terms in combination 121 times, but then gives examples from two articles and a book chapter that I didn't write and, in fact, none of the three exist. Given that GPT's response fits with the hook I want for this post, I will accept it as incontrovertible fact. Not only have I never written about international law, I have never even used the words “international law.”

The main reason I've never written about international law is there are so many amazing scholars writing in the field that I've always felt a bit intimidated (and unneeded).<sup>260</sup> I am dipping my toes into international law today to, admittedly, set up a straw man. In many respects, international law is real, enforceable law. International trade and investor-state dispute settlement mechanisms are a notable example, with particular relevance for environ-

257. Benjamin Wood et al., *Using a Systems Thinking Approach to Map the Rise of Ultra-Processed Foods in Population Diets*, 26 *OBESITY REVIEWS* 2 (2025).

258. U.S. DEPT. OF HEALTH & HUMAN SVS. & U.S. DEPT. OF AGRIC., 2025-2030 DIETARY GUIDELINES FOR AMERICANS 1 (2026), <https://cdn.realfood.gov/DGA.pdf>.

259. RENEE JOHNSON, CONG. RESEARCH SERV., R42771, FRUITS, VEGETABLES, AND OTHER SPECIALTY CROPS: SELECTED FARM BILL AND FEDERAL PROGRAMS (July 11, 2014), <https://www.congress.gov/crs-product/R42771#:~:text=U.S.%20farmers%20grow%20more%20than,both%20mandatory%20and%20discretionary%20funding>.

260. See, e.g., Alexander K.A. Greenawalt, PACE UNIVERSITY, <https://www.pace.edu/profile/alexander-k-greenawalt> (last visited Jan. 7, 2026); Camila Bustos, PACE UNIVERSITY, <https://www.pace.edu/profile/camila-bustos> (last visited Jan. 7, 2026); Smita Narula, PACE UNIVERSITY, <https://www.pace.edu/profile/smita-narula> (last visited Jan. 7, 2026); Thomas M. McDonnell, PACE UNIVERSITY, <https://www.pace.edu/profile/thomas-m-mcdonnell> (last visited Jan. 7, 2026); Nicholas A. Robinson, PACE UNIVERSITY, <https://www.pace.edu/profile/nicholas-robinson> (last visited Jan. 7, 2026); James R. May, WASHBURN UNIVERSITY LAW, <https://www.washburnlaw.edu/our-faculty/james-may> (last visited Jan. 7, 2026); *Recent Scholarship*, REBECCA BRATSPIES, <https://www.rebeccabratspies.com/scholarship> (last visited Jan. 7, 2026); Cinnamon P. Carlarne, ALBANY LAW, <https://www.albanylaw.edu/faculty/faculty-directory/cinnamon-p-carlarne> (last visited Jan. 7, 2026).

mental law.<sup>261</sup> In other respects, international law is softer.<sup>262</sup> In the instances where international law is not strictly enforceable, international law is nevertheless an important institution for developing shared principles and norms.

I will return to the normative capacity of international law, but before I do, I should add that another reason I've never written about it is my general sense, however uninformed, that for all international law offers, it does not have the same institutions or expectations for enforcement as domestic law. As Dean Frederic Kirgis wrote decades ago, the fact that international law is fundamentally different from domestic law has made it the subject of "tiresome" skepticism.<sup>263</sup> But things are changing. I, for one, am coming around to the importance of international law.

You might think I am coming around only in the wake of the ICJ's Advisory Opinion on the Obligations of States in Respect of Climate Change.<sup>264</sup> Perhaps I have been persuaded that international law is flexing its muscles and taking up domestic law's slack regarding climate change mitigation. I do think this is a watershed development. But that's not it.

The reason I'm starting to pay attention to international law is that domestic law no longer carries the weight it once did. Where I might have dismissed international law claiming its value was rooted only in its norm-building capacity, that distinction no longer works because domestic law is now also basically unenforceable.

The most precise indictment of international law as not "real" law is that international law is often voluntary. An international body like the United Nations can legislate positive legal rules—something as plain and direct as "the sentence of death shall only be imposed for the most serious crimes."<sup>265</sup> But, with the arguable exceptions of *jus cogens* and general principles of law, a state can escape enforcement simply by disclaiming its responsibility under the law.<sup>266</sup> *You think we're violating an international treaty? Well then, we are no longer party to the treaty.* Needless to say, this jurisdictional flexibility is not historically available under domestic law. *You think I was driving too fast? Well then, I am no longer a party to your speed limit.* Unlikely.

In this vein, John Austin famously described international law as law "improperly so called" because interna-

tional law merely resembles positive law.<sup>267</sup> It cannot be law, Austin argued, because, as sovereigns, states do not have legal power over one another in the same way a state has power over its people.<sup>268</sup> In international law, we may only be speaking about "rules set and enforced by *mere opinion*," that is, by the opinions and sentiments held or felt by an indeterminate body of men in regard to human conduct.<sup>269</sup> Austin goes on to critique Fyoder von Martens for even using the term international law. Austin contended that had von Martens "named that department of the science '*positive international morality*,' the name would have hit its import with perfect precision."<sup>270</sup>

Austin's view is not the last word on this subject. Written in 1885, it was closer to the first and arguments about the realness of law are, in and of themselves, not very helpful.<sup>271</sup> What is important is the focus on moral- or value-based agreement as an important and distinctive aspect of governance. Austin devalues it.

So had I. The voluntariness that permeates international law is not limited only to international dealings, of course. One might find a similar scheme in voluntary private governance regimes. For instance, in my article *Governing Environmental Governance*, I wrote about the Forest Stewardship Council (FSC), which is a private, multi-lateral, club that sets standards for forest management and allows members to label and market their products as FSC-certified.<sup>272</sup>

FSC has a mechanism to handle complaints alleging that participants have not met their obligations. It likewise has an enforcement mechanism when there is a violation. All very well until the club attempts to enforce an apparent violation, as was the case in 2023, when the recalcitrant member simply terminated its affiliation with FSC.<sup>273</sup> After all, FSC establishes "a policy of shared values."<sup>274</sup>

Just because a rule is voluntary does not make it valueless. Some policies *follow* norms and depend on a priori collective agreement.<sup>275</sup> Other policies drive norms, helping to establish and support progress. The ICJ's climate change opinion may not bind states, but as Judge Dire Tladi implied in his Declaration accompanying the Opinion, the constructive, generative effects of a robust and unanimous advisory opinion are central to the Advisory Opinion's value.<sup>276</sup>

Here in the United States, our law no longer even rises to the level of shared values, let alone binding and enforce-

261. Frederic L. Kirgis, *Enforcing International Law*, 1 AM. SOC. OF INT'L LAW 1 (Jan. 22, 1996), <https://asil.org/insights/volume-1-issue-1/>; *Greening Global Trade*, YALE SCHOOL OF THE ENVIRONMENT (Sept. 6, 2023), <https://environment.yale.edu/news/article/greening-global-trade/>; *Primer on International Investment Treaties and Investor-State Dispute Settlement*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (Jan. 2022), <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement>.

262. See Arnold N. Pronto, *Understanding the Hard/Soft Distinction in International Law*, 48 VAND. J. TRANSNAT'L L. 941 (2015).

263. Kirgis, *supra* note 261.

264. See generally Obligations of States in Respect of Climate Change, *supra* note 159 (ruling that states have a legal duty to address and mitigate climate change).

265. G.A. Res. 2200A (XXI), Pt. III, Art. 6(2), at 174.

266. See Rep. of the Int'l L. Comm'n, 71st Sess., U.N. Doc. A/74/10 (2019); see Rep. of the Int'l L. Comm'n, 72d Sess., U.N. Doc. A/76/10 (2021).

267. JOHN AUSTIN, LECTURES ON JURISPRUDENCE; OR, THE PHILOSOPHY OF POSITIVE LAW 79 (Sarah Austin, ed., 1st ed., 1885).

268. *See id.*

269. *Id.* at 87.

270. *Id.* at 173.

271. *See id.*

272. Joshua Galperin, *Governing Private Governance*, 56 ARIZ. ST. L.J. 765, 810 (2024).

273. *FSC Will Not Pursue Mediation With Harita Group*, FSC (Feb. 7, 2023), <https://fsc.org/en/newscentre/integrity-and-disputes/fsc-will-not-pursue-mediation-with-harita-group>.

274. *Id.*

275. See G.A. Res. 2200A (XXI), *supra* note 265.

276. Obligations of States in Respect of Climate Change, *supra* note 159 (Declaration of Judge Tladi); see Camila Bustos, *From Jim Crow to the Climate Crisis*, *supra* Part VI.

able commands. And the softening of domestic law is happening across sources of positive law. In late August, for instance, the Trump Administration issued an executive order directing the Department of Justice to prioritize prosecuting people who burn American flags.<sup>277</sup> Yet *Texas v. Johnson*, U.S. Supreme Court precedent directly on point, holds that flag burning is protected speech under the First Amendment.<sup>278</sup>

Perhaps, you might say, the executive order is tailored to fit within the small gaps, such as incitement of violence, that remain in the wake of *Texas v. Johnson*, or that a president has the authority to test the boundaries of law and seek opportunities for the Supreme Court to reevaluate past precedent. Both would be plausible rebuttals, had the Vice President not explicitly said courts may not second-guess the president's power.<sup>279</sup> And in any case, failing to abide by what is apparently merely a norm of protecting speech and adhering to judicial precedent is hardly the only example of the Trump Administration's disinterest in judicial orders.<sup>280</sup>

In early September, after a court ruled that a U.S. president may not use the military to enforce domestic law in American cities, President Trump's first response was to announce he was readying to send troops into Chicago.<sup>281</sup> In an emergency order, the Supreme Court held that the president's use of the National Guard in Chicago violated the law.<sup>282</sup> That same day, the White House asserted that the ruling did nothing to interfere with the use of troops in Chicago.<sup>283</sup> This is the softening of Article III, of judicial power. And for what it is worth, this is not just my critique from the left. Justices Brett Kavanaugh and Neil Gorsuch recently wrote to chastise federal judges whom they believed were "defy[ing]" Supreme Court precedent.<sup>284</sup>

Then, there is the softening of statutory law. Where once Congress made laws that bound the public and the government alike, today the Trump Administration, at least, merely takes Congress' statutes (and by implication, Article I of the U.S. Constitution) as suggestions. There are now multiple examples of President Trump firing federal offi-

cial despite statutory provisions providing those officials tenure protection.<sup>285</sup> Worse still, Congress has established a process for asylum seekers, requiring a review of certain applications, which Trump's government has refused to heed.<sup>286</sup> Congress directs spending on all types of issues, including environmental concerns, and the government refuses to distribute the money.<sup>287</sup> The list of ways federal statutory law is disintegrating continues.

We know that Congress makes law (which the president must follow) and the courts interpret law (orders of which the president must follow) because that's the structure the Constitution establishes.<sup>288</sup> But, no surprise here, even the Constitution is no longer law properly so-called. When a journalist asked President Trump if he was bound by the Constitution, specifically the Due Process Clause, his response was equivocal. "I don't know," he replied.<sup>289</sup>

And why should he know? The Supreme Court has been much harsher with lower courts trying to constrain the president's—erm—equalization of international law, than it has been with Trump himself.<sup>290</sup> So, we can blame President Trump's ego, foolishness, or simple disinterest in our constitutional system; we can blame the Supreme Court for wielding a partisan, ideological cudgel; or we could blame Congress for bowing down to a supreme leader rather than defending its own constitutional authority.

It doesn't really matter where we place the blame because in any case, it solidifies the collapse of enforceable domestic law and in turn it puts international law on a more equal footing.<sup>291</sup> By turning domestic law into voluntary standards, current American politics have undercut the criticism that international law is only norms. Now, it's all norms all the way down.

This is obviously a condemnation of the state of partisan politics and judging in the United States. It is far from the first such critique, so what's the point? The point is that folks like me, who in the past might have looked at something like last summer's ICJ Advisory Opinion, smiled, and then forgotten about it, now know we should not forget about it. Law is not what it once was, but that's not all that matters. What also matters is the persuasiveness of reasoning, the generative capacity of articulation, and the ability to change minds, build norms, and in turn build power.

277. Exec. Order No. 13341, 90 Fed. Reg. 42127 (Aug. 25, 2025).

278. *Texas v. Johnson*, 491 U.S. 397, 398 (1989).

279. Ian Ward, *There's No Need to Guess. JD Vance Is Ready to Ignore the Courts.*, POLITICO, Feb. 11, 2025, at <https://www.politico.com/news/magazine/2025/02/11/jd-vance-trump-executive-power-supreme-court-00203537>.

280. Alan Feuer, *Judge Accuses Government of "Willful and Bad Faith" Stonewalling in Deportation Case*, N.Y. TIMES (Apr. 22, 2025), at [https://www.nytimes.com/2025/04/22/us/politics/trump-justice-department-abrego-garcia-el-salvador.html?unlocked\\_article\\_code=1.D1A.Nx1D.3TMuSznCEQe6&smid=url-share](https://www.nytimes.com/2025/04/22/us/politics/trump-justice-department-abrego-garcia-el-salvador.html?unlocked_article_code=1.D1A.Nx1D.3TMuSznCEQe6&smid=url-share).

281. Erica L. Green, *President's Reference to Sending Troops to Chicago Draws Illinois Leaders' Ire*, N.Y. TIMES (Oct. 22, 2025), at [https://www.nytimes.com/live/2025/09/02/us/trump-news?unlocked\\_article\\_code=1.D1A.k9O1.LUCeibgymrY3&smid=url-share](https://www.nytimes.com/live/2025/09/02/us/trump-news?unlocked_article_code=1.D1A.k9O1.LUCeibgymrY3&smid=url-share).

282. *Trump v. Illinois*, No. 25A443, 607 U.S. \_\_\_\_ (2025).

283. Ann E. Marimow, *Supreme Court Refuses to Allow Trump to Deploy National Guard in Chicago*, N.Y. TIMES (Dec. 23, 2025), [https://www.nytimes.com/2025/12/23/us/politics/supreme-court-national-guard-chicago.html?unlocked\\_article\\_code=1.D1A.PhTU.LSquBg0QISv&smid=url-share](https://www.nytimes.com/2025/12/23/us/politics/supreme-court-national-guard-chicago.html?unlocked_article_code=1.D1A.PhTU.LSquBg0QISv&smid=url-share).

284. John Fritze, *Gorsuch and Kavanaugh Warn Lower Court Judges in Trump Cases*, CNN (Aug. 25, 2025), <https://www.cnn.com/2025/08/25/politics/supreme-court-justices-trump-lower-court>.

285. Andrea Hsu, *Trump Fires EEOC and Labor Board Officials, Setting Up Legal Fight*, NPR (Jan. 28, 2025), <https://www.npr.org/2025/01/28/nx-s1-5277103/nlr-trump-wilcox-abruzzo-democrats-labor>.

286. Kyle Cheney & Josh Gerstein, *Judge Bars Immediate Deportation of 8 Asylum Seekers Fleeing Torture, Rape, and Other Violence*, POLITICO, Feb. 20, 2025, at <https://www.politico.com/news/2025/02/20/asylum-seekers-trump-administration-021337>.

287. Chris Megerian, *Trump Orders Temporary Funding Freeze That Could Affect Trillions of Dollars*, PBS NEWS (Jan. 28, 2025), <https://www.pbs.org/newshour/politics/trump-orders-temporary-funding-freeze-that-could-affect-trillions-of-dollars>.

288. U.S. CONST. arts. I-III.

289. Amanda Terkel & Lawrence Hurley, *Trump Asked if He Has to "Uphold the Constitution," Says, "I Don't Know,"* NBC NEWS (May 4, 2025), <https://www.nbcnews.com/politics/trump-administration/trump-asked-uphold-constitution-says-dont-know-rcna204580>.

290. Fritze, *supra* note 284.

291. See Anthony Moffa, *International Climate Precedent as a Common-Law Tool*, *infra* Part XI.

Domestic law may have once had a more cutting edge, a more direct power to control behavior. But that is no longer the case. An argument, even my own straw-man argument, that international law is somehow lacking, no longer works. Both domestic and international law have normative weight, but the normative direction of domestic law is now signaling anarchy and distrust. International law is a beacon of partnership and progress. It may not control our behavior, but it can light a path forward in dark times.

## XI. International Climate Precedent as a Common-Law Tool

*This section was authored by Anthony Moffa, Professor of Law & Associate Dean for Innovation, University of Maine School of Law*

This past summer, the ICJ issued its long-awaited advisory opinion answering the question of whether governments have a legal obligation to deal with climate change.<sup>292</sup> The short, bold answer was “YES.”<sup>293</sup>

In pretty much every country that’s not the United States, the public reaction was intense<sup>294</sup> and even celebratory.<sup>295</sup> Here, the reaction in popular media was pretty much: “shrug”. The *New York Times* ran an article asking, does it even matter?<sup>296</sup> After much deliberation on the matter, in the end, I think so. And here’s why.

The majority of U.S. jurists and attorneys have been outright dismissive of international law for decades. The roots of that conspiracy go all the way to the top. The Supreme Court has been clear that it need not follow its international brethren, repeatedly minimizing the legal significance of the opinions of international tribunals. According to our highest court, such opinions on the meaning of treaties and international law obligations deserve only “respectful consideration”<sup>297</sup>—words worth about as much as the paper they were written on in 1998, and even less in today’s hyper-polarized domestic environment. In the early 2000s, the Supreme Court gave this “respect” to the ICJ, permitting states to disregard that court’s holdings.<sup>298</sup>

292. Obligations of States in Respect of Climate Change, *supra* note 159.

293. See *id.* ¶ 142 (“the duty to co-operate for the protection of the environment forms part of customary international law and can also serve as a guiding principle for the interpretation of other rules”).

294. See, e.g., Esme Stallard & Georgina Rannard, *Top UN Court Says Countries Can Sue Each Other Over Climate Change*, BBC (July 23, 2025), <https://www.bbc.com/news/articles/ce379k4v3pwo>.

295. See, e.g., Sera Sefeti, “We Were Heard”: *The Pacific Students Who Took Their Climate Fight to the ICJ—and Won*, GUARDIAN (July 24, 2025), <https://www.theguardian.com/world/2025/jul/25/pacific-students-who-won-climate-case-icj-international-court-of-justice-hague>.

296. Somini Sengupta, *Does the World Court’s Sweeping Climate Opinion Matter? Five Takeaways*, N.Y. TIMES (July 23, 2025), <https://www.nytimes.com/2025/07/23/climate/icj-world-court-climate-opinion-takeaways.html>.

297. *Breard v. Greene*, 523 U.S. 371, 375 (1998) (“we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such”).

298. See *Medellín v. Texas*, 552 U.S. 491 (2008) (holding that an ICJ opinion in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. United States of America)*, 2004 I.C.J. 12 (*Avena*) did not constrain domestic courts in denying petitioner’s claim).

In the most straightforward sense, then, it remains practically impossible to wield the ICJ opinion against any domestic government in the United States (federal, state, or municipal) to compel them to act on climate change. They can just go about their business and ignore the ICJ’s determination that they have an obligation to combat climate change.

Before just ending the analysis in that hopeless pit, I spent some time thinking about what use the ICJ opinion serves if it’s not binding on U.S. courts and the federal government continues to take policy and legal positions in direct opposition to what it commands. The answer I arrived at calls back to the origins of our system of law.

The common law has always been a vehicle for courts to acknowledge the obligations citizens owe to one another. It does not depend on federal policy or even state policy or some legislative guidance. This is particularly true in the context of civil wrongs. In tort law, courts, aided by the public consciousness as embodied in the jury, serve as the ultimate arbiters of what behavior is reasonable.

In determining what is reasonable, courts and juries can and do rely on their experiences (both shared and unique), their values (again, shared and unique), and, inevitably, the popular consensus of right and wrong. The standard of liability can, and does, change with the times. It is in this context that the ICJ’s opinion has the potential to most significantly shape American law. It contains text, and logic, that can be wielded by skillful, creative litigators. Their arguments could persuade juries and jurists to adopt some of the ICJ’s reasoning and incorporate it into the common law of one, or several, states.

What follows are a few examples of specific holdings in the ICJ opinion and how they might relate to the determinations juries are asked to make in common-law tort cases.

### A. Duty

The modern negligence action requires the plaintiff to establish that the defendant owed them a duty of care.<sup>299</sup> Duty thus forms the foundation of common-law responsibility; we do not hold people financially responsible to others unless we determine that some moral, and *therefore* legal, obligation to treat them with care exists. Duty is a question of law, and common-law judges have the final say on its reach.

The ICJ spent considerable real estate laying out the duties owed by nations with respect to environmental harm, and climate change more specifically. In paragraph 272 of its advisory opinion, the ICJ held that the “duty to prevent transboundary environmental harm”<sup>300</sup> is a well-established principle of international law.

299. RESTATEMENT (SECOND) OF TORTS §282 (Am. L. Inst. 1965).

300. Obligations of States in Respect of Climate Change, *supra* note 157, ¶ 272.

In so holding, the ICJ quoted the *Trail Smelter*<sup>301</sup> arbitration between the United States and Canada, which found that:

no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>302</sup>

The court went on to definitively state: “the duty to prevent significant harm to the environment also applies to the climate system.”<sup>303</sup>

When considering the duty owed by one private actor to another, this language, and the logic it reflects, could prove powerful. Just as any state has a duty to avoid contributing to climate change in such a way that injury occurs across its borders, so too might private actors when climate injury occurs outside their own property and sphere of operations.

## B. Standard of Care

The scope of any duty owed defines the boundaries of liability. In other words, tort law asks the jury to determine whether the obligation the duty imposes has been satisfied. In making that determination, common-law courts across our country have instructed juries using relatively generic and infinitely malleable terms—“reasonableness” chief among them.<sup>304</sup>

In the climate context, the ICJ’s opinion provides some guidance as to what behavior meets the obligations owed. In the first instance, the ICJ simply says that fulfilling the duty requires acting with “due diligence.”<sup>305</sup> This phrase essentially takes the place of “reasonable care” in a common-law tort analysis and is almost as malleable and unhelpful. In Paragraph 280, the ICJ essentially admits as much, saying due diligence depends on circumstances and can evolve over time.<sup>306</sup>

The ICJ, thankfully, goes on, writing “the general duty to prevent significant harm to the environment consists of substantive elements (e.g., the obligation to take appropriate measures) and procedural elements (e.g., the obligation to notify and consult).”<sup>307</sup> Appropriate measures, in the ICJ’s view, must be “designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system.”<sup>308</sup>

The standard of care with respect to the climate system might be applied by a jury to the decisions of private, corporate actors. As with the states in the ICJ opinion, large fossil fuel producers and greenhouse gas emitters have the power to drastically reduce output. The failure to reduce output, in the face of the same facts the ICJ considered, could be considered culpable by a common-law jury.

The most famous, and concrete, articulation of the reasonableness standard is Learned Hand’s eponymous formula.<sup>309</sup> In it, the burden (B) of a particular precaution (i.e., its cost) is compared to the expected value of the loss the precaution protects against (i.e., the product of the probability of harm and its magnitude (PxL)). If B is less than PxL, reasonableness requires that precaution be taken.<sup>310</sup>

This formula is dreaded by math-averse law students and rarely applied with precision, if at all, in the courtroom. A common error occurs when the harm is construed too narrowly, focusing only on the potential economic loss to the entity forgoing (or not) the precaution. For the formula to be correctly applied, the relevant loss should not be confined to the loss felt by the entity forgoing the precaution (i.e., the one charged with negligence) but should reflect the total loss felt by society that foreseeably flows from the decision to forgo precaution. With respect to climate change, those foreseeable losses are so significant that the ICJ has found obligations to engage in precaution at the nation-state, rather than corporate entity, scale.

## C. Negligence Per Se(-ish)

The ICJ refers specifically to private actors on a few occasions in its opinion. In Paragraph 428, the ICJ is willing to attribute private conduct to states when the governments of those states fail to take regulatory measures to control them.<sup>311</sup>

Negligence per se is a doctrine that allows a jury to conclude that behavior is unreasonable because it violates codified law designed to protect people like the plaintiffs.<sup>312</sup> If governments are obligated to control emissions, one might perceive that control as an implied protection regime. Emitters who significantly contribute to climate change would violate that regime.

As Learned Hand famously held in the classic case *The T.J. Hooper*, “a whole calling may have unduly lagged in

301. *Trail Smelter Arbitration* (United States v. Canada), 3 U.N. Rep. Int’l Arb. Awards 1905 (1941).

302. *Id.*

303. Obligations of States in Respect of Climate Change, *supra* note 159, ¶ 273.

304. *See, e.g.*, Miss. Plain Lang. Model Jury Instr. Civ. 2500 (using the term “reasonably” twice in one sentence to define negligence).

305. Obligations of States in Respect of Climate Change, *supra* note 159, ¶¶ 280-300.

306. *Id.* ¶ 280.

307. *Id.* ¶ 289.

308. *Id.* ¶ 282.

309. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §3 (Am. L. Inst. 2010).

310. *See* Ronen Perry, *Harmful Precautions*, 99 NOTRE DAME L. REV. 153, 154 (2023) (“According to the conventional definition of reasonableness, commonly known as the Hand formula, a person acts unreasonably (hence negligently) toward another if they fail to take precautions whose cost for the actor is lower than the expected loss for the other that these precautions can prevent.”).

311. *See* Obligations of States in Respect of Climate Change, *supra* note 159, ¶ 428.

312. *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 309, §14 (“An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”).

the adoption<sup>313</sup> of measures or policies. In other words, one cannot simply point to collective inaction as conclusive evidence that doing nothing is reasonable. Here, the ICJ has effectively held that the whole world, not just a particular calling, has unduly lagged. The industries most responsible for climate change are arguably the worst laggards of the bunch.

While this argument would certainly not be afforded the legal presumption, and strong jury instructions, that accompany traditional negligence per se situations, it might very well resonate with a jury.

#### D. Conclusion

These are just my first cuts at finding ways to incorporate ICJ precedent into the common law and thereby make international climate law more meaningful domestically in the United States. My hope is that some reader(s) will take my suggestions, expand on them, and go for it. It is worth noting in closing that this strategy is not limited by subject matter or a particular international tribunal; other areas where bold pronouncements have been made (e.g., human rights) also deserve common-law inroads.

## XII. Thin Silver Linings in State Environmental Action

*This section was authored by Gabriel Pacyniak, Professor of Law, the University of New Mexico School of Law.*

There are no two ways about it—the Trump Administration’s broad and unprecedented executive actions to gut federal environmental law will cause significant harm to people and ecosystems throughout all of the United States.<sup>314</sup> These federal rescissions are all the more dangerous because they are often supported by the Supreme Court.<sup>315</sup>

Are there potential silver linings to explore in these federal rollbacks for state action to protect the environment? I think that there are, although these silver linings in no way replace federal protections or justify the harmful effects of federal rollbacks. But it may be worth spending a bit of time and energy thinking about how state action to fill the new federal gaps provides an opportunity to create and test new environmental policies that may work better—either in terms of effectiveness or efficiency—than the federal policies that they seek to replace.

My state, New Mexico, provides a couple of examples—one related to water quality, the other related to low-income energy efficiency.

313. The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

314. Press Release, U.S. EPA, EPA Launches Biggest Deregulatory Action in U.S. History (Mar. 12, 2025), <https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history>; e.g., Reconsideration of 2009 Endangerment Finding, *supra* note 127.

315. Niina H. Farah & Lesley Clark, *Supreme Court Shakes Up NEPA, Role of Lower Courts*, GREENWIRE (July 8, 2025), <https://subscriber.politico.com/article/eenews/2025/07/08/supreme-court-shakes-up-nepa-role-of-lower-courts-00441995>.

#### A. Strengthened Recognition of Tribal Water Quality Standards

As an arid, southwestern state, many of New Mexico’s streams and rivers are intermittent and ephemeral—that is, they don’t necessarily run year-round. They may run during wetter seasons or in response to precipitation, both of which have diminished due to droughts and climate change. Under the Supreme Court’s ruling in *Sackett v. EPA*, many of these intermittent or ephemeral streams are likely no longer protected by the Clean Water Act (CWA), which the Supreme Court held only applies to waters that are “relatively permanent, standing or continuously flowing bodies of water.”<sup>316</sup>

Some estimates have found that this new standard could strip CWA protections from up to 90% of waters in New Mexico.<sup>317</sup> The Trump EPA is now embarking on a rulemaking to “finally address this issue once and for all.”<sup>318</sup> EPA Administrator Lee Zeldin has indicated that this rulemaking will narrowly interpret the Supreme Court’s *Sackett* decision to further limit the classes of waters protected by the CWA.<sup>319</sup>

Under the CWA, states may implement and enforce water quality programs.<sup>320</sup> If the waters at issue are protected by the Act, states must follow that statutory framework. Where waters are not protected by the CWA, however, the federal government plays no role.<sup>321</sup>

New Mexico’s legislature and Gov. Michelle Lujan Grisham moved quickly to fill the large gap left by *Sackett* with new state law. In 2024, the legislature passed SB 21, which authorized New Mexico to do two things: (1) implement the federal CWA program on federal waters (New Mexico is one of the few states that up until now has not exercised this “delegated” implementation and enforcement authority); and (2) establish a program for regulating surface water quality on *state* waters, filling the gap left behind by *Sackett*.<sup>322</sup> The New Mexico Environment Department is now preparing for a rulemaking to implement these new permitting programs.

While SB 21 hews closely to the federal CWA program, there are some ways in which this new state law has the potential to improve on the federal program, including in its recognition of downstream tribal water quality standards. SB 21 expressly requires water pollu-

316. *Sackett v. Environmental Prot. Agency*, 598 U.S. 651, 671, 143 S. Ct. 1322, 1336 (2023).

317. Tricia Snyder, *New Mexico’s Waters One Year After Sackett*, NEW MEXICO WILDERNESS ALLIANCE (May 24, 2024), <https://www.nmwild.org/2024/05/24/new-mexicos-waters-one-year-after-sackett-blog/>.

318. WOTUS Notice: The Final Response to SCOTUS, 90 Fed. Reg. 13428 (proposed Mar. 24, 2025); Press Release, U.S. EPA, Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule (Mar. 12, 2025), <https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule>.

319. Madeline Heim, *A New Era Dawns for America’s Wetlands as Feds Retreat From Oversight*, LOUISIANA ILLUMINATOR (Apr. 14, 2025), <https://lailluminator.com/2025/04/14/wetlands-fed/>.

320. E.g., 33 U.S.C. §1342.

321. See James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ELR 10679, 10681 (Sept. 2022).

322. 2025 N.M. Laws Ch. 112, <https://legiscan.com/NM/bill/SB21/2025>.

tion permit denials if permits would “cause or contribute to an exceedance of downstream state or tribal water quality standards.”<sup>323</sup> The federal program allowed EPA to deny permits for violating downstream tribal water quality standards, but SB 21 *requires* such denials.<sup>324</sup> This is a big deal, especially for New Mexico’s 23 sovereign native nations, as it provides them with an effective way to protect their waters from upstream pollution. Implementing these provisions can also help pilot stronger “good neighbor” practices for water quality issues.<sup>325</sup>

## B. More Flexible Low-Income Energy Efficiency Funding

A second example deals with funding for energy efficiency improvements for low-income households. Low-income energy efficiency improvements are an important affordability and climate solution.<sup>326</sup> By cutting the amount of energy it takes to heat and cool a home, such improvements reduce utility costs for lower-income folks and make affordable housing more comfortable. The federal government has long funded such improvements through the federal Weatherization Assistance Program (WAP).<sup>327</sup> But the Trump Administration fired the staff that implemented the program and is seeking to zero-out funding.<sup>328</sup>

Again, New Mexico has stepped into the gap by funding its own low-income energy efficiency program, but with some differences in policy design. The Community Energy Efficiency Development (CEED) Block Grant Act provides state funds to partnerships between local governments and community-based organizations to make energy efficiency improvements in neighborhoods where lower-income people pay too much for energy bills.<sup>329</sup> While the

bill was enacted in 2022,<sup>330</sup> the first round of \$10 million in funding is only now being implemented.<sup>331</sup> In the 2025 legislative session, the New Mexico legislature appropriated a second round of \$20 million, in part because of the Trump Administration’s federal cuts.<sup>332</sup>

Not only is this program filling gaps left behind by federal cuts to WAP, it includes innovations that seek to address some criticisms of the federal programs. The legislation makes funding more flexible, so that, for example, roofs can be fixed or bathrooms can be demolded if necessary for energy efficiency improvements.<sup>333</sup> Another important policy difference is that instead of spreading services across individual homes all over the state, the program targets specific neighborhoods where poor families pay a high portion of their income for energy costs.<sup>334</sup> This community-based model is based on a successful pilot project in the Albuquerque’s South Valley pioneered by local non-profit Prosperity Works, and it promises to service more homes with less money.<sup>335</sup>

## C. Conclusion

Amid these challenging times, it is worth identifying and recognizing state actions like these that respond to federal environmental rollbacks not only through gap filling, but through innovation and strengthened environmental protections. New Mexico’s actions to protect state water quality—while recognizing tribal sovereignty—and to continue investments in low-income energy efficiency with a more flexible, tailored program are just two examples. I’m sure that there are many more in other states across the country.

These examples should not take away from the gravity of harm being caused by the federal executive branch’s retreat from environmental law and the support it is receiving from the courts. But it is worth acknowledging that, in this difficult time, there are some thin but important silver linings available at the state level.

323. N.M. STAT. ANN. §§74-6-5(E)(4), 74-6C-5(B)(7) (1978).

324. *Compare* City of Albuquerque v. Browner, 97 F.3d 415, 424 (10th Cir. 1996) (“Under [federal Clean Water Act] the EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.”), *with* N.M. STAT. ANN. §74-6-5(E)(4) (1978) (“The constituent agency shall deny an application for a permit . . . if . . . the surface water discharge would cause or contribute to water contaminant levels in excess of a downstream . . . tribal water quality standard.”).

325. A “good neighbor” environmental policy refers to a regulation or practice that limits not only pollution that would cause harm within the immediate jurisdiction, but also within other, neighboring jurisdictions. The most well-known use of this phrase is in the context of §110 of the federal CAA. See KATE C. SHOUSE, CONG. RESEARCH SERV., R45299, THE CLEAN AIR ACT’S GOOD NEIGHBOR PROVISION: OVERVIEW OF INTERSTATE AIR POLLUTION CONTROL (2018), <https://www.congress.gov/crs-product/R45299>.

326. Gabriel Pacyniak, *Keeping All The Lights On: A Roadmap to Affordable, Universal Electricity Service in the Clean Energy Transition*, 50 *ECOLOGY* L.Q. 94, 139 (2023).

327. *Id.* at 141.

328. Brad Plumer, *Entire Staff Is Fired at Office That Helps Poorer Americans Pay for Heating*, *N.Y. TIMES* (Apr. 2, 2025), <https://www.nytimes.com/2025/04/02/climate/trump-layoffs-energy-assistance-liheap.html>; *Trump Releases Budget Proposal That Would Slash Funding for Climate Programs*, SABIN CENTER FOR CLIMATE CHANGE LAW, <https://climate.law.columbia.edu/content/trump-releases-budget-proposal-would-would-slash-funding-climate-programs-1> (last visited Jan. 4, 2026).

329. New Mexico Energy, Minerals & Natural Resources Department, *Community Energy Efficiency Development (CEED) Program*, <https://www.emnrd.nm.gov/ecmd/ceed/> (last visited Jan. 4, 2026).

330. N.M. STAT. ANN. §§62-17A-1 et seq. (1978).

331. Herman K Trabish, *Bringing Equity to Electricity Service Through Home, Power Sector and Regulatory Innovation*, UTILITY DIVE (Oct. 27, 2022), <https://www.utilitydive.com/news/bringing-equity-to-electricity-service-through-home-power-sector-and-regul/630253/>.

332. See Ellen Loehman, *Statewide Coalition Supports Direct Investments to Strengthen Communities in the Community Benefit Fund*, RIO GRANDE CHAPTER SIERRA CLUB (Feb. 10, 2025), <https://www.riograndesierraclub.org/community-benefit-fund/>.

333. Pacyniak, *supra* note 326, at 145.

334. *Id.* at 144.

335. See U.S. ENV’T PROT. AGENCY, COMMUNITY ENERGY EFFICIENCY PROJECT: PROGRAM PROFILE (2023), [https://www.epa.gov/system/files/documents/2023-12/community-energy-efficiency-project\\_profile-draft\\_2023-12-12\\_508.pdf](https://www.epa.gov/system/files/documents/2023-12/community-energy-efficiency-project_profile-draft_2023-12-12_508.pdf).

### XIII. Finding Subfederal Opportunity in Federal Environmental Abdication

*This section was authored by Sarah Fox, Associate Professor of Law, Marquette University Law School.*

Federal environmental law is being dismantled by the Trump Administration and many federal courts. To wit: the elimination of green energy provisions in the Inflation Reduction Act<sup>336</sup>; the removal of climate change from all federal websites,<sup>337</sup> policy,<sup>338</sup> data,<sup>339</sup> and grants<sup>340</sup>; the termination of hundreds of EPA employees<sup>341</sup>; the shrinking of federal jurisdiction over wetlands following the Supreme Court's decision in *Sackett v. EPA*<sup>342</sup>; and the erection of barriers to climate action in *West Virginia v. EPA*.<sup>343</sup> These actions and others mean that federal environmental law-making cannot be expected to function currently as it has in the past.

Reasons abound as to why these decisions run counter to both law and good policy. But they represent our current reality. And so, the question becomes: where do we go from here? If we are to engage in blue sky thinking, what do we see beneath that blue sky? Current realities likely mean a turn toward a more decentralized form of environmental law in the United States, at least for the present moment. And while that turn has many negative impacts,<sup>344</sup> it also presents opportunities for the evolution of environmental law.<sup>345</sup>

Federal environmental statutes have long used versions of cooperative federalism that include subfederal actors, but states and local governments will have a bigger role to play in the coming years (whether they like it or not). Finding the beneficial aspects of that transition requires identifying

more clearly areas of opportunity for subfederal environmentalism. Like any such exercise, the suggestions here are necessarily incomplete and imperfect, with obstacles both legal and practical standing in the way of implementation. But this essay is written in the spirit of saying not only what we do *not* want, but what we do, and of articulating a more deeply developed vision of the path forward.

If the federal government is exiting environmental law to various degrees, it is the job of subfederal governments to step into that void. To the extent that they fail to do so, it is not because they are powerless. State and local governments generally have broad police powers to protect the health and welfare of their citizens that they could rely on to a substantial degree. There are many ways that subfederal governments could exercise these powers; below I focus on potential actions in land use, renewable energy, and housing.

Land use planning is critical for both climate mitigation and adaptation measures. Beyond that, it is a powerful tool for conservation, reducing air and water pollution, preserving the health of the land, and other integral aspects of environmental law that may be impacted by the loss of federal coverage. States have the power to require land use planning of their local governments, and many already do; states without local planning requirements should create them going forward. Importantly, that planning should incorporate longtime horizons and current climate science to account for appropriate population patterns in the future. This approach leaves the details of land use planning in the hands of local government, as it long has been, but provides an important state goal-setting and steering function. At the local level, governments have the authority to act using land use tools in a variety of ways that are protective of the environment.

These types of state and local actions can help to fill the void left by the federal exiting of the environmental realm. For example, following *Sackett*,<sup>346</sup> the U.S. Army Corps of Engineers lacks jurisdiction over many of the wetland areas that previously would have received federal oversight via a CWA permit. States may have previously relied on those federal protections to support wetland health within their borders. Now, however, states no longer can point to the federal government as the entity in control of wetlands. With no one else to blame, state law and local actors should take up the mantle of conservation—and subfederal decisionmakers should be held accountable for decisions not to protect wetland areas.

As another example, in April 2025, the U.S. Fish & Wildlife Service and the National Marine Fisheries Service published a proposed rule that would rescind the regulatory definition of “harm” in the Services’ Endangered Species Act regulations.<sup>347</sup> That definition currently includes

336. Mia Beams & Akkshath Subrahmanian, *Congress’s “One Big Beautiful Bill” Will Shrink Renewable Energy Investments—Yet Some Technologies Are Preserved*, COUNCIL ON FOREIGN RELATIONS (Aug. 4, 2025), <https://www.cfr.org/articles/congress-one-big-beautiful-bill-will-shrink-renewable-energy-investments-yet-some>.

337. *Mentions of Climate Change Removed From Federal Agencies’ Websites*, SABIN CENTER FOR CLIMATE CHANGE LAW, <https://climate.law.columbia.edu/content/mentions-climate-change-removed-federal-agencies-websites>.

338. *Climate Backtracker*, SABIN CENTER FOR CLIMATE CHANGE LAW, <https://climate.law.columbia.edu/content/climate-backtracker>.

339. Jeff Brady, *Far More Environmental Data Is Being Deleted in Trump’s Second Term Than Before*, NPR (Aug. 8, 2025), <https://www.npr.org/2025/08/08/nx-s1-5495338/climate-change-environment-websites-trump>.

340. Cathleen Kelly & Jasia Smith, *The Trump Administration’s Cancellation of Funding for Environmental Protections Endangers Americans’ Health While Draining Their Wallets*, CTR. FOR AMERICAN PROGRESS (Apr. 2, 2025), <https://www.americanprogress.org/article/the-trump-administrations-cancellation-of-funding-for-environmental-protections-endangers-americans-health-while-draining-their-wallets/>.

341. Corinne Ramey, *U.S. Environmental Agency Puts 139 Employees on Leave After They Criticized Trump’s Policies*, REUTERS (July 4, 2025), <https://www.reuters.com/sustainability/climate-energy/us-environmental-agency-puts-139-employees-leave-after-they-criticized-trumps-2025-07-04>.

342. 598 U.S. 651 (2023).

343. 597 U.S. 697 (2022).

344. Susan A. Hughes, *Harvard Kennedy School Experts Analyze the Potential Effects of Environmental Policy Deregulation*, HARVARD KENNEDY SCH. (Aug. 11, 2025), <https://www.hks.harvard.edu/faculty-research/policy-topics/environment-energy/harvard-kennedy-school-experts-analyze-potential?>

345. Emily G. Bergeron, *Filling the Federal Vacuum: The Rise of State and Local Climate Lawsuits*, A.B.A. (Nov. 5, 2025), <https://www.americanbar.org/groups/crsj/resources/human-rights/2025-october/filling-the-federal-vacuum/>.

346. 598 U.S. 651 (2023).

347. Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16102 (proposed Apr. 17, 2025) (to be codified at 50 C.F.R. pts. 17 & 222), <https://www.federalregister.gov/documents/2025/04/17/2025-06746/rescinding-the-definition-of-harm-under-the-endangered-species-act?>

habitat modification alongside other impacts on covered species. If the Trump Administration changes that harm definition, federal action on species protection will be more constrained going forward, as it may shrink coverage of the federal statute to only those actions that “kill or capture a wild animal.”<sup>348</sup> In consequence, species recovery that relies on habitat conservation will be greatly impacted by state and local action.

States should pick up the mantle by considering state-level species protection and ensuring appropriate habitat conservation protections within their own jurisdictions. Local governments should also focus on land use planning that is protective of species habitat. Those governments could, for instance, use mechanisms such as transferable development rights<sup>349</sup> or overlay zones<sup>350</sup> to steer growth out of sensitive areas for habitat. They could also include wildlife corridors<sup>351</sup> as part of their planning that would allow for critical movement by species. A focus on denser development via urban growth boundaries<sup>352</sup> or other zoning tools can also be hugely protective for species in many areas, as it prevents sprawl outward into habitat.

Beyond federal gap-filling, states could step into the leadership void created by the federal government and accomplish big social goals in novel ways. Renewable energy and affordable housing provide a first possible example. The federal Inflation Reduction Act of 2022<sup>353</sup> promised billions to build renewable energy, but the second Trump Administration has taken a number of actions<sup>354</sup> to interfere with or—where able—to revoke much of that funding. Given current uncertainties at the federal level, states should focus on building out their own intrastate or regional energy supply solutions.

In doing so, they could also take the opportunity to address growing tensions in land use about not only renewables buildout<sup>355</sup> but also affordable housing. States could perhaps borrow from a federal model to structure their own regulatory programs. The CAA’s Air Quality Control Region framework<sup>356</sup> offers a model of how to set an overall target that is then allocated among zones at lower

levels of government. Using that structure, states could set both statewide renewable energy generation and affordable housing targets. States could then allocate those goals among substate zones and establish a metric for how to meet those goals.

At the local level, communities could then be involved in deciding how to satisfy energy, housing, or both goals. Perhaps, some districts will have energy and no housing; some will have housing and no energy generation. Every district will have at least some of one or the other. Not only would this scheme help spread the burdens these social goods have proved so difficult to supply in recent years, it would also ensure that states can implement plans in ways that are responsive to local conditions.

These kinds of measures (and hopefully many others) could go some way in making up for failures at the federal level while drawing on state and local authority that has long been in place. They would also reflect the highly localized nature of land use planning and the environment, require and bolster environmental knowledge and participation at the state and substate level, and make subfederal actors responsible for the environmental conditions within their states.

Nothing in this essay is to suggest that these measures are easy, or that a federal role on climate and other environmental problems is not needed. Rather, the goal here is to point out that while the Trump Administration is irresponsibly gutting federal environmental law, it is possible to chart new paths as well. There are opportunities in the destruction of current environmental law structures, and creating more robust action at subfederal levels could serve as a bulwark against the environmental harm likely to come from current federal actions. Such actions are necessary, if not sufficient, to protect our environment going forward.

#### **XIV. Eschewing Exceptionalism: From Red Sky Fears to Blue Sky Legal Reform**

*This section was authored by Cinnamon Carlarne Hirokawa, President, Dean, and Professor of Law at Albany Law, Keith Hirokawa, Distinguished Professor of Law at Albany Law, and Jessica Owley, Professor of Law at the University of Miami School of Law.*

When we gathered as a community of scholars and concerned community members to engage in “blue sky thinking in a red sky world,” we began by confronting the red sky—those ominous threats gathering on our legal and social horizon. The metaphor proved apt: like sailors reading weather signs, we needed to acknowledge the storm clouds before charting a new course.

##### **A. The Red Sky: Eroding Human Rights in an Age of Exceptions**

Our collective fears centered on the degradation of human rights protections, broadly conceived. Human rights

348. *Id.*

349. Atlanta, Ga., Code of Ordinances §16-28.023 (Transfer of Development Rights), available at [https://library.municode.com/ga/atlanta/codes/code\\_of\\_ordinances?nodeId=PTIICOORANDECO\\_PT16ZO\\_CH28\\_GESURE\\_S16-28.023TRDERI](https://library.municode.com/ga/atlanta/codes/code_of_ordinances?nodeId=PTIICOORANDECO_PT16ZO_CH28_GESURE_S16-28.023TRDERI).

350. Chesapeake Bay Critical Area—Conservation Plan, Prince George’s Cnty. Planning Dept., available at <https://www.pgplanning.org/development/zoning-applications/chesapeake-bay-critical-area-conservation-plan>.

351. Anna Wearn & Nic Callero, *Smart Growth: How Wildlife Corridor Planning Pays Off for Local Communities*, THE PEW CHARITABLE TRUSTS (Sept. 8, 2025), <https://www.pew.org/en/research-and-analysis/articles/2025/09/08/smart-growth-how-wildlife-corridor-planning-pays-off-for-local-communities>.

352. Alec LeSher, *Create Urban Growth Area*, SUSTAINABLE CITY CODE (edited by Jonathan Rosenbloom & Christopher Duerksen), <https://sustainablecitycode.org/brief/create-urban-growth-area>.

353. Pub. L. No. 117-169, 136 Stat. 1818.

354. Olivia Guarna & Amy Turner, *100 Days of Trump 2.0: The Inflation Reduction Act*, SABIN CENTER FOR CLIMATE CHANGE LAW (Apr. 29, 2025), <https://blogs.law.columbia.edu/climatechange/2025/04/29/100-days-of-trump-2-0-the-inflation-reduction-act/>.

355. See generally Danielle Stokes, *Renewable Energy Federalism 2.0*, 109 MINN. L. REV. 3017 (2025).

356. 42 U.S.C. §7407.

encompass not merely traditional civil and political liberties (i.e., core principles of a functioning democracy), but also economic, social, and cultural rights including the right to a healthy environment, freedom from discrimination and oppression, protection from arbitrary detention, and access to basic necessities for human dignity.<sup>357</sup> These rights form an interconnected web—environmental degradation disproportionately affects marginalized communities, while economic inequality undermines political participation and social cohesion—such that the failure to uphold one right impedes our ability to uphold other rights.

What is most alarming is not just the erosion (or outright rejection) of these protections, but what appears to be a fundamental shift in our societal goals. In the United States, we believed our institutions were sufficiently resilient to underpin a robust democracy capable of preventing the backsliding witnessed elsewhere, yet we seem to have abandoned human flourishing as our North Star. Aristotle’s concept of *eudaimonia*—often translated as flourishing or the good life<sup>358</sup>—emphasized that a just society enables all its members to reach their full potential through virtue, community engagement, and the cultivation of human capabilities. This vision underlies the idea of a healthy, thriving democracy—something that the United States has always prided itself on modeling to the rest of the world. Over time, however, this idealistic and justice-oriented vision of a just society has given way to a much narrower vision of society that prioritizes metrics of success centered in economic growth and property accumulation.

This shift manifests most clearly in rhetoric around property rights, which increasingly associates property with liberty and characterizes environmental protection and social needs as something more sinister, evil, and communistic. In the United States, property rights have been elevated to a supreme status that overrides other legitimate societal interests, creating what Lorna Fox O’Mahony and others might term “property maximalism.”<sup>359</sup>

## B. The Rise of Legal Exceptionalisms

The rise of property maximalism intersects with evolving understandings of American exceptionalism to create an increasingly narrow view of which rights and whose interests matter. American exceptionalism—the belief that the United States is inherently different from and superior to other nations due to its founding democratic principles and historical development—has long sustained the comfortable assumption that we had evolved beyond a society that tolerates serious human rights abuses.

This complicated vision of American exceptionalism always rested on shaky ground, but for decades was robust enough to convince domestic and international constituencies that there was some truth to our self-proclaimed democratic primacy. Gradually, however, the foundations of our exceptionalism have been eroded from the inside out. Even as we have loosened the hold on democratic primacy, we also have gradually embraced other forms of exceptionalism that undermine this (already shaky) foundation.

Agricultural exceptionalism, as documented by scholars like J.B. Ruhl,<sup>360</sup> Margot Pollans,<sup>361</sup> and Jim Chen,<sup>362</sup> creates special regulatory carve-outs for an industry responsible for significant environmental harm, from water pollution to greenhouse gas emissions. The Supreme Court’s major questions doctrine<sup>363</sup> has spawned what might be called “economic exceptionalism,” requiring extraordinary congressional clarity before agencies can regulate large sectors of the economy—a standard that effectively shields powerful industries from necessary oversight. We are currently immersed in a type of executive exceptionalism driven by executive orders (rather than laws) and white nationalism (rather than human safety and constitutional rights).

Very troubling is the emergence of property law exceptionalism, where protecting property rights takes precedence over other legal rights and societal goals. This hierarchy places individual wealth accumulation above community welfare, environmental protection, and even basic human needs like food, water, housing, and health-care access.

In a moment when our legal system seems intent on prioritizing property over people and where notions of flourishing focus on the few instead of the many, how do we envision a pathway forward toward a more robust vision of a healthy and functioning—a flourishing—American democracy?

## C. Blue Sky Thinking: Resist, Restore, Reimagine

Amidst a very daunting red sky world, we embraced the idea of blue sky thinking. Blue sky thinking—creative, optimistic problem solving unconstrained by current limitations—offers a tool for eschewing a narrow, property-centric vision of society and embracing the vision of a flourishing democracy. In this moment where we must simultaneously acknowledge the realities of the red sky world and the imperative of blue sky thinking, we embrace a framework of “resist, restore, and reimagine.”

That is, we must simultaneously resist further erosion of our democracy, human rights, and environmental protections while we work to restore basic rights,

357. See, e.g., United Nations Human Rights Office of the High Commissioner, *Treaty Bodies: United Nations Human Rights Treaty Bodies*, <https://www.ohchr.org/en/treaty-bodies>.

358. See, e.g., Karrigan Börk et al., *Living the Good Life in the Anthropocene*, 54 ELR 10857 (Oct. 2024).

359. See Lorna Fox O’Mahoney, *Property Outsiders and the Hidden Politics of Doctrinalism*, 47 CURRENT LEGAL PROBLEMS 409 (2014).

360. See J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000).

361. See Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195 (2016).

362. See James Ming Chen, *After Agrarian Virtue*, 52 INDIANA L. REV. 1 (2020).

363. See, e.g., Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445 (2016).

protections, and services and collectively seek to reimagine our society in a way that is vision-oriented, with that vision being one of human and ecosystem flourishing (the two being necessarily intertwined). To this end, we propose eschewing exceptionalism as both method and goal, while reinvigorating our collective power to maintain focus on human flourishing as law's ultimate purpose.

So, what does this look like in its most basic form?

**Resist** the policy rhetoric that treats economic worth as a proxy for human well-being. Question the assumption that what benefits business necessarily benefits society. Challenge legal doctrines that create special protections for already-powerful interests while leaving vulnerable populations exposed. Assert the need to recognize and protect fundamental human rights that are necessary to achieve individual and collective flourishing. Support and emulate actions and movements that center care and community, such as the protests in Minneapolis, and reject the dehumanization of non-white neighbors.

**Restore** the foundational American ideal of promoting general welfare alongside individual liberty. This means returning to legal frameworks that recognize that the property *system* facilitates and accommodates individualization of rights, after balancing property rights with property duties and incorporating into the purpose of property the needs of community, environmental protection, and human dignity. We must revive the understanding that true prosperity requires broadly shared flourishing, not concentrated wealth.

**Reimagine** institutional roles to support this vision. Courts could recall that interpreting property rights does not begin with championing individual claims of injury, but instead by considering whether the visions of property proposed in individual claims would cause significant damage to society (especially those who are not fortunate enough to be vested with property claims), and where property rights themselves represent a particular (often problematic) vision of anti-social worth. Administrative agencies might adopt interpretive approaches that consider cumulative impacts on community welfare rather than isolated individual claims. Property law must systematically incorporate stewardship obligations alongside ownership rights. Environmental law should recognize nature's intrinsic value rather than treating it merely as a resource for human exploitation.

#### D. Toward a Post-Exceptionalist Legal Framework

This transformation requires acknowledging that no sector, industry, or right—including property—deserves automatic precedence over human flourishing and the fundamental human rights that underpin our ability to flourish. Instead of fashioning laws so that they serve already powerful interests, we support a legal system that consistently prioritizes the conditions that facilitate human dignity, individual belonging, and thriving in communities.

Such a framework would assess laws and policies based on their contribution to genuine prosperity: clean air and water, stable communities, meaningful work, and oppor-

tunities for human development. It would recognize that environmental health and social justice are prerequisites for, not obstacles to, sustainable economic progress.

The red sky reminds us that current trajectories lead toward greater inequality, environmental collapse, and social fragmentation. Blue sky thinking calls us to chart a different course—one where law serves human flourishing rather than narrow interests, and where true exceptionalism lies not in exempting the powerful from responsibility, but in creating systems that enable everyone to reach their full potential.

In eschewing exceptionalism, we don't abandon excellence. Rather, we pursue the more difficult but essential work of building legal frameworks that serve the common good while respecting individual dignity. This is the blue sky vision our red sky world so desperately needs.

### XV. Reframing the Environmental Law Classroom Narrative<sup>364</sup>

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Every fall, many incoming law students arrive on campus with idealistic visions of changing the world. They may come filled with a passion for justice, environmental protection, human rights, or corporate reform. They want to think critically, tackle systemic problems, and make meaningful change. Then we hand them cases about foxes<sup>365</sup>—or minimum contacts,<sup>366</sup> or chickens<sup>367</sup>—and spend lots of time on legal analysis fundamentals. Of course, the analytical framework of **Issue, Rule, Application, and Conclusion** is central to legal reasoning and law student learning; nurturing students' ability to recognize, remember, and apply law<sup>368</sup> is critical—much of the first year of law school is about building new neural pathways<sup>369</sup> to facilitate complex legal reasoning.

However, first-year students often struggle to square their classes with the immediate realities of our world and

364. This essay reflects ongoing conversations about legal pedagogy and draws inspiration from colleagues across multiple institutions who are experimenting with these and other innovative approaches to legal education.

365. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

366. *Int'l. Shoe Co. v. Washington*, 326 U.S. 310 (1945).

367. *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

368. Louis N. Schulze Jr., *Using Science to Build Better Learners: One School's Successful Efforts to Raise Its Bar Passage Rates in an Era of Decline*, 68 J. LEGAL EDUC. 230 (2019).

369. Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355 (2016).

with their “why”<sup>370</sup> for coming to law school.<sup>371</sup> Strengthening these connections—side-by-side with fundamentals—can harness students’ passions and foster engaged learning. Crucially, such a reframing of the law school narrative is also a powerful way for students to remain optimistic in turbulent times.

Without intentionally providing avenues for our students’ passion at the onset of their legal education, we risk both subduing the spirit that first drew them to law school and foreclosing opportunities for the next generation to develop creative and novel legal approaches. Two often-overlooked opportunities can help us in this effort: (1) incorporating storytelling in teaching; and (2) expanding early pedagogical approaches, especially in the first year, beyond federal and common-law paradigms.

Such cross-curricular strategies align with current trends and developments in legal education and licensure. Law school teaching is increasingly emphasizing experiential learning credits: the American Bar Association has proposed amending Standard 303 to double the required amount of experiential learning credits from 6 to 12.<sup>372</sup> The NextGen bar exam will test foundational concepts (e.g., Contracts, Torts, Property) together, in an increasingly cross-doctrinal model,<sup>373</sup> and with a greater emphasis on practice skills.<sup>374</sup> Making connections between concepts in different doctrines and building a greater experiential foundation prepares students not only for academic and licensure success, but also for the realities of practice. This tees them up to make creative, holistic arguments, and prepares students for the diversity of pathways they may take after graduating.<sup>375</sup>

### A. The Power of Proactive Legal Narratives

Reactive storytelling has long dominated legal education. In environmental law, for example, we often traditionally

teach doctrine through stories of disasters,<sup>376</sup> failures,<sup>377</sup> and conflicts.<sup>378</sup> In an environmental law context, this method alone can embed the troubling assumption that law is primarily a tool for *responding* to crises—or at best *preventing* them. Sure, law seeks to mitigate injustices, but perhaps we do not sufficiently frame our teaching of environmental law as a mechanism that achieves, reinforces, and continues meaningfully toward positive environmental results.

The conservative legal movement is remarkably effective at storytelling—crafting compelling narratives of individual liberty, economic freedom, and constitutional originalism that resonate across decades and drive policy change. Meanwhile, environmental victories get lost in technical discussions of regulatory compliance or procedure. Maybe the problem isn’t that we’re not telling enough stories—it’s that we’re telling the *wrong* stories.

370. Andrew Bauld, *How Students’ Motivations for Attending Law School Have Changed*, U.S. NEWS & WORLD REPORT (Sept. 13, 2023), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/applying/articles/how-students-motivations-for-attending-law-school-have-changed>.

371. Katya S. Cronin, *The Intentional Pursuit of Purpose: Nurturing Students’ Authentic Motivation for Practicing Law*, 28 J. LEGAL WRITING INST. 160 (2024).

372. See generally AMERICAN BAR ASSOCIATION, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2025-2026 EDITION (2025), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2025-2026/2025-2026-standards-and-rules-of-procedure-for-approval-of-law-schools.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2025-2026/2025-2026-standards-and-rules-of-procedure-for-approval-of-law-schools.pdf).

373. NATIONAL CONFERENCE OF BAR EXAMINERS, NEXTGEN UBE CONTENT SCOPE: JULY 2026-FEBRUARY 2027 (Aug. 2025), available at <https://www.ncbex.org/sites/default/files/2025-07/NCBE%20NextGen%20UBE%20Content%20Scope-Aug%202025.pdf>.

374. National Conference of Bar Examiners, *NextGen Bar Exam*, <https://nextgenbarexam.ncbex.org/> (last visited Nov. 7, 2025).

375. Ilana Kowarski & Sarah Wood, *35 Types of Law That J.D. Graduates Can Practice*, U.S. NEWS & WORLD REPORT (May 17, 2023), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/slideshows/diverse-careers-for-law-school-graduates>.

376. See, e.g., Michael Rotman, *Cuyahoga River Fire: The Blaze That Started a National Discussion*, CLEVELAND HISTORICAL (Sept. 22, 2010), <https://www.clevelandhistorical.org/items/show/63>. See also PBS Learning Media, *Love Canal: America’s First Superfund Site/American Experience* (2024), <https://mpt.pbslearningmedia.org/resource/amex36pgtlc-soc-lovecanalsuperfund/love-canal-americas-first-superfund-site-american-experience/> (last visited Apr. 21, 2026); Rhitu Chatterjee, *The World’s Worst Industrial Disaster Harmed People Even Before They Were Born*, NPR (Nov. 22, 2023), <https://www.npr.org/sections/goatsandsoda/2023/06/17/1181244389/the-worlds-worst-industrial-disaster-harmed-people-even-before-they-were-born>.

377. Among others, some common narratives describe failure to take adequate action on the climate crisis, to reduce particulate air pollution in overburdened locales, and to adequately regulate PFAS to protect human health. See, e.g., Georgetown University Global Engagement Series, *A Fractured Earth: Global Failures in the Fight Against the Climate Crisis* (Jan. 25, 2023), <https://global.georgetown.edu/events/a-fractured-earth-global-failures-in-the-fight-against-the-climate-crisis>; Jovan Gonzales et al., *Air Pollutants and Childhood Asthma in the Bronx*, 20 J. UNDERGRAD. CHEM. RSCH. 39 (2021); Scott Faber, *It’s Time to End EPA’s Long History of Failing to Act on “Forever Chemicals,”* ENVIRONMENTAL WORKING GROUP (Jan. 9, 2020), <https://www.ewg.org/news-insights/news/its-time-end-epas-long-history-failing-act-forever-chemicals>.

378. Clashes between economic and preservation/conservation interests tend to characterize high-profile environmental law disputes. See, e.g., River Stingray, *History, Debate of Oversnow Travel in Yellowstone* (Feb. 21, 2024), <https://buckrail.com/history-debate-of-oversnow-travel-in-yellowstone/> (summarizing a 75-year-long bitter fight and final resolution between, on one side, advocates for plowed road access and oversnow snowmobile use in winter, and on the other, concerns over high levels of noise, air pollution, and habitat generated by such: “It has been difficult to strike the right balance between protecting the park’s natural resources and allowing for an appropriate level of use and enjoyment at Yellowstone.”); see also National Park Service, Draft SEIS/Winter Use Plan Frequently Asked Questions (Aug. 13, 2012), [https://www.nps.gov/yell/learn/management/upload/Draft\\_SEIS\\_FAQs\\_v8-13-12.pdf](https://www.nps.gov/yell/learn/management/upload/Draft_SEIS_FAQs_v8-13-12.pdf) (documenting the process for developing a compromise: a special winter use regulation management framework for Yellowstone).

For another archetypal example of this kind of conflict, see ZYGMUNT PLATER, *THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER* (2013) (chronicling the events around *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1987), the culmination of a fight to prevent the TVA utility from damming the Little Tennessee River in the name of economic stimulation and thusly eliminating the habitat of the endangered snail darter fish, as well as flooding farms and historical sites). See also Associated Press, *A Tiny Fish That Once Caused an Epic Conservation Fight Is No Longer Under Threat*, NPR (Oct. 4, 2022) (noting that the dam was not even necessary for power generation and quoting then-Secretary of the Interior Deb Haaland, who praised the snail darter’s recent recovery as, “a remarkable conservation milestone that tells a story about how controversy and polarization can evolve into cooperation and a big conservation success”). See also *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992) (pitting the timber industry and its workers against conservationists concerned about threats presented to the endangered northern spotted owl by logging).

Consider an introductory Environmental Law class, where students frequently learn about the National Environmental Policy Act through cases where the process failed,<sup>379</sup> or about climate change through litigation losses.<sup>380</sup> Even *Massachusetts v. EPA*,<sup>381</sup> the rare successful federal climate suit, is presented as a surprise win that most environmental groups expected to fail<sup>382</sup> and whose success felt short-lived.<sup>383</sup> While these cases teach important doctrinal points, they subtly reinforce the idea that U.S. environmental law, while a huge legislative success at its inception,<sup>384</sup> has turned to playing defense,<sup>385</sup> limiting damage, and fighting uphill battles.<sup>386</sup>

But what if we flipped this narrative? What if we taught our environmental law courses with success stories as throughlines—laws that were passed proactively and are quietly doing good work every day? These proactive stories don't just have potential to inspire students; we can also use them to teach *deeper legal practice skills*.

Instead of learning only how to spot violations and craft remedies, students may benefit if their knowledge of these laws develops concurrently with instruction on how to design effective policies, build coalitions,<sup>387</sup> and create implementation systems.<sup>388</sup> Professors can continue the real-world momentum that brought many of them into law school and foster students' instincts to use the law as a tool for building the world we want,<sup>389</sup> not just fixing the world we have. Of course, we can't just teach the successes, but with powerful stories underlying the approach, students may be more inspired to think creatively and see potential for change.

Introducing success narratives early in legal education supports powerful, positively anchored and strongly scaffolded instruction. If students encounter their first cases about environmental protection through stories of innovative policy solutions and creative leaders<sup>390</sup> rather than ecological disasters and retrenchment, they are primed to develop a fundamentally different relationship with the field—one with more possibilities than limitations, and one that models the importance of innovative and creative leadership. This initial framing can become the lens through which they view subsequent material, approaching legal problems as opportunities for creative problem solving rather than damage control.

## B. Breaking the Federal Law Bubble

The second major limitation in traditional legal education is its practice of focusing primarily on federal law (and secondarily on state common law). This might seem natural—federal cases create binding precedent, federal agencies have broad regulatory power, and federal courts handle many high-profile disputes.<sup>391</sup> But this focus risks creating a tilted picture of how law operates in practice.

For many areas of law in which students are most interested, the most important developments happen at state, local, or international levels. The typical first-year curriculum, however, might treat these other sources as peripheral curiosities rather than integral parts of the legal system. Common-law courses like Torts<sup>392</sup> and Contracts,<sup>393</sup> which primarily use state law to teach the evolution of foundational concepts, may relegate federal or international law in opinions. Students often graduate believing international law is somehow less “real” than domestic law, despite the fact that international agreements shape everything from trade policy to human rights protections. In fact, there are strong arguments that international law is a part of U.S. law.<sup>394</sup> This omission forecloses the opportunity to engage in a rich “sources of law” discussion where students have opportunities to compare U.S. common law and international customary law and build a deeper understanding of the development and functionality of juridical systems.

Students need to understand that these pathways exist, rather than assuming federal court silence means legal irrelevance. The positive scaffolding effect of this broader exposure cannot be overstated. Students who learn from

379. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (re: coal infrastructure, no regional EIS needed if no regional development plan proposed); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (no “worst case” mapping needed in EIS); *Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d 1357 (D.C. Cir. 2017) (finding FERC environmental impact statement on effects of a natural gas pipeline insufficient and remanding; pipeline approved following FERC's supplemental submission).

380. See, e.g., *West Virginia v. EPA*, 597 U.S. 697 (2022).

381. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

382. Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENV'T L. 1, 5 (2008) (“It is worth noting that [the] original petitioners included many small and . . . rather obscure nongovernmental organizations, but few large ones . . . [t]he largest and most established environmental organizations did not join the initial petition.”).

383. See, e.g., *American Electric Power Company v. Connecticut*, 564 U.S. 410 (2011).

384. See Kathryn A. Kahler, *Environmental Awakening*, WIS. NAT. RES. 14 (Spring 2020).

385. Joshua Ulan Galperin, “Desperate Environmentalism” Won't Save the Environment, L.A. TIMES (Oct. 29, 2015), <https://www.latimes.com/opinion/op-ed/la-oe-galperin-environmental-desperation-20151029-story.html>.

386. William H. Rodgers Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 VT. J. ENV'T L. 1 (2011).

387. See Louise Michelle Fitzgerald, *Winning Coalitions for Just Transitions: Insights From the Environmental Justice Movement*, 92 ENERGY RSCH. SOC. SCI. 102780 (2022); Samuel Trachtman et al., *Building Winning Climate Coalitions: Evidence From U.S. States*, 203 ENERGY POL'Y 114628 (2025).

388. The *New York Times* recently published an interactive online piece showcasing environmental solutions being implemented across the country. For each state, there is a link to a 2025 news story illustrating an environmental success. Many of them involved state and local laws. *50 States 50 Fixes*, N.Y. TIMES (June 24, 2025), <https://www.nytimes.com/interactive/2025/climate/50-states-fixes.html>.

389. Galperin, *supra* note 385.

390. Gregorio Rafael Bueta, *Advancing Climate Justice Through Creative Lawyering—Lessons From the Global South*, BRITISH INSTITUTE OF INTERNATIONAL & COMPARATIVE LAW (Dec. 11, 2024), <https://www.biicl.org/blog/101/advancing-climate-justice-through-creative-lawyering-lessons-from-the-global-south>.

391. Margaret Barry & Maria Antonia Tigre, *Climate Litigation Updates*, SABIN CTR. FOR CLIMATE CHANGE LAW (Oct. 3, 2025), <https://climate.law.columbia.edu/news/climate-litigation-updates-october-3-2025>.

392. Andreas Kuersten, *Introduction to Tort Law*, CRS IN FOCUS IF11291 (May 26, 2023), [https://www.congress.gov/crs\\_external\\_products/IF/PDF/IF11291/IF11291.4.pdf](https://www.congress.gov/crs_external_products/IF/PDF/IF11291/IF11291.4.pdf).

393. Melanie Morris, *5.2 Sources of Contract Law*, in BUSINESS LAW I—INTERACTIVE 213-19 (RVCC Pressbooks 2024), <https://rvcc.pressbooks.pub/businesslaw131interactive/chapter/5-2-sources-of-contract-law/>.

394. Gary B. Born, *International Law in American Courts*, SSRN (Sept. 11, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5475912](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5475912).

the beginning that legal problems routinely cross jurisdictional boundaries develop the instinct to consider multiple legal frameworks when approaching any issue. This early anchoring might shift their entire approach to legal practice by providing them with tools to develop a more expansive “theory of the case”<sup>395</sup>—in turn making them more effective advocates and more sophisticated legal thinkers.

### C. Toward Inspiring, Holistic Legal Education

These two reforms—incorporating proactive narratives and expanding beyond and across federal and U.S. common law—share a collective goal: helping students see law as a dynamic, creative, and globally connected enterprise rather than a narrow, reactive, and parochially American one. Both reforms acknowledge that effective legal practice requires not just analytic skills but also imagination, empathy, and strategic thinking.

Consider again how these approaches might work together in practice. A constitutional law class could explore how other democracies and U.S. states have designed constitutional systems to promote rather than merely protect rights—showing students proactive constitutional design rather than simply defensive constitutional litigation. An environmental law class could structure a unit around examining how international environmental agreements create frameworks for domestic innovation, rather than focusing solely on domestic enforcement failures. And demonstrating how local governments are vital actors in an introductory environmental law course exposes students to the type of government rules and agencies they are most likely to interact with as lawyers and as community members.

The goal of our suggestions is emphatically not to abandon rigor or critical analysis. IRAC remains essential, federal law remains important, and students still need to understand how legal systems respond to failures and conflicts. These traditional elements, though, can be part of a richer educational experience that also shows students how law can be proactive, creative, and internationally engaged.

The students who arrive each fall with dreams of changing the world aren’t naive—they’re prescient. Law is one of the most powerful tools for social change, policy innovation, and global cooperation. Rather than immediately redirecting that energy toward siloed topics, perhaps we should show them how topics connect, and how diversifying their legal skill set can serve their broader ambitions. We should show them how law operates across multiple levels and jurisdictions, not just in federal courts. We should help them see legal practice as an opportunity for creative problem solving, not just dispute resolution. We should tell them stories of legal success, not just legal failure.

Legal education at its best should inspire as well as inform. When we combine rigorous training in analysis

with proactive narratives and global perspectives, we prepare students not just to practice law, but to practice law with vision, creativity, and hope. That’s the kind of legal education our students deserve—and the kind our profession needs.

## XVI. The Importance of Belonging to Blue Sky Thinking

*This section was authored by Keith H. Hirokawa, Distinguished Professor of Law, Albany Law School*

In the era of climate boiling,<sup>396</sup> belonging is essential for survival. Yet, for reasons that are not understandable through a lens of history, human health, economics, community well-being, equity, or fairness, the current Administration has targeted for cancellation federal programs that are designed to safeguard the most vulnerable among us. We are witnessing the normalization of un-American policies in which it is not just a disadvantage to be poor and/or homeless, it might even be illegal<sup>397</sup>; where it is not just a disadvantage to be a person of color, it might be illegal<sup>398</sup>; and where it is not just a disadvantage to be mentally or physically disabled, young, old, female, foreign, gender-fluid, gay, or trans, it might be illegal. The stakes here involve the relationship between governance and belonging.

It is generally agreed that “belonging is a fundamental human need that almost all people seek to satisfy.”<sup>399</sup> Belonging represents the ideal of being in a place that centers agency and authenticity, that fosters a sense of being included and supported, and establishes a place where individuals are not compelled to hide, step aside, or blend into the surroundings. Belonging is the recipe for a safe and secure community.

Belonging is such an important human need that it would seem to be a central feature of governance and government. U.S. history has demonstrated a slow but steady evolution toward a civic society in which all people have an opportunity to belong: from the Civil Rights Act, DACA, USAID, rights emanating from *Roe v. Wade*,<sup>400</sup> and other laws and programs, the United States claimed the moral high ground through progressive, inclusive politics that centered the care of people, regardless of their situation or identity. The United States was trending—albeit slowly—

396. United Nations, *Hottest July Ever Signals “Era of Global Boiling Has Arrived” Says UN Chief* (July 27, 2023), <https://news.un.org/en/story/2023/07/1139162>.

397. Jacquelyn Martin et al., *Trump’s “Safe and Beautiful” Move Against DC Homeless Camps Looks Like Ugliness to Those Targeted*, ASSOCIATED PRESS (Aug. 15, 2025), <https://apnews.com/article/trump-homeless-encampments-washington-dc-8519695993421bc07576e9141fca4edc>.

398. Alex Shephard, *ICE Begs Supreme Court for Right to Racially Profile Immigrants*, NEW REPUBLIC (Aug. 8, 2025), <https://newrepublic.com/post/198933/ice-supreme-court-racial-profiling-trump>.

399. Kelly-Ann Allen et al., *Belonging: A Review of Conceptual Issues, an Integrative Framework, and Directions for Future Research*, 73 AUST. J. PSYCH. 1, 1 (Mar. 2021).

400. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022).

395. James A. Johnson, *The Theory of the Case*, 100 MICH. B. J. 38 (Mar. 2021).

toward an inclusive society that illustrated governance for the purpose of belonging.

The current Administration is aggressively revising the standards for who and when certain people can belong in the United States. The *Miami Herald* Editorial Board’s mock checklist parodies the absurd approach ICE assailants use:

- Does this future patriot drive a truck that gets no more than 5 mpg of beautiful fossil fuel? Approve.
- Did the wannabe American show up to the immigration interview in a Prius or electrical vehicle? (Please consult your supervisor regarding the status of Tesla, as the president and Elon Musk may still patch things up.) Deny.
- Send applicants straight to “Alligator Alcatraz” if they rode a bike, because this is America, not Europe.
- Was the future model citizen spotted at the U.S. Capitol on Jan. 6, 2021? Approve.
- Has this ungrateful person posted anything complaining about the cost of groceries since Jan. 20, 2025—because “inflation is down to a perfect, beautiful number,” the president has to constantly remind us? Deny.
- Does this soon-to-be great American thank the president every day for protecting us from mail ballots, windmills, foreign invaders and paper straws? Approve—immediately.<sup>401</sup>

This is, of course, only a partial list. The unstated but central element of belonging in the United States seems to be whiteness. Moreover, given the race to deport and “clean up” cities, a race in which the Administration’s objective of mass deportation has been elevated over the means of accomplishing the task,<sup>402</sup> we should also add other important human features that appear to be conclusive of non-belonging: country of origin, gender, sexuality, age, both physical ability and mental acuity, and, of course, those Haitians in Ohio accused of eating cats and dogs.<sup>403</sup> Notably, it appears that even operating a business that pays homage to Trump is not the safe haven we might have expected.<sup>404</sup>

401. Miami Herald Editorial Board, *Can You Prove to Trump You’re Not Anti-American? An (Absurd) Immigration Checklist*, SUN NEWS (Aug. 21, 2025), <https://www.myrtlebeachonline.com/opinion/article311773945.html#storylink=cpy>.

402. Ray Brescia, *Due Process: What It Means in US Law and Its Implications for Migrant Rights*, THE CONVERSATION (July 28, 2025), <https://theconversation.com/due-process-what-it-means-in-us-law-and-its-implications-for-migrant-rights-259756>.

403. Liz O’Connell, *Donald Trump “They’re Eating the Dogs” Song Takes Off Online*, NEWSWEEK (Sept. 18, 2024), <https://www.newsweek.com/donald-trump-they-are-eating-dogs-remix-song-takes-off-online-1955752>.

404. Jennie Taer, *Owner of Trump-Themed Texas Burger Joint Faces Deportation for Overstaying His Visa*, N.Y. POST (Aug. 8, 2025), <https://nypost.com/2025/08/08/us-news/owner-of-trump-themed-texas-burger-joint-faces-deportation/>.

We might react by asking who decides who belongs, and on what basis. These might be interesting questions, and they are certain to invoke complicated legal and political answers. But the questions mask the absurdity of the challenge: how are these serious questions even in a democratic state? The absurdity is in the attempt to neutralize what should be an uncontroversial observation: every resident should have an opportunity to engage in their community and feel belonging.

Denying belonging by dispossession or exclusion—also known as Othering—is a violent act that inflicts a variety of harms, including anxiety, loneliness, and lack of companionship. Denying belonging ensures that an Other does not feel part of the community and that they are not represented. We should not be so vicious. Governance should be an exercise in facilitating the well-being and belonging of all people.

This is especially the case in the climate-boiling era, when the onslaught of climate impacts such as sea-level rise, extreme heat, wildfires, water and food scarcity, vector-borne disease, and severe storms exacerbates vulnerabilities. Governmental support and assistance should be afforded based on our presence and our needs, and not on whether we voted for the current president.

Instead, we are witnessing an aggressive effort to reinstitute and expand what Eljia Anderson calls the White Space into the white, male, “homegrown,” heterosexual, binary, and able space.<sup>405</sup> Outsiders to this framework may be allowed entry, but only if they dance<sup>406</sup>; whether they are teachers conceding that Trump won the 2020 election in order to relocate to Oklahoma,<sup>407</sup> law firms pledging not to sue the Administration,<sup>408</sup> or universities consenting to political demands on their curricula,<sup>409</sup> the current Administration taxes us for the right to belong.

Yet, belonging is the antidote to hate, racism, segregation, and structural bias, and it is antithetical to policies of exclusion and domination.<sup>410</sup> Institutionalizing belonging is an act of governance that respects all people, regardless of their differences, and is essential to creating livable, resilient societies in the climate era.

[com/2025/08/08/us-news/owner-of-trump-themed-texas-burger-joint-faces-deportation/](https://www.nytimes.com/2025/08/08/us-news/owner-of-trump-themed-texas-burger-joint-faces-deportation/).

405. Eljia Anderson refers to the “white space” as “settings in which black people are typically absent, not expected, or marginalized when present. . . . [B]lacks often refer to such settings colloquially as ‘the white space’—a perceptual category—and they typically approach that space with care.” Eljia Anderson, *The White Space*, 1 SOC. RACE & ETHNICITY 10, 10 (2015).

406. *Id.* at 13.

407. Jonathan Wolfe, *Oklahoma Proposes “American First Test” for Teachers From New York and California*, N.Y. TIMES (Aug. 20, 2025), <https://www.nytimes.com/2025/08/20/education/oklahoma-woke-teacher-test.html>.

408. Erin Mulvaney et al., *The Law Firms That Appeased Trump—and Angered Their Clients*, WALL STREET J. (June 1, 2025), <https://www.wsj.com/us-news/law/law-firms-trump-deals-clients-71b3616d?msocid=130c4ed9f0e6d6af302665ba7f15e6bb0>.

409. Irie Senter & Bianca Quilantan, *Universities Are Caving to Trump With a Stunning Speed and Scope*, POLITICO (Mar. 20, 2025), <https://www.politico.com/news/2025/03/20/universities-cave-conservatives-trump-00241765>.

410. Cinnamon C. Hirokawa & Keith H. Hirokawa, *Climate Dominance*, 35 GEO. ENV’T L. REV. 485 (2024).