

ARTICLES

A CONTRACTUAL RELATIONSHIP WITH ENVIRONMENTAL JUSTICE

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While corporations have long grappled with environmental issues, environmental justice is different. Corporations regularly manage compliance with environmental permits over a polluting facility's long lifespan. Justice issues, however, are a fast-growing space for corporations as they wrestle with employee, government, customer, and public demands to step up for the communities that are directly impacted by the pollution their facilities produce. This Article explores the relationship between corporate polluters and impacted communities, with a focus on private-ordering tools like contracts. Such a focus enriches environmental justice law's traditional focus on government decision-makers, moving instead to corporate decision-making about where, how, and what kinds of polluting facilities impact communities. Scholars have long recognized "community benefit agreements" and "good neighbor agreements" as contractual mechanisms that can drive forward corporate decision-making on polluting facilities in specific environmental justice communities. Yet, they also rightly raise concerns that these agreements suffer from problems of unequal bargaining power, negotiation implementation costs, and unenforceable terms. This Article asserts that environmental nonprofit organizations are in the best position to meet corporate counsel at the contract drafting table. Environmental nonprofit organizations have environmental technical expertise, access to large grant/philanthropic funding, an ability to provide pro bono legal representation to communities, and a governance structure that allows for mission-oriented work. In short, this Article calls on environmental nonprofit organizations to

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develop environmental justice transactional practice groups to supplement their public-law administrative focus with private ordering tools.

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INTRODUCTION

The world of environmental law is abuzz with the renewed attention amongst scholars and practitioners on environmental justice. The major environmental nonprofit organizations are prioritizing environmental justice after years of criticism that they have historically done more for wildlife and conservation than people and well-being.¹ The corporate sector is hiring high-level executives with experience in

1. Dorceta E. Taylor, *Race, Diversity, and Transparency in Environmental Organizations*, AM. SOCIO. ASS'N: FOOTNOTES, <https://www.asanet.org/footnotes-article/race-diversity-and-transparency-environmental-organizations> [https://perma.cc/CV5W-X3N6]; see also Ronda Chapman, *Prioritizing Environmental Justice in Climate Conservation*, TR. FOR PUB. LAND (Feb. 13, 2023), <https://www.tpl.org/blog/prioritize-environmental-justice-push-climate-conservation-goals> [https://perma.cc/9AXU-7MHH].

environmental justice and diversity, equity, and inclusion to advance not only environmental goals, but justice goals as well.² The federal government is embarking on a massive endeavor to “deliver [forty] percent of the overall benefits of climate, clean energy, affordable and sustainable housing, clean water, and other investments to disadvantaged communities (“Justice40 Initiative”).”³ The rapid revival in attention to environmental justice means that this is the moment for environmental lawyers to make real change for communities directly impacted by the environmental decisions that have largely failed to consider them.

Environmental injustices abound in the United States. In general, who gets the good (e.g., green space) and the bad (e.g., pollution), correlates with race, class, income, education, and a variety of other indicators.⁴ On average, non-Hispanic whites enjoy the benefit of a “pollution advantage” whereas Blacks and Hispanics on average bear a “pollution burden” relative to the exposure caused by their consumption.⁵ For example, one eighty-five mile stretch of land between New Orleans and Baton Rouge in Louisiana lined with oil refineries and petrochemical plants is known as “cancer alley” because residents of the area, who are predominately Black, are fifty times more likely to develop cancer than the average American.⁶ Factors such as

2. *Diversity, Equity and Inclusion: Our Commitment to Transformative Change*, ENV'T DEF. FUND, <https://www.edf.org/diversity> [<https://perma.cc/ZJ54-4GT7>]; Brittney J. Miller, *Racism Drives Environmental Inequality—But Most Americans Don't Realize*, NATURE (June 14, 2022), <https://www.nature.com/articles/d41586-022-01283-0> [<https://perma.cc/T8N7-W2BU>].

3. *FACT SHEET: Biden-Harris Administration Holds Justice40 Week of Action to Highlight Historic Investments in Overburdened and Underserved Communities*, WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-biden-harris-administration-holds-justice40-week-of-action-to-highlight-historic-investments-in-overburdened-and-underserved-communities> [<https://perma.cc/3ND3-EGXN>] [hereinafter *Justice40 Week of Action*] (describing billions of dollars in environmental justice investment across multiple federal programs).

4. See *Overview of Socioeconomic Indicators in EJScreen*, EPA, <https://www.epa.gov/ejscreen/overview-socioeconomic-indicators-ejscreen> [<https://perma.cc/VHW3-K52E>] (describing the U.S. Environmental Protection Agency Environmental Justice Screen as a mapping tool designed to reflect environmental injustice in specific areas of the United States as related to pollution).

5. Christopher W. Tessum, Joshua S. Apte, Andrew L. Goodkind, Nicholas Z. Muller, Kimberley A. Mullins & David A. Paoletta et al., *Inequity in Consumption in Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PROC. NAT'L ACAD. SCI. 6001, 6001–05 (2019).

6. Natalie Colarossi, *Ten Egregious Examples of Environmental Racism in the US*, INSIDER (Aug. 11, 2020, 3:35 PM), <https://www.insider.com/environmental-racism-examples-united-states-2020-8> [<https://perma.cc/7LUA-U8YB>].

education, income, and race also impact access to environmental benefits, like parks and other green space.⁷ A 2019 study of ten U.S. metropolitan cities found that residents with higher levels of education and income were more likely to have access to urban vegetation than other residents.⁸ The time for addressing rampant inequities across environmental decision-making is indeed a long time coming.

The reason for such environmental injustice is in large part due to historic decision-making by the government.⁹ In land use, government decision-making has dispossessed tribal communities of land that had been central to their livelihoods.¹⁰ In housing, government decision-making has led to massive disinvestment in urban minority communities and concentration of industrial facilities.¹¹ In pollution control, government decision-making has caused concentration of industrial facilities and toxic waste sites in low income and minority communities.¹² In climate change, government decision-making has

7. Shivani Shukla, *Racial Disparities in Access to Public Green Space*, CHI. POL'Y REV., (Sept. 23, 2020), <https://chicagopolicyreview.org/2020/09/23/racial-disparity-in-access-to-public-green-space> [<https://perma.cc/62UC-RRZU>] (noting the increased access to green spaces enjoyed by white and affluent populations).

8. Richard Florida, *The Inequality of America's Parks and Green Space*, BLOOMBERG (Mar. 19, 2019, 8:00 AM), <https://www.bloomberg.com/news/articles/2019-03-19/access-to-green-space-varies-by-class-race-in-the-u-s> [<https://perma.cc/58C4-YZGK>].

9. *See, e.g.*, Executive Order 14096, 88 Fed. Reg. 25251 (Apr. 26, 2023) (describing the lasting impact of government decisions regarding the locations of polluting entities, toxic dumps, and highways).

10. *See* Christopher Flavelle & Kalen Goodluck, *Dispossessed, Again: Climate Change Hits Native Americans Especially Hard*, N.Y. TIMES, <https://www.nytimes.com/2021/06/27/climate/climate-Native-Americans.html> [<https://perma.cc/Q2F3-25LA>] (last updated June 22, 2023) (noting the change in 1855 when a treaty stripped the Quileute tribe of most of its land); *see also* Nishan Degnarain, *Ten Ways that Racial and Environmental Justice Are Inextricably Linked*, FORBES (June 30, 2020, 11:56 PM), <https://www.forbes.com/sites/nishandegnarain/2020/06/30/eight-ways-that-the-fight-for-racial-and-environmental-justice-are-inextricably-linked> [<https://perma.cc/9KKQ-6B6L>] (“Blunt environmental policies such as the creation of poorly planned National Parks or Marine Protected Areas have been used to forcibly displace indigenous populations.”).

11. *See* Alejandra Borunda, *The Origins of Environmental Justice—and Why It's Finally Getting the Attention It Deserves*, NAT'L GEOGRAPHIC (Feb. 24, 2021), <https://www.nationalgeographic.com/environment/article/environmental-justice-origins-why-finally-getting-the-attention-it-deserves> [<https://perma.cc/T5R7-84V9>] (discussing the impacts of housing redlining and polluting site placement).

12. *See* Jennifer Hijazi, *EPA Finds Evidence of Disparate Impact in 'Cancer Alley'*, BLOOMBERG NEWS (Oct. 13, 2022, 4:14 PM), <https://news.bloomberglaw.com/environment-and-energy/epa-finds-evidence-of-disparate-health-impacts-in-cancer-alley> [<https://perma.cc/VSG7-M3EL>].

resulted in a lack of emergency relief for communities of color.¹³ The government is reckoning with past decision-making and trying to make changes going forward.¹⁴

Yet, corporate decision-making has also played a role in environmental injustice. Before government agencies make decisions on corporate applications for a permit or license to operate, the corporation must make decisions about what to put in the application. As government agencies propose new pollution regulations to account for cumulative impacts, the corporation must make decisions about what to say in responsive regulatory comments. When government agencies sue corporations for pollution violations in environmental justice communities, the corporation must make decisions about how to respond and/or resolve the litigation. Corporate decision-making and government decision-making are interrelated, and together have led to the environmental injustice prevalent throughout the United States today.

To be sure, corporations are waking up to justice issues. America's fifty biggest public companies and their foundations have collectively committed approximately \$50 billion to a wide range of justice issues since 2020.¹⁵ While such dollar values do not compare to the Biden Administration's funding commitments for the Justice40 Initiative, it is enough to make an impact as well as signal a larger trend in corporate philanthropy.¹⁶ In addition, corporations are increasingly focusing attention on elements of justice within "corporate social responsibility" ("CSR") and "environmental, social, governance" ("ESG") frameworks.¹⁷ With surveys indicating that eighty-one percent of Americans want

13. See Borunda, *supra* note 11 (discussing the ready flow of recovery aid to white communities versus communities of color).

14. Executive Order 14096, 88 Fed. Reg. 25251 (Apr. 26, 2023).

15. Trace Jan, Jena McGregor & Meghan Hoyer, *Corporate America's \$50 Billion Promise*, WASH. POST (Aug. 24, 2021, 7:03 PM), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice> [<https://perma.cc/765V-9GCJ>].

16. *Justice40 Week of Action*, *supra* note 3 (detailing the billions of dollars spent in environmental justice investment across multiple federal programs).

17. Lance Dial, Elizabeth Goldberg & Rachel Mann, *The Challenge of Investing in the Face of State Anti-ESG Legislation*, REUTERS (Aug. 24, 2022, 10:02 AM), <https://www.reuters.com/legal/legalindustry/challenge-investing-face-state-anti-esg-legislation-2022-08-24> [<https://perma.cc/LXZ3-JPEL>]; Elizabeth George, *Can Corporate Social Responsibility Be Legally Enforced?*, FORBES (Oct. 11, 2019, 9:58 AM), <https://www.forbes.com/sites/uhenergy/2019/10/11/can-corporate-social-responsibility-be-legally-enforced> [<https://perma.cc/7QZM-TM2T>].

CEOs to do more on justice and inequality, it is no wonder corporations are upping their game.¹⁸

At the same time, there is reason to caution against relying on corporations to achieve much by way of environmental justice.¹⁹ Some argue that claims by corporations regarding ethical and responsible practices towards marginalized communities are greenwashing.²⁰ Others assert that CSR is simply “soft law” that lacks the teeth of real accountability that exists within “hard law.”²¹ Research has shown that business “codes of conduct” in the space of social justice and human rights have largely failed to benefit marginalized communities due in part to lack of oversight mechanisms.²² Moreover, even if corporations want to engage in “real” environmental justice work, state anti-ESG legislation in several states, might limit progress.²³

This Article asserts that in a world where corporations, nonprofit organizations, and the government intend to advance environmental justice, private-ordering tools provide a vehicle to get there.²⁴

18. Zahid Torres Rahman, Jane Nelson & Tara Shine, *A Framework for Business Action on Climate Justice*, STAN. SOC. INNOVATION REV. (Oct. 17, 2022), https://ssir.org/articles/entry/a_framework_for_business_action_on_climate_justice [<https://perma.cc/6WQB-9TTX>] (discussing how the public believes that corporations should address inequality and providing a framework for how businesses can do so for climate justice).

19. See, e.g., Carlyann Edwards, *What is Greenwashing?*, BUSINESS NEWS DAILY (Sept. 1, 2023), <https://www.businessnewsdaily.com/10946-greenwashing.html> [<https://perma.cc/M5E5-3GP3>] (defining greenwashing and discussing how corporations sometimes use environmental initiatives to “mislead consumers”); e.g., Kathy G. Beckett, *Environmental Justice Should Result in Solutions*, AM. COLL. OF ENV'T L. (July 1, 2022), <https://acoel.org/environmental-justice-should-result-in-solutions> [<https://perma.cc/69JX-3JHW>] (discussing increased EPA inspections in problem areas and suggesting that violator’s penalties might more effectively solve problems if dispersed directly to affected communities).

20. See Abby Rogerson, *Never Let a Good (Climate) Crisis Go to Waste: Greenwashing in the Mining Industry*, MINN. CTR. ENV'T ADVOC. (June 14, 2022), <https://www.mncenter.org/greenwashing-in-mining> [<https://perma.cc/N64K-DMGM>] (highlighting a mining company’s use of such terms while disregarding environmental justice); see also Dial et al., *supra* note 17 (describing the term greenwashing).

21. George, *supra* note 17.

22. MSI INTEGRITY, NOT FIT FOR PURPOSE, EXECUTIVE SUMMARY, 4–7, 66, 137 (2020), https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf [<https://perma.cc/SU9Q-PE5A>].

23. Dial et al., *supra* note 17.

24. This Article uses the term “private ordering” to mean contractual in nature (as opposed to statutes, agency rules, or decisional law). See Megan Wischmeier Shaner, *Interpreting Organizational “Contracts” and the Private Ordering of Public Company*

Agreements between corporations and community-based organizations have been around for decades as “community benefit agreements” (“CBA”) or “good neighbor agreements” (“GNA”) (hereinafter collectively, “corporate-community agreements”).²⁵ These types of agreements stipulate that corporations provide environmental benefits to a community in exchange for the community’s commitment to resolve opposition (or provide support for) the corporation’s permitting and licensing a new or expanded facility.²⁶ Some legal scholars tout corporate-community agreements as proof of an available mechanism to advance environmental justice when government decision-making does not suffice.²⁷ Other legal scholars express concerns with corporate-community agreements related to unequal bargaining positions between the entities that are party to the agreement.²⁸ Yet, scholars seem to agree there is great potential for corporate-community agreements to be better, particularly through an assembly of best practices and lessons learned, and the development of model draft agreements.²⁹

This Article calls for a heightened role for environmental nonprofit organizations to support corporate-community agreements through the development of environmental transactional practice groups within their organizations. Environmental nonprofit organizations are increasingly prioritizing justice within their core missions, actively

Governance, 60 WM. & MARY L. REV. 985, 988 n.2 (2019) (noting that such an understanding of “private ordering” is consistent with prior scholarship to be contractual in nature).

25. Kristen van de Biezenbos, *Contracted Fracking*, 92 TUL. L. REV. 587, 593, 614–15, 631 (2018).

26. *Id.* at 593 (“Both domestic and foreign precedent exist for these comprehensive community agreements.”).

27. Michael Vandenberg, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2064–66 (2005) (discussing GNA’s as an example of the ways in which a private agreement does at least some of the work of public law).

28. See Kristen van de Biezenbos, *Enforcing Private Environmental Governance Standards Through Community Contracts*, 9 GEO. WASH. J. ENERGY & ENV’T L. 45, 48 (2018) (positing that putting community groups at a bargaining disadvantage potentially incentivizes them to agree to nonbeneficial terms); see also Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 35, 41 (2008) (noting that one community group signed an agreement without the benefit of independent counsel).

29. Michael Baram, *A New Social Contract for Governing Industrial Risk in the Community*, 56 JURIMETRICS J. 223, 240–43 (2016); see Vandenberg, *supra* note 27, at 2034 (discussing GNA’s as an example of the ways in which private agreements do at least some of the work of public law); van de Biezenbos, *supra* note 28, at 593 (discussing model draft agreements for GNA’s and CBA’s in the context of oil and gas fracking and impacted communities).

pledging to protect environmental rights, pursuing solutions that advance equity, and confronting systemic racism and oppression.³⁰ The funders of environmental nonprofits are also emphasizing giving to those organizations that prioritize justice work.³¹ To meet the growing justice work, environmental nonprofit organizations should also expand the tools used in their work. The same litigation and policy focused tools that inherently focus on government decision-making remain critical.³² However, adding private-ordering tools that focus on corporate decision-making helps to complete the environmental justice toolbox.³³

This Article proceeds in four parts. Part I provides framing and context for environmental justice, including the role for corporations. It describes corporate purpose and governance, especially as related to obligations and duties towards local communities impacted by corporate operations. Part II focuses on private ordering and contract law, including ongoing discussion on the theory and purpose of contracts. It draws upon important conversations in contract law about the role of justice in private law.³⁴ Part III focuses on corporate-community agreements, offering analysis on what they have been to date. It animates the work by clinical law scholars and legal service advocates on coalition building, bargaining power, and enforceability of corporate-community agreements.³⁵ Part IV argues for the

30. See *Equity and Environmental Justice at EDF*, ENV'T DEF. FUND, <https://www.edf.org/about/equity-and-environmental-justice-edf> (discussing the organization's vision and principles for environmental justice); *Environment, Equity, and Justice Center*, NAT'L RES. DEF. COUNCIL, <https://www.nrdc.org/about/environment-equity-justice-center> [<https://perma.cc/RKS4-5LD6>] (explaining how their organization "seeks to foster" social change through environmental justice); *Our Focus: Environmental Justice*, S. ENV'T L. CTR., <https://www.southernenvironment.org/our-focus/environmental-justice> [<https://perma.cc/PS6Q-Q267>] (committing to working with other partners to promote environmental justice).

31. *To Save the Climate Crisis We Need Funders to Change the Way They Do Business*, CLIMATE FUNDERS JUST. PLEDGE, <https://www.climate.donorsofcolor.org> [<https://perma.cc/4ZBK-EVYV>].

32. Wischmeier Shaner, *supra* note 24, at 988–89.

33. See Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 IND. L. REV. 621, 631–32 (2016) (arguing that tools like using the "benefits of public good transactions" provided by social enterprises and nonprofits are necessary for social change efforts).

34. See Baram, *supra* note 29, at 243 (discussing the ways private contracts may further social justice); Dial et al., *supra* note 20 (discussing state efforts to prohibit private ESG investing).

35. E.g., Robert Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10697, 10700 (2000) (discussing how the National Environmental Justice Advisory

development of transactional legal practice groups within the large environmental non-profit organizations to play a key role in the development of corporate-community agreements. It engages with scholarly work on nonprofit organizations and innovation in transactional drafting.³⁶ The Article then briefly concludes.

I. BACKGROUND

An April 2023 article from several environmental practitioners stated:

As companies face increased scrutiny all along the supply chain, including from regulators, customers, investors, and the public, one thing is clear: failure to consider environmental justice implications of corporate activities can significantly hinder the advancement of corporate objectives, including the achievement of climate targets, the effects of which are quite significant.³⁷

This Part provides background on the relationship between corporations and communities with environmental justice concerns, and framing for the specific focus of this Article on private-ordering tools to advance that relationship.

A. *Defining Environmental Justice*

The words “environmental” and “justice” are the combination of two issues that rank high in importance for Americans today. The attention to justice is in large part due to increased visibility and outrage over mass incarceration and police violence in communities of color.³⁸ The environment is hard to ignore as stories of devastating wildfires and floods across many areas of the United States due to extreme weather

Council recommended increasing government actions in low-income areas and “fostering the ability” of these communities ensure compliance with environmental laws).

36. See, e.g., Peter Molk & Daniel D. Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1505–07 (2021); Glen T. Troyer, David E. Jose & Andrea D. Brashear, *Governance Issues for Nonprofit Health Care Organizations and the Implications of the Sarbanes-Oxley Act*, 1 IND. HEALTH L. REV. 175, 179, 182 (2004); Faith Rivers James, *Nonprofit Pluralism and the Public Trust: Constructing a Transparent, Accountable, and Culturally Competent Board Governance Paradigm*, 9 BERKELEY BUS. L.J. 94, 98, 100 (2012).

37. Tatjana Vujic, Arie T. Feltman-Frank & Daniel L. Robertson, *Embracing Environmental Justice Initiatives to Advance Corporate Objectives*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 9, 2023), <https://corpgov.law.harvard.edu/2023/06/09/embracing-environmental-justice-initiatives-to-advance-corporate-objectives> [https://perma.cc/TXL6-GL36].

38. PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/policing.html> [https://perma.cc/VEQ8-USNK].

events increasingly appearing on newsfeeds.³⁹ The consideration of the intersection between “environmental” and “justice” is also likely due to visible connections between extreme weather events and challenges that exist for certain local economies to recover.⁴⁰ The COVID-19 pandemic too exposed American society to the inequities that exist in access to green space, public health, and safe housing.⁴¹ As corporate counsel in 2021 stated, “once a topic confined to activism and academia, environmental justice has washed over national conversation, and industry is preparing for the next wave.”⁴²

The term environmental justice has a wide definition. Corporate counsel working on advising corporate clients on environmental justice have suggested that environmental justice “targets every factor impacting one’s ability to live in a safe and healthy community and to access opportunities.”⁴³ Community leaders include a broad range of issues within principles of environmental justice such as worker safety and health, economic and political self-determination of communities, and recognition of a special relationship between native tribes and the U.S. government.⁴⁴ Local governments, like the City of New York, include “fair treatment” and “meaningful involvement” not only with respect to the development of environmental laws and policies, but

39. Joseph Pisani & Jennifer Calfas, *Extreme Heat, Floods, Fire: Was Summer 2023 the New Normal?*, WALL ST. J. (Aug. 23, 2023, 5:30 AM), <https://www.wsj.com/us-news/climate-environment/heat-floods-fire-was-summer-2023-the-new-normal-2df9bc21> [<https://perma.cc/AWR8-6CHD>].

40. See, e.g., Renee Cho, *Why Climate Change is an Environmental Justice Issue*, COLUM. CLIMATE SCHOOL: STATE OF THE PLANET (Sep. 22, 2020), <https://news.climate.columbia.edu/2020/09/22/climate-change-environmental-justice> [<https://perma.cc/N3HC-HV43>] (“Climate change is a threat to everyone’s physical health, mental health, air, water, food and shelter, but some groups—socially and economically disadvantaged ones—face the greatest risks.”).

41. See Tanya Khemet Taiwo, Pamela Lein & Bianca Yaghoobi, *Going Viral: COVID-19, Environmental Injustice & Institutionalized Racism*, UC DAVIS: ENV’T HEALTH SCI. CTR., (March 4, 2021), <https://environmentalhealth.ucdavis.edu/news/covid-19-environmental-injustice-racism> [<https://perma.cc/E45A-2NM3>] (noting the racial disparities in the death rate for COVID-19 stemmed from health conditions relating to environmental factors such as pollutant exposure).

42. Krista McIntyre, Ariel Stavitsky & Lydia Heye, *The Rising Tide of Environmental Justice and Preparing for the Next Wave*, CORP. COUNCIL (June 23, 2021), [https://www.stoel.com/getmedia/90b1cb5f9e9f4d9c-a03d-ca5627089295/EJ-Corporate-Counsel-\(1\).pdf](https://www.stoel.com/getmedia/90b1cb5f9e9f4d9c-a03d-ca5627089295/EJ-Corporate-Counsel-(1).pdf) [<https://perma.cc/H47G-AHCK>].

43. *Id.*

44. *Principles of Environmental Justice*, UNITED CHURCH OF CHRIST, https://www.ucc.org/what-we-do/justice-local-church-ministries/justice/faithful-action-ministries/environmental-justice/principles_of_environmental_justice [<https://perma.cc/E8CG-2NTB>].

also with “respect to the distribution of benefits.”⁴⁵ The federal government’s April 2023 announcement of a singular definition of environmental justice for the federal government, further demonstrates the term as inclusive of protection from burdens as well as access to benefits.⁴⁶

Subsets of environmental justice reflect a growing conception in society of the very meaning of the term “environmental.” The work of climate justice as a subset of environmental justice is to address the idea that existing social, economic, and health disparities “can be exacerbated by extreme heat, flooding, and catastrophic weather events.”⁴⁷ Energy justice and water justice bring to attention the growing problem of affordability and the increase in utility rates that are facing marginalized populations.⁴⁸ Food justice seeks to address disparities in food access, land ownership, and nutrition.⁴⁹ Housing justice focuses on inequities related to indoor environmental concerns as opposed to outdoor environmental concerns, such as lead paint, drinking water, and sewage backups.⁵⁰ We have come to include virtually all the conditions that make up a person’s surroundings in our conception of the “environment.”

The changing nature of the term “environmental” comports with a similar story on the term “justice.” The great Western philosophers of ancient history up to the contemporary era, from Plato in ancient times to John Rawls in the twentieth century, have long discussed the

45. *Environmental Justice*, N.Y.C. MAYOR’S OFF. OF CLIMATE CHANGE & ENV’T JUST., <https://climate.cityofnewyork.us/topic/environmental-justice> [<https://perma.cc/97-RYSA>].

46. Executive Order 14096, 88 Fed. Reg. 25251 (Apr. 26, 2023) (calling out protection from “disproportionate and adverse human health and environmental effects” as well as “equitable access to a healthy, sustainable, and resilient environment”).

47. *Environmental Justice*, *supra* note 45.

48. *Environmental Justice*, COAL. OF CMTYS. OF COLOR, <https://www.coalitioncommunitiescolor.org/environmental-justice> [<https://perma.cc/QU62-ZMJH>].

49. *Food Justice*, B.U. CMTY. SERV. CTR., <https://www.bu.edu/csc/edref-2/what-is-food-justice> [<https://perma.cc/WHJ9-EY9U>].

50. Maria Georgieva, *Connecting Environmental Justice and Housing Justice*, NAT’L CMTY. REINVESTMENT COAL. (May 25, 2021), <https://nrc.org/connecting-environmental-justice-and-housing-justice> [<https://perma.cc/J4GQ-4TFE>]; *see also* Gary Adamkiewicz, Ami R. Zota, M. Patricia Fabian, Teresa Chahine, Rhona Julien & John D. Spengler et al., *Moving Environmental Justice Indoors: Understanding Structural Influences on Residential Exposure Patterns in Low-Income Communities*, 101 AM. J. PUB. HEALTH 239, 239–43 (Supp. 1) (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222513> [<https://perma.cc/YZM2-7FT5>] (noting that “an underappreciated [environmental justice] issue relates to disparities in indoor residential environmental quality”).

meaning of justice and words associated with justice like “fair” and “inequality.”⁵¹ In addition, philosophers have brought into ideas of justice, whether there are certain justifiable criteria to which it is acceptable to treat people differently, such as with a person that is first in line for tickets to a performance.⁵² In some cultures, the concept of healing, along with reintegrating of individuals into a community, is a central concept.⁵³ The foundations of justice correspond to ethical values of social stability, interdependence, and equal dignity.⁵⁴

Scholars cite to four dimensions to justice that are embedded in the concept of environmental justice: distributive justice, procedural justice, corrective justice, and transitional or social justice.⁵⁵ Distributive justice is concerned with the allocation of the burdens and benefits of any society amongst persons with competing needs and claims.⁵⁶ Corrective justice is the principle that wrongfully caused harms of the past ought to be repaired by the individuals/entities that caused the harms.⁵⁷ Procedural justice is concerned with the means by which we apply the requirements of corrective and distributive justice, with an emphasis on voice, participation, and acknowledgment of the concerns of people impacted by the decision.⁵⁸ Transitional or social

51. See Wayne P. Pomerleau, *Western Theories of Justice*, INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/justwest/#H4> [<https://perma.cc/65AS-DYPB>] (consolidating and discussing the theories of justice from Greek to Christian to modern and contemporary philosophers).

52. Manuel Velasquez, Claire Andre, Thomas Shanks, S.J. & Michael J. Meyer, *Justice and Fairness*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA U. (Aug. 1, 2014), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness> [<https://perma.cc/H9GG-92L2>].

53. Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INT'L INST. RESTORATIVE PRACS. (Apr. 27, 2004), <https://www.iirp.edu/images/pdf/natjust1.pdf> [<https://perma.cc/ZKZ5-CREM>].

54. Velasquez et al., *supra* note 52.

55. Kuehn, *supra* note 35, at 10681.

56. *Id.* at 10683–84.

57. Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1323 (2004); see also Kuehn, *supra* note 35, at 10693–94 (describing that corrective justice also includes other conceptions of justice such as reparative justice, restorative justice, and compensatory justice).

58. Valerie Jenness & Kitty Calavita, “*It Depends on the Outcome*”: *Prisoners, Grievances, and Perceptions of Justice*, 52 LAW & SOC'Y REV. 41, 46–47 (2018); see also Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PA. STATE L. REV. 745, 771 (2017) (considering how procedural justice contributes to voluntary obedience of the law because of the role citizens play in electing and promoting the facilitators of procedural justice); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192,

justice examines “how societies move beyond histories of oppression and violence toward a more just and peaceful order.”⁵⁹

It is important to distinguish between “environmental justice” and “environmental quality” because the two are not always the same. Promoting a renewable energy transition may be an environmental or climate “win,” but such transition also requires extensive mining of essential minerals, from companies with multiple recorded human rights and worker abuses.⁶⁰ Advancing passenger rail to move society out of cars and into public transportation may be an environmental or climate “win,” but such advancement may also cause increased traffic congestion, noise, and safety concerns for communities living near rail stations.⁶¹ Promoting biogas systems at hog farms to reduce methane emissions may be an environmental or climate “win,” but such systems also cause localized water pollution for communities living near the hog farms.⁶² What is good for the environment or climate does not

238 (2004) (weighing the price paid by those impacted by the procedure with the fairness of the outcome).

59. Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1, 2 (2020); see also Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 45–46 (2019) (arguing in favor of “transformational justice” instead of “transitional justice” because the term “transition” is too limiting in that it “suggests a system that will remain largely intact, merely with new constituent parts”); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 778, 790–91 (1998) (stressing that social justice inquiries, especially in the context of environmental justice, must “evaluate the mechanisms and processes producing inequity”).

60. See *Mineral Extraction Necessary for Net-Zero at Risk as Human Rights Abuses Slow Energy Transition*, BUS. & HUM. RTS. RES. CTR. (May 4, 2022), <https://www.business-humanrights.org/en/from-us/media-centre/mineral-extraction-necessary-for-net-zero-at-risk-as-human-rights-abuses-slow-energy-transition> [https://perma.cc/RPK2-HA7J] (reporting that there have been almost 500 human rights abuses reported relating to mineral extraction between 2010 and 2021).

61. See Nathan Lee, *Off the Rails: How America Can Revitalize Its Railroads*, ENV'T & ENERGY STUDY INST. (Sept. 2, 2022), <https://www.eesi.org/articles/view/off-the-rails-how-america-can-revitalize-its-railroads> [https://perma.cc/W9LX-AB73] (characterizing a “robust” railway as a vital alternative to carbon-producing automobiles); Hazel Trice Edney, *From Erroneous Data to Environmental Justice, Rail Merger Concerns Still Loom Large*, FORWARD TIMES (Nov. 18, 2022), <https://forwardtimes.com/from-erroneous-data-to-environmental-justice-rail-merger-concerns-still-loom-large> [https://perma.cc/8RE7-VNYU] (reporting that with freight trains rolling through communities of color means more emissions and dirtier air for residents there).

62. E.g., Cameron Oglesby, *‘This Plan Is a Lie’: Biogas on Hog Farms Could Do More Harm than Good*, ENERGY NEWS NETWORK (Mar. 28, 2022), <https://energynews.us/>

always equate to what is good for local people, and therein lies the complication within the environmental justice movement.

B. Corporations and Communities

The theoretical debate over whether corporations have responsibilities to communities with environmental justice concerns depends in part on the theory of the business corporation. At the beginning the nineteenth century, the business corporation was considered artificial, in that it owed its existence to the positive law of the state rather than to the private initiative of individual incorporators.⁶³ In contrast to the “artificial entity theory” that dominated the nineteenth century, the “natural entity theory,” which emerged in the twentieth century, imagined the “corporation as the creation of [private individuals] rather than state power.”⁶⁴ The shift in thinking from the “artificial theory” to the “natural theory” brought about ideas of the corporation as a collection of individuals tied together through mutual agreements—known as the “aggregate theory” of the corporation.⁶⁵ All these theories continue to influence operation of the business corporation today, including its place in social and environmental justice.⁶⁶

The debate today on the theory of the corporation continues to wrestle with the role of shareholders as owners of the corporation. The “principal-agent” theory views the central contractual relationship as an agency relationship between the shareholders, who are the real owners of the corporation’s property and act as principals, and the directors and managers who serve as their agents.⁶⁷ The “contractarian theory” sees the corporation as a “nexus of contracts’ among the various suppliers of inputs to the business, such as investors, creditors,

2022/03/28/this-plan-is-a-lie-biogas-on-hog-farms-could-do-more-harm-than-good [https://perma.cc/WC5Z-HN8F] (“At farms using this system, hog waste—feces, urine, blood, and pus — drips through slats in the floors and into open pit lagoons, where it is mixed with water.”).

63. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205–06 (1990).

64. *Id.* at 211.

65. Reuven S. Avi-Yonah, *The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 771 (2005).

66. Martin Petrin, *Reconceptualizing the Theory of the Firm—from Nature to Function*, 118 PA. STATE L. REV. 1, 14 (2013) (explaining that all theories continue to influence American law today).

67. Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27, 28–29 (1998).

and employees.”⁶⁸ That is, “the holders of common stock . . . are not the owners of the corporation, but just one of many contractual claimants.”⁶⁹ The discussion over shareholder primacy versus stakeholder theory has been alive and well for decades.⁷⁰

The Great Depression also inspired the advent of required business corporate disclosures regarding risk, including from polluting facilities.⁷¹ The U.S. Securities and Exchange Commission (SEC) today is empowered to require corporate disclosure of information that is material to investors, and increasingly, such material information includes corporate activity associated with everything from climate risk to labor and human rights.⁷² Companies file annual reports (Form 10-K), quarterly reports (Form 10-Q), and additional reports when there have been important events and changes between quarterly reports (Form 8-K).⁷³ A 2022 SEC proposed rule on enhanced corporate

68. Robert Anderson IV, *A Property Theory of Corporate Law*, 2020 COLUM. BUS. L. REV. 1, 5–7 (2020).

69. *See id.* at 1 (describing contractual claimants as individuals or entities engaged in contractual relationships with the corporation, redefining shareholders as merely one of several groups with contractual claims rather than exclusive owners).

70. Multiple scholars continue to discuss the 1932 debate published in the *Harvard Law Review* between the view of Professor Adolph A. Berle on “shareholder primacy” versus that of Professor E. Merrick Dodd on “stakeholder theory.” *See* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189, 1200 (2002) (detailing the history of Berle’s shareholder primacy argument and Dodd’s “vehement” disagreement, and positing that the best argument for shareholder primacy is that it is “a second-best solution that is good for *all* the stakeholders”); Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337, 339–48 (2018) (detailing the critique of Dodd and arguing that critics often mischaracterize his theory); Fenner Stewart, Jr., *Berle’s Conception of Stakeholder Primacy: A Forgotten Perspective for Reconsideration During the Rise of Finance*, 34 SEATTLE U. L. REV. 1457, 1474–85 (2011) (comparing and contrasting the positions of Berle and Dodd).

71. Alexandra Thornton & Tyler Gellasch, *The SEC Has Broad Authority to Require Climate and Other ESG Disclosures*, CTR. AM. PROGRESS (June 10, 2021), <https://www.americanprogress.org/article/sec-broad-authority-require-climate-esg-disclosures> [<https://perma.cc/7ZZB-LEY9>] (describing the historical context in which Congress passed federal security laws and establishing the SEC over eighty years ago).

72. *Id.* (arguing that the SEC has a responsibility to ensure market participants have the necessary climate-related information important to their business decisions).

73. *Form 10Q*, SEC, <https://www.investor.gov/introduction-investing/investing-basics/glossary/form-10-q> [<https://perma.cc/W2RM-FPP3>]; *see also* Maia Gez, Era Anagnosti & Taylor Pullins, *ESG Disclosure Trends in SEC Filings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 16, 2022), <https://corpgov.law.harvard.edu/2022/07/16/esg-disclosure-trends-in-sec-filings> [<https://perma.cc/2ZPD-WPLZ>] (describing

disclosures included comments from over a hundred environmental justice organizations specifically stating “we believe the rule would be greatly strengthened by inclusion of disclosures regarding Indigenous and tribal peoples’ rights risks where Indigenous and tribal peoples are directly or indirectly impacted by listed companies’ operations.”⁷⁴ At the same time, as of January 2023, multiple states have enacted anti-ESG legislation, criticizing ESG investments as putting ideology above shareholder profits.⁷⁵

C. *Role of Transactional Law*

Transactional law encompasses the legal issues generated by business dealings.⁷⁶ It can involve a variety of actions including organizational formation, securities issuances, mergers and acquisitions, negotiation of commercial contracts, litigation settlement, and advising on regulatory matters related to transactions.⁷⁷ It tends to be less adversarial than litigation where one party normally wins and another party loses, but instead seeks to find a solution to a dealing that all sides support.⁷⁸ It also applies to a wide range of types of organizations, including business corporations, but also government agencies, community organizations, and large nonprofit organizations, all of which engage in the negotiation, formation, and drafting of various kinds of agreements with each other.⁷⁹

how, in the Fall of 2021, the SEC issued sample comment letters and questioned companies on their climate assessments).

74. Letter from Environmental Justice Organizations to Gary Gensler, Chairperson of the SEC (June 16, 2022) (on file with the SEC), <https://www.sec.gov/comments/s7-10-22/s71022-20131665-302054.pdf> [<https://perma.cc/XD4S-XA22>].

75. See Saijel Kishan & Danielle Moran, *Republicans Prepare to Ramp up Their Anti-ESG Campaign in 2023*, BLOOMBERG (Dec. 29, 2022, 6:00 AM), <https://news.bloomberglaw.com/environment-and-energy/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023> [<https://perma.cc/4LME-ZSA3>] (discussing how Florida and at least six other states plan to pull funds from BlackRock over its ESG stance, while Texas and Oklahoma are crafting bills to restrict ESG use, and reporting a Kentucky banking group sued the state attorney general over investigating banks’ ESG factors).

76. *Transactional Law*, HARV. L. SCH, <https://hls.harvard.edu/bernard-koteen-office-of-public-interest-advising/about-opia/what-is-public-interest-law/public-interest-work-types/transactional-law> [<https://perma.cc/5BM8-ZZDJ>].

77. *Id.*

78. Patience A. Crowder, *Impact Transaction: Using Collective Impact Relational Contracts to Redefine Social Change in the Urban Core*, 8 TENN. J. RACE GENDER & SOC. JUST. 1, 4 (2019) (“Transactional law is centered on value creation, and transactional practice seeks to create value for all of the parties to a transaction.”).

79. See *id.* at 11–13 (explaining how transactional law seeks value creation for all the parties to a transaction when parties make up a variety types of organizations).

Transactional documents frequently contain environmental provisions. Many provisions seek to limit the risk of environmental liability and litigation for the parties involved, such as insurance contracts that include provisions regarding potential future pollution incidents, such as leaks and spills at facilities.⁸⁰ Other provisions seek to abdicate responsibility for clean-up of existing pollution, such as merger and acquisition agreements that include provisions regarding due diligence over the sale of contaminated land.⁸¹ Additionally, provisions seek to advance interest in larger environmental goals, such as the inclusion of energy efficiency or waste reduction requirements in supply chain contracts.⁸² Moreover, provisions might allow for the collection of fees or utility rates from an environmentally oriented project, like in a private-public partnership agreement for a new water sewage infrastructure system.⁸³ So pervasive are environmental provisions in transactional documents that some scholars have argued that many of the goals of the key federal pollution statutes are achieved not only through traditional administrative law, but also through contracts and agreements.⁸⁴

Yet, it is unclear how much (or in what ways) transactional documents shape issues of environmental justice. An organization might impose energy efficiency requirements in a supply contract to move towards meeting net zero pledges, but might not do anything to control fugitive dust air pollution from its facility that exists in an

80. See, e.g., *Environmental Insurance*, AIG, <https://www.aig.com/environmental> [<https://perma.cc/X6MN-TAVP>] (discussing the benefits and reasons for choosing AIG environmental insurance).

81. See Stephen E. Luttrell & Chris Alviggi, *Minimizing Environmental Liabilities Post-Mergers and Acquisitions*, WHITEFORD (Mar. 29, 2022), <https://www.whitefordlaw.com/news-events/minimizing-environmental-liabilities-post-mergers-and-acquisitions> [<https://perma.cc/25AQ-TVNZ>] (explaining that mergers and acquisitions typically contain representation and warranty clauses).

82. See Michael P. Vandenberg & Patricia A. Moore, *Environmental Governance by Contract: The Growing Role of Supply Chain Contracting*, 12 MICH. J. ENV'T & ADMIN. L. 1, 7, 38–39 (2022) (using Graphic Packaging as an example of a company that requires its suppliers to commit to environmental preservation using measures such as waste reduction, resource conservation, and pollution control).

83. See PATRICK SABOL & ROBERT PUENTES, BROOKINGS INST., PRIVATE CAPITAL, PUBLIC GOOD: DRIVERS OF SUCCESSFUL INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS 9 (2014), https://www.brookings.edu/wp-content/uploads/2016/07/BMPP_PrivateCapitalPublicGood.pdf [<https://perma.cc/DU6C-LN8S>] (identifying a group that took over the operations and maintenance of a city's water system in turn for the right to collect revenue from users).

84. Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (2013).

environmental justice community.⁸⁵ A corporation might agree in an agreement with a government regulator to address the specific pollutants from its facility, but might not adequately take into account the cumulative impact of other polluting facilities in the same area on local residents.⁸⁶ A corporate insurance company might provide discounts for homeowners that make their homes more fire or flood resistant in the climate risk areas, but low income communities may not be able to afford such improvements.⁸⁷ Thus, the use of transactional documents to further environmental quality does not always also further environmental justice. There must be a deliberate attempt to do so.

The challenge of linking transactional law with justice lies within the need to build resources within the legal community. Many legal research resources have traditionally been geared toward litigation-based areas of practice, with only limited availability for helpful print and online research tools for transactional lawyers.⁸⁸ Legal service providers, such as law school clinics, have focused on litigation tools to advance justice, with only limited instances of transactional legal services offering legal aid to small businesses and community organizations.⁸⁹ As Professor Patience Crowder describes, there is a need for “impact transaction,” which she states is “based on voluntary

85. See *id.* at 192 (“It is difficult to connect many private governance activities with specific changes in environmental quality at the local or regional levels.”).

86. E.g., Kiana Courtney, #DenyThePermit? A Call for Cumulative Impacts Legislation by Frontline Communities, ENV'T L. & POL'Y CTR. (Dec. 8, 2021), <https://elpc.org/blog/deny-the-permit-a-call-for-cumulative-impacts-legislation-by-frontline-communities> [<https://perma.cc/77AP-2CJ7>] (discussing movement to deal with state permits that do not consider cumulative impacts).

87. See Renee Cho, *With Climate Impacts Growing, Insurance Companies Face Big Challenges*, COLUM. CLIMATE SCH.: STATE OF THE PLANET (Nov. 3, 2022), <https://news.climate.columbia.edu/2022/11/03/with-climate-impacts-growing-insurance-companies-face-big-challenges> [<https://perma.cc/2A94-XJN2>] (discussing a new law in California that requires insurance companies to give consumers a discount for fireproofing measures and Florida insurance companies that offer discounts for hurricane-proofing).

88. Laura M. Scott, *Transactional Resources: Research Tools for Doing a Deal*, DUKE U. SCH. OF LAW (Oct. 2018), <https://law.duke.edu/sites/default/files/lib/transactional.pdf> [<https://perma.cc/B4WS-A3KB>].

89. See Leah Duncan, *The Role of Transactional Law Clinics in Promoting Social Justice*, MICH. J. RACE & L. (Mar. 18, 2019), <https://mjrl.org/2019/03/18/the-role-of-transactional-law-clinics-in-promoting-social-justice> [<https://perma.cc/3B6U-28JA>] (arguing that “by exposing students to the nexus between transactional law and social justice, transactional law clinics such as the Housing Initiative Transactional Clinic promote an increased awareness of the ways in which lawyers can use business law to increase access to justice”).

actions and agreements among parties interested in pursuing large-scale social change.”⁹⁰ Impact transaction is “a forward-looking practice designed to effectuate parties’ common goals while simultaneously identifying and accounting for preventative mechanisms to prevent disharmony among the parties.”⁹¹ As this Article argues, large environmental nonprofit organizations are a promising avenue for achieving impact transaction in environmental justice because of their legal sophistication, access to large scale funding, and understanding of both corporate and community organizations.

II. CONTRACTUAL MECHANISMS

The public wants corporations to do more on social and environmental justice.⁹² However, corporate promises to improve social and environmental justice do not always lead to results on social and environmental justice. Indeed, news stories have reported on the lack of follow-through of many corporate pledges on social justice issues, arguing for ways to hold corporations to promises made.⁹³ As stated by prominent contract law scholar Daniel Markovits, “[p]romises lie at the center of persons’ moral experience of one another, and contracts lie at the center of their legal experience of one another.”⁹⁴ This Part provides an understanding of the theory of contract, and its relationship to justice, as foundation for understanding the future potential development of corporate-community contracts.

90. Crowder, *supra* note 78, at 4 (contrasting “impact transaction” with “impact litigation,” which seeks to create social change based on judicial adjudication).

91. *Id.*

92. See, e.g., Tim Stobierski, *15 Eye-Opening Corporate Social Responsibility Statistics*, HARV. BUS. SCH. (June 15, 2021), <https://online.hbs.edu/blog/post/corporate-social-responsibility-statistics> [<https://perma.cc/A7NU-MLMX>] (surveying statistics that show a significant percentage of the general public and investors prefer companies that promote global enhancement and prioritize CSR initiatives and the impact corporate statements and actions on social and environmental issues has on the perception of the corporation by customers and investors).

93. See, e.g., Laura Morgan Roberts & Megan Grayson, *Businesses Must be Accountable for Their Promises on Racial Justice*, HARV. BUS. REV. (June 1, 2021), <https://hbr.org/2021/06/businesses-must-be-accountable-for-their-promises-on-racial-justice> [<https://perma.cc/Q47W-9HZF>]; see also Adam Shamsi, Monica L. Wang & Hannah McKinney, *Who’s Going to Check Them? Racial Equity Audits Can Help Corporate America Keep Its Promises to Address Systemic Racism*, BOS. GLOBE, <https://www.boston-globe.com/2023/03/13/opinion/whos-going-check-them> [<https://perma.cc/GS75-JCPB>] (Mar. 13, 2023, 11:03 AM) (discussing the potential and limitations of racial equity audits as a tool to address racial inequalities in the corporate context).

94. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419 (2004).

A. *Theory and Purpose*

The world of contracts impacts individuals, non-profit organizations, government agencies, and business corporations routinely. Individuals encounter contracts throughout multiple daily activities, including renting an apartment, downloading computer software, taking new jobs, and hiring kitchen remodelers.⁹⁵ Business organizations and non-profit organizations also interact with contracts through daily operation with suppliers, landlords, employees, and insurance companies.⁹⁶ The government frequently contracts with private entities to provide products and services ranging from aircraft to software to health care.⁹⁷ Contracts are at the heart of interactions between and among individuals and organizations.

Given the diverse nature of contracts, it makes sense that there is no one theory and purpose of contract law.⁹⁸ The classical theory of contract holds freedom and autonomy as contract law's central purpose.⁹⁹ The rights of parties to decide “to contract (or not contract) with one another and to determine the terms of such contract” is of utmost importance.¹⁰⁰ Because a contract is a special kind of promise—one that carries a legal duty of performance—the purpose of law under the classical contract theory is to protect that very act of contracting.¹⁰¹ In a classical theory world of contracts, the law is to fulfill the will of the contracting parties by providing a remedy when one party fails to

95. Lisa Burden, *What Contracts Are Required to Be in Writing?*, FINDLAW (Aug. 30, 2023), <https://www.findlaw.com/smallbusiness/business-contracts-forms/what-contracts-are-required-to-be-in-writing.html> [<https://perma.cc/5ZUB-YNP7>].

96. *Contract 101: Definition, Types, Essential Elements & Lifecycle*, FACTOR (Apr. 11, 2023), <https://www.factor.law/insights/contracts-101-definition-types-essential-elements-lifecycle> [<https://perma.cc/4C2G-CPFG>].

97. *A Snapshot of Government-Wide Contracting for FY 2021 (Interactive Dashboard)*, GOV'T ACCT. OFF. (Aug. 25, 2022), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard> [<https://perma.cc/A5RJ-LCST>].

98. See Florian Rödl, *Contractual Freedom, Contractual Justice, and Contract Law (Theory)*, 76 LAW & CONTEMP. PROBS. 57, 57 (2013) (noting philosophical and economic approaches to the theory and explaining the task of contract theory is to “help us understand what a contract is and why contract law is therefore the way it is”).

99. Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1286 (1990).

100. Eric H. Franklin, *Mandating Precontractual Disclosure*, 67 U. MIA. L. REV. 553, 560 (2013).

101. RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981).

perform.¹⁰² Such remedies could include damages or specific performance.¹⁰³

A law and economics theory of contract focuses on contracting parties as rational decision-makers and economic efficiency as the central purpose of contract.¹⁰⁴ The theory is that each contracting party wants to maximize its gain from the transaction.¹⁰⁵ In its measurement of “gain,” contracting parties will consider those costs associated with the “front-end” of contracting the negotiation process, as well as the “back-end” of contracting—the enforcement process—collectively referred to as transaction costs.¹⁰⁶ A law and economics formulation also asserts that if a contracting party has a rational incentive to breach a contract (a superior opportunity comes along), as long as the other contracting party is adequately compensated, such a breach would be economically efficient.¹⁰⁷

In addition to classical and law and economics theories, the relational contract theory has also featured prominently in legal scholarship. Relational contract theory supports the idea that contracts are formed and performed in a greater context in which the contract is only one aspect of the relationship.¹⁰⁸ Classical theory assumes that contracts are more or less static documents between arms-length bargainers, where the parties’ identities do not matter and the terms

102. Luca Anderlini, Leonardo Felli & Andrew Postlewaite, *Should Courts Always Enforce What Contracting Parties Write?*, 7 REV. L & ECON. 1, 20 (2011).

103. See Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1365 (1982) (noting the two most prevalent types of remedies for breach of contract).

104. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543–44 (2003) (explaining that contract law should primarily prioritize economic efficiency by maximizing the joint gains from transactions, and thereby adhering to the core principles of a law and economics theory of contract).

105. *Id.* at 544.

106. Naveen Thomas, *Rational Contract Design*, 74 ALA. L. REV. 967, 969 (2023) (noting that vagueness lowers the “front-end” transaction costs but involves higher “back-end” costs).

107. David Campbell, *The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 TEX. WESLEYAN L. REV. 455, 460–61 (2005) (arguing that in such an event, the “net result will be identical for the [the other contracting party] and superior for the [contracting party]”).

108. See, e.g., Stewart Macaulay & William C. Whitford, *The Development of Contracts: Law in Action*, 87 TEMP. L. REV. 793, 799 (2015) (describing the practical impact on people and businesses’ dispute resolution and influences on future parties to contracts).

and remedies are outlined in clear fashion.¹⁰⁹ Relational contract theory, however, asserts that pre-existing and ongoing relationships, like marriage—where trust and social norms typically drive contract compliance—actually govern contracts.¹¹⁰ Relational contract law theory emphasizes the parties' social and interpersonal relationships and not simply the contractual agreement of those parties.¹¹¹

A similar theory to relational contract theory, collaborative contract theory, focuses on the role of cooperation in contracts involving business transactions. As contracts law scholar Alan Schwartz describes, a “traditional economy” involving fairly simple transactional contracts “containing a price, [a] quantity, [a] description of what the parties were trading, and sometimes a warranty” dominated the nineteenth and twentieth centuries.¹¹² Today’s “new economy” is different in that businesses jointly produce complex products, whereas production occurs over multiple years (e.g., software and drug development).¹¹³ These new economy contracts often differ from traditional conceptions of contract law.¹¹⁴ New economy contracts often contain vague terms, such as provisions that require the parties to employ “best efforts,” conduct “‘routine’ inspections” (without specifying what constitutes routine), or comply “material[ly].”¹¹⁵ New economy contracts are a dominant topic in contract law today.

Both the relational and collaborative contract theories envision a different working relationship amongst the contracting parties than classical contract theory considers. It is impossible to predict every scenario in many contractual relationships, particularly in business contracts, where technology, regulation, and globalization create

109. Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 836 (1985) (“Classical contract law also provides an interpretive framework that further minimizes interpretation problems associated with discrete transactions.”).

110. Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 652 (2010) (outlining the seven properties that most contracts share under a relational contract theory).

111. James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RESV. L. REV. 1, 4–5 (2003) (arguing that “relational contract theories present important revisions to the standard perspective on contract law” that “most first-year contracts courses” have taught for “much of the last two generations”).

112. Alan Schwartz & Simone M. Sepe, *Contract Remedies for New-Economy Collaborations*, 101 TEX. L. REV. 749, 754 (2023).

113. *Id.*

114. *Id.*

115. Cathy Hwang, *Collaborative Intent*, 108 VA. L. REV. 657, 660 (2022); see Schwartz & Sepe, *supra* note 112, at 754–55 (noting “[p]arties conduct deals today under agreements that are not contracts as the Restatements define contracts”).

constant changes.¹¹⁶ As such, recognition, respect, and community among the parties are common features of many contractual relationships in practice.¹¹⁷ These theories acknowledge that in the real world, contractual relationships are premised on parties working together in good faith and focusing on fixing problems rather than blaming each other.¹¹⁸ The emphasis is on a contractual relationship that is not adversarial but rather based on transparency, joint management of risk over the long term, and self-enforcement.¹¹⁹

B. *Contracts and Justice*

Contract law, a traditionally private law field, is not typically the first legal arena to come to mind when thinking of justice. The classical view of contract law that dominates contract law today is one that places utmost value on individual autonomy, allowing individuals and private organizations to “pursue their own conceptions of the good in collaboration with others.”¹²⁰ There is justice simply in the idea of making and enforcing agreements.¹²¹ The history of freedom in the United States demonstrates that even the right to be able to contract has deep ties to racial justice.¹²² The law and economics theory of

116. See Kate Vitasek & David Frydinger, *Contracting in the New Economy: What is New? Why the Need to Change? And a Suggested Approach for Creating Strategic Contracts*, 53 U. PAC. L. REV. 583, 609 (2022) (discussing how market threats can come from everywhere—competitors, customers, regulators, technology—and how in such a complex environment achieving a complete plan is costly).

117. See generally Markovits, *supra* note 94, at 1465 (noting that within the collaborative view, contracts engender “distinctive forms of respect and community”).

118. *Collaborative Contracting – An Introduction*, COLLABORATIVE CONTRACTING BLOG, <https://collaborativecontracting.com.au/2019/10/13/collaborative-contracting-an-introduction> [<https://perma.cc/2X2Q-54CH>].

119. See Schwartz & Sepe, *supra* note 112, at 754–55 (explaining that each party will “expect[] the other to comply independently of the state’s power to enforce”).

120. Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485, 1493 (2022).

121. *Id.* at 1485; Logue, *supra* note 57, at 1329–30 (“[D]istributive justice is assumed to be relegated to the redistributive arm of the government, specifically, the tax-and-transfer system.”).

122. The Reconstruction Era statutes, enacted as part of the Civil Rights Act of 1866—an effort to move the country out of racial discrimination and economic suppression—specified that “[a]ll persons” shall have the rights to “[m]ake and enforce contracts,” a right already “enjoyed by white citizens.” 42 U.S.C. §§ 1981–82; see John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1138–39 (1990) (discussing the judicial developments after the Civil Rights Act of 1866, such as *Runyon v. McCrary*, decided in 1976 and a significant step toward eliminating racial discrimination); Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH.

contract law also does not emphasize distributive justice as a contractual objective but rather focuses on the contracting parties' rational choice and assumes they will define for themselves the value of the goods and services they are trading.¹²³ The argument is as follows: Intervention in contracts to address systemic problems interferes with private parties' ability to transact.¹²⁴ Distributive justice is the government's responsibility since it involves moving resources between groups of people through taxes, subsidies, and regulations.¹²⁵ Only where breaches occur should contract law attempt to restore the equality that existed between the parties prior to the breach as a matter of corrective justice.¹²⁶ So fundamental are such principles of contract that a 2018 conference, which discussed contract law and social justice, questioned whether grouping the topics together was an "oxymoron."¹²⁷

Yet, what if the interest of contracting parties themselves is justice?¹²⁸ The idea of freedom to contract means that contracting parties get to choose with *whom* they want to contract and *what* to include in the contract. The element of choice by itself should mean that parties may consider the principles of justice in the choice. Consideration of justice principles in contract law needs not fall exclusively on the government's shoulders, by way of legislatures crafting rules that dictate contracting, or in judges interpreting terms in contracts. There should, in theory, be no need to wait for the government to influence

& LEE L. REV. 1803, 1803–04 (2022) (noting the recent "atrocious acts of anti-Black violence" in 2020 as evidence of the gap between their civil rights and humanity).

123. *Law and Economics*, INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/law-and-economics> [<https://perma.cc/Z74P-X79A>] (noting that the central assumption is that humans are "rational maximizers of their individual satisfactions").

124. See Anthony J. Casey & Anthony Niblett, *The Limits of Public Contract Law*, 85 LAW & CONTEMP. PROBS. 51, 52 (2022) (arguing that judicial enforcement of contract law is not the appropriate method to address systemic issues).

125. See Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 106 (2008) (describing distributive justice as a movement of resources throughout a political community); Marco Jimenez, *Distributive Justice and Contract Law: A Hohfeldian Analysis*, 43 FLA. STATE U. L. REV. 1265, 1271, 1273 (2017) (contending that distributionally neutral contract rules are a "legal unicorn" and that courts should consider the distributional consequences of their decisions).

126. See Marco J. Jimenez, *Retribution in Contract Law*, 52 U.C. DAVIS L. REV. 637, 637–38 (2018) (explaining that contract law remedies are "typically fashioned to restore the equality that existed between the parties prior to the breach").

127. Southwestern Law School, *Contract Law & Social Justice: An Oxymoron?*, YOUTUBE (Sept. 12, 2008), <https://www.youtube.com/watch?v=ugHFtg8pUhA>.

128. *Law and Economics*, *supra* note 123 (noting that even a law and economics theory for contract law does not restrict "economics . . . to [an] analysis of monetary issues [and that] there are nonmonetary as well as monetary satisfactions").

or intervene in contracts to promote justice considerations. In a world where contracting parties have an interest in justice, the parties can bear the onus to promote justice through private ordering when forming, designing, and enforcing contractual agreements.¹²⁹

Contract law does acknowledge the justice concerns at play in the act of contracting.¹³⁰ The doctrine of unconscionability examines whether a bargaining process was deficient due to factors such as duress, fraud, and undue influence.¹³¹ It also examines the contract's content and whether the contract terms are oppressive due to factors such as inflated price, unfair disclaimers, immoral clauses, and contracts that contravene public policy.¹³² A clear example in practice involves adhesion contracts where one contracting party has such disproportionate bargaining power that the party of weaker bargaining strength finds itself in an untenable take-it-or-leave-it position.¹³³ In the context of housing justice, scholars have criticized residential mortgages as adhesion contracts because their terms are selected by professional lenders for borrowers who have no choice but to accept the terms or forgo buying a home.¹³⁴ Courts may render unenforceable any contract with procedural and substantive unconscionability concerns based upon defenses of coercion, duress, undue influence, or reasonable expectations.¹³⁵

Further, information asymmetry, which is ubiquitous in contract formation and negotiation, raises justice concerns.¹³⁶ In general,

129. Cathy Hwang, *Value Creation by Transactional Associates*, 88 *FORDHAM L. REV.* 1649, 1655 n.44 (2020) (“Contract design is different from contract formation—offer, acceptance, and consideration” because “[r]ather than being about when a contract is formed, contract design theory is largely concerned with how to design contracts, substantively and structurally, in order to make the deal more efficient.”).

130. See Rödl, *supra* note 98, at 61 (advocating that one must “reconcile the idea of contractual freedom and contractual justice in a way that . . . represents a coherent understanding of the basic structure of contract law and . . . illuminates contract law in its modern version”).

131. *Adhesion Contract (Contract of Adhesion)*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/adhesion_contract_\(contract_of_adhesion\)](https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion)) [<https://perma.cc/LW5C-TG8S>].

132. *Id.*

133. Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 *LEWIS & CLARK L. REV.* 1035, 1035 n.1 (2010).

134. *Id.* at 1040.

135. See Rosenfeld, *supra* note 109, at 782–83 (noting that freedom of contract without such barriers as coercion, duress, and undue influence typically renders an agreement procedurally unfair).

136. See Franklin, *supra* note 100, at 561 (noting that “the existence of information asymmetry in many contracting relationships presents some problems for the freedom of contract theory”).

“[i]nformation asymmetry exists whenever a party to a contract does not enjoy the same level of access to information as the party’s contracting counterpart.”¹³⁷ The primary justification for allowing information asymmetry is to reward the contracting party who invests in the cost of information discovery.¹³⁸ Yet, others argue that information asymmetry undermines the value of individual freedom and autonomy to contract in the first instance because it impacts the ability to make a reasoned choice.¹³⁹ Information asymmetry is particularly problematic in the area of pollution because corporations typically control pollution information and do not widely disseminate such information to communities with environmental justice concerns.¹⁴⁰

Justice concerns also arise over the impact that contracts can have on individuals or groups who are not parties to the contract. In contract law, party status matters—the party primacy norm in contract law dictates that contract law’s primary goal is to advance the legitimate interests of the contracting parties.¹⁴¹ Pursuant to the common law of privity in contract, only the parties to the contract may negotiate, design, and enforce the contract.¹⁴² In addition, a party gets to decide on intended third-party beneficiaries to the contract, which then gives third parties rights to sue under the contract.¹⁴³ In general, “[u]nlike

137. *Id.*

138. *Id.* at 562 (providing the example of a land prospector who pays for studies and measurements to determine whether minerals might exist on a piece of land for sale and noting that, if the land ultimately turns out to contain minerals, the expense of the studies was justified).

139. *See id.* at 563 (arguing that “most freedom of contract justifications founder when faced with the reality of information asymmetry. . . . because the natural consequences of information asymmetry undermine the freedom of contract justifications”).

140. Subodh P. Kulkarni, *Environmental Ethics and Information Asymmetry Among Organizational Stakeholders*, 27 J. BUS. ETHICS 215, 218 (2000) (noting that businesses will often be in a position of possessing unique knowledge about the environmental consequences of their products and their production processes).

141. *See* Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 171 U. PENN. L. REV. 1095, 1099 (2023) (“Contract law helps *the parties*, not outsiders, achieve cooperation. It protects interests, plans, and well-being of the *parties*, not of others. When it operates to remove ambiguity over the terms of the contract . . . contract law looks at the interests, the implied intent, and the conduct of the parties as the guiding criterion.”).

142. *See Privity*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/privity> [<https://perma.cc/JHK6-N5NK>] (explaining that privity establishes legal rights between contracting parties).

143. *See* James Thuo Gathii, *Incorporating the Third Party Beneficiary Principle in Natural Resource Contracts*, 43 GA. J. INT’L & COMPAR. L. 93, 103–04 (2014) (noting that to be

other types of private law rights and obligations, like torts, property, or restitution, contract law often allows parties to ignore the interests of third parties, the community, or the government.”¹⁴⁴ Indeed, courts regularly dismiss cases that local communities bring against corporations, alleging breach of supply chain contracts for human rights and labor abuses, because such local communities are not parties to the supply chain contract.¹⁴⁵

C. *Private Ordering*

A wider view of contract, suggested by Professor Martha Ertman, allows for “new areas of social and economic life that might be understood and regulated in contractual terms.”¹⁴⁶ This wider view is captured in the term “private ordering,” a form of self-regulation, contractual in nature, that private entities voluntarily undertake.¹⁴⁷ In private ordering, the private entities conceive, observe, and often enforce a set of “rules” through extra-legal means.

Professor Barak Richman has observed that private-ordering systems arise under two general sets of conditions.¹⁴⁸ The first is when contracting parties must use private rules and enforcement because

entitled to sue, the third party must show he/she entered into the contract for his/her benefit).

144. Ben-Shahar et al., *supra* note 141, at 1096.

145. See Kishanthi Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L.J. 327, 332, 343 (2021) (citing several examples of “[l]itigation involving . . . human rights abuses” brought against corporations such as Mars, Costco, Wal-Mart, and Royal Dutch Petroleum that courts dismissed).

146. Martha M. Ertman, *Mapping the New Frontiers of Private Ordering: Afterword*, 49 ARIZ. L. REV. 695, 695 (2007).

147. See Wischmeier Shaner, *supra* note 24, at 988, 988 n.2 (noting that Delaware courts have developed a “permissive attitude toward corporate governance contracting”).

148. See Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2335 (2004) (describing the two categories under which private enforcement systems arise as (1) “those that arise where private law is employed because reliable state-sponsored contract enforcement is unavailable” and (2) “those that arise where public courts are available but where private law is preferable”). Steven Schwarcz develops a slightly different taxonomy identifying not two but three categories of private ordering. See Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 324 (2002) (adopting the view that private ordering exists on a “broad spectrum,” with (1) “rules of law originated and put into force by sovereign governments” at one end of the spectrum, (2) “rules that are adopted entirely by private actors” at the other end, and (3) “a continuum of government participation” between the two).

courts are unavailable to enforce commitments among the actors.¹⁴⁹ The reputation mechanism is the typical enforcement mechanism, like when a merchant community punishes parties in breach of the agreement by denying them future business.¹⁵⁰ The second arises when courts may be available, but the parties prefer private rules and enforcement because of the nature of the parties' commitments and relationships.¹⁵¹ For example, in family law, private ordering exists in the form of premarital agreements, marital agreements, separation agreements, open adoption agreements, and other agreements that alter the state's legal rules which would otherwise govern family relationships.¹⁵²

Legal scholars have noted that private ordering is generally more successful among people and institutions with strong ties to each other.¹⁵³ These social ties could be sports leagues, ethnic or cultural bonds, or past transactions and dealings where the existing social ties provide incentives for people to comply with formal and informal agreements to behave in specific ways.¹⁵⁴ For example, a 2019 roundtable of influential CEOs affirmed a group agreement to commit "to *all* of [their] stakeholders" implying a joint effort to consider

149. See Richman, *supra* note 148, at 2335–36 (noting that "communities that fall into th[is] first category . . . resort to self-enforcement because state contractual enforcement is not a reliable option").

150. See Aidin Hajikhameneh & Jared Rubin, *Exchange in the Absence of Legal Enforcement: Reputation and Multilateral Punishment Under Uncertainty*, CHAPMAN U. ECON. SCI. INST., https://www.chapman.edu/research/institutes-and-centers/economic-science-institute/_files/WorkingPapers/hajikhameneh-rubin-multilateral-2017.pdf [<https://perma.cc/S5JG-986W>] (defining "bilateral reputation" as "the reputation established between two parties in a repeated relationship" and noting that bilateral reputation "works to facilitate exchange when individuals have much to gain from maintaining the exchange relationship and there are few outside options that yield similar returns").

151. See Richman, *supra* note 148, at 2335–36 (noting that in "[t]he second category of reputation-based enforcement mechanisms . . . a particular merchant community . . . deliberately declines to rely on available court remedies to enforce agreements").

152. Brian Bix, *Agreements in Family Law* 1, 2 (U. Minn. L. Sch.: Minn. Legal Stud. Rsch. Series Rsch. Paper No. 12-43, Mar. 1, 2012), <https://ssrn.com/abstract=2125343>.

153. *E.g.*, Claire Stamler-Goody, *A Wider View of Private Ordering*, U. CHI. L. SCH. (Feb. 4, 2020), <https://www.law.uchicago.edu/news/wider-view-private-ordering> [<https://perma.cc/Y2PU-XUGF>] (advocating for an understanding of private ordering via "[a] social network approach," which "suggests that reputation-based forces can support exchange when" (1) "th[e] bad behavior is unlikely to go detected" and (2) "the ties among people and institutions are structured in such a way that information about th[e] bad behavior is easily transmitted or can be obtained by going through only one or two intermediaries").

154. *Id.*

communities.¹⁵⁵ Indeed, in one corporate-community agreement involving a mining company in Montana, there has been no arbitration or litigation in the twenty-two years during which the agreement has existed, signifying the existence of a trust relationship built over a long stretch of time.¹⁵⁶

III. CORPORATE-COMMUNITY AGREEMENTS

Corporate-community agreements have surfaced in a variety of areas, including real estate development, mining operations, and wind energy projects.¹⁵⁷ They are not new, with some of the first such agreements arising as early as the 1970s.¹⁵⁸ In corporate-community agreements, corporations agree to provide a variety of “environmental” benefits (pollution information, pollution control measures, local hiring, affordable housing) to communities in exchange for a promise by the communities to either support or resolve opposition to the corporation’s permit and license process for the facility or development project.¹⁵⁹ This Part discusses the challenges and

155. See Michal Barzusa, Quinn Curtis & David H. Webber, *ESG and Private Ordering*, 1 U. CHI. BUS. L. REV. 1, 3 (2022) (internal quotations omitted).

156. See Ray Levy-Uyeda, *Can a Mining Corporation Ever Truly Be a Good Neighbor?*, GUARDIAN (Sept. 2, 2020, 6:00 EDT), <https://www.theguardian.com/environment/2020/sep/02/mining-corporation-montana-good-neighbour-agreement> [<https://perma.cc/5PWM-S2BR>] (“[community] [m]embers now say that their best leverage with dealing with [the mining company] is the relationship they’ve facilitated over the last two decades, one they hope is based on mutual respect”); US PGM OPERATIONS, THE GOOD NEIGHBOR AGREEMENT 2 (2022), <https://reports.sibanyestillwater.com/2022/download/ssw-FS22-good-neighbor-agreement.pdf> [<https://perma.cc/W2UU-MY5B>] (emphasizing the agreement’s significance in the community and noting the achievement that there has never been any arbitration or litigation over the agreement).

157. E.g., Sinziana Dorobantu & Dennis Flemming, *It’s Never Been More Important for Big Companies to Listen to Local Communities*, HARV. BUS. REV. (Nov. 10, 2017), <https://hbr.org/2017/11/its-never-been-more-important-for-big-companies-to-listen-to-local-communities> [<https://perma.cc/8EEG-SHJ8>] (noting the controversy surrounding Dakota Access Pipeline and the Cape Wind Associates’ offshore wind farm).

158. Thalia González & Giovanni Saarman, *Regulating Pollutants, Negative Externalities, and Good Neighbor Agreements: Who Bears the Burden of Protecting Communities?*, 41 ECOLOGY L. Q. 37, 61 (2014) (stating that the first GNA in Worcester, Massachusetts was negotiating “as a community strategy to remediate issues of environmental pollution”).

159. *Id.* at 60, 62–63 (noting that “provisions may grant the community the right to inspect the facility, establish a stakeholder audit, and ensure accident preparedness”). See generally Gross, *supra* note 28, at 36–37 (arguing that “the nationwide interest in CBAs demonstrates a substantial level of public dissatisfaction with [the traditional land use approval process]”).

opportunities associated with corporate-community contracts across three stages—pre-agreement, negotiation, and post-agreement.

A. *Pre-Agreement*

Corporate-community agreements come with significant pre-agreement transaction costs. These agreements often involve multiple parties over multiple years of changes in community participants.¹⁶⁰ Agreements have involved dozens of groups and coalitions at one time.¹⁶¹ Agreements have also involved various kinds of corporate entities, such as when polluting facilities close and developers take over for reuse.¹⁶² Simply bringing relevant parties to the negotiation table (and keeping them there over renegotiation to modify the agreement) takes time and effort.

In many situations, corporations have little incentive to come to the bargaining table with a community. Corporations are likely to get the permits and licenses they need from government officials to operate or develop, without the need to consider local communities.¹⁶³ For example, a developer looking to transform a highly-polluting refinery in Philadelphia into a repurposed site took over a year to commit to the idea of an agreement with environmental justice-focused

160. See *Community Benefits Agreement*, METRO. ST. LOUIS SEWER DIST., <https://msdprojectclear.org/about/diversity/programs-resources/community-benefits-agreement> [<https://perma.cc/4BTA-25V5>] (listing the cumulative signatories to the Community Benefits Agreement). The webpage includes five addendums from 2013 to 2016 adding multiple community parties. See, e.g., *Community Benefits Agreement – Addendum No. 2* (Feb. 12, 2014), <https://portal.laserfiche.com/Portal/DocView.aspx?id=2193053&repo=r-a96260ce> [<https://perma.cc/7RPD-BBTW>] (adding a new signatory to the agreement one year after it was made).

161. E.g., *As Redevelopment of the Former Oil Refinery Advances, Residents Hold Press Conference Demanding Community Voice and Investment*, SW. GLOBE TIMES (Apr. 25, 2022), <https://www.swglovetimes.com/as-redevelopment-of-the-former-oil-refinery-advances-residents-hold-press-conference-demanding-community-voice-and-investment> [<https://perma.cc/7AJT-YTCS>] (describing a coalition of over twenty organizations participating on the “community” side of negotiations of a CBA).

162. See *Sustainable Redevelopment at Superfund Sites*, EPA, <https://www.epa.gov/superfund-redevelopment/sustainable-redevelopment-superfund-sites> [<https://perma.cc/NDB8-85JE>] (detailing the different ways that communities and developers may utilize old, renewed pollution sites).

163. Gosia Wozniacka, *East Portland Residents, School Officials Say Large Warehouse Will Bring More Pollution, Despite City’s Commitment to ‘Environmental Justice,’* OREGONIAN, <https://www.oregonlive.com/news/2022/11/east-portland-residents-school-officials-say-large-warehouse-will-bring-more-pollution-despite-citys-commitment-to-environmental-justice.html> [<https://perma.cc/8JUG-69KH>] (last updated Nov. 20, 2022, 9:23 AM) (reporting on city officials describing that they cannot deny a building permit to a developer that meets established requirements).

community groups despite intense pressure from the groups.¹⁶⁴ It took another year and a half for negotiations to begin.¹⁶⁵ In another example, a foundry in Portland agreed to begin negotiations only after significant community activism for over a year, involving organizing town hall meetings, getting petitions signed, submitting comments on the foundry's pollution permits, meeting with state environmental agency officials, and submitting testimony to politicians.¹⁶⁶ The reality is that corporations do not come to the negotiation table with communities unless there is a chance that the community may delay or halt corporate plans.

To be sure, government agencies do incentivize and influence corporations to engage with communities through agreement. One city official in Portland has stated:

“We can call the development and say, ‘Look, you’re generating a decent amount of concern from neighbors, how about you voluntarily try to reach an agreement.’ . . . We can acknowledge that we don’t have the power to force it, but we can mediate, we can put some energy into just trying to encourage the parties to meet and see what they can do.”¹⁶⁷

At the federal level, the U.S. Department of Energy is requiring “Community Benefits Plans as part of . . . [certain] funding opportunity announcements (FOAs) and loan applications,” and recognizes that “[CBAs are] one possible outcome of meaningful community engagement” that will be part of an applicant's Community Benefits Plan.¹⁶⁸ Increasing dedication to environmental justice in local, state, and federal government agencies may spur corporations to come to the negotiation table with communities.

Communities also struggle with whether to come to the negotiating table with corporations. Community organizations often struggle with

164. Sophia Schmidt, *Community Benefits Agreement Talks to Start in 2023 for Philly Refinery Redevelopment*, WHYY PBS (Nov. 18, 2022), <https://whyy.org/articles/pes-refinery-redevelopment-community-benefits-agreement> [<https://perma.cc/Y3H7-6KWX>] (describing community groups pushing an agreement in early 2021, and developer agreeing in September 2022 at a public meeting).

165. See Mike D’Onofrio, *Groups Begin Talks on Bellwether District Community Benefits*, AXIOS PHILA. (Apr. 26, 2023), <https://www.axios.com/local/philadelphia/2023/04/26/groups-begin-talks-on-bellwether-district-community-benefits> [<https://perma.cc/VEJ4-KPG2>] (negotiating and drafting Community Benefits Agreement for the Philadelphia refinery repurposed site began on April 25, 2023).

166. González & Saarman, *supra* note 158, at 70–71.

167. Wozniacka, *supra* note 163 (Engstrom’s statement).

168. *About Community Benefits Plans*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/infrastructure/about-community-benefits-plans> [<https://perma.cc/GDF4-Y23W>].

the idea of a corporate-community agreement because some feel that they are acquiescing to a new facility or development that they do not actually support.¹⁶⁹ As a community organizer in Pennsylvania said about a corporate-community agreement with Shell Oil Company, “[a]ll of the agreements have a pay-to-pollute aspect about them, which no one on the advocacy side is happy about. . . . On the glass-half-full side, it’s making the best of a bad situation. And there’s degrees of making the best of it.”¹⁷⁰ Likewise, a community leader in Montana opined that a GNA with a mining company was not a “magic bullet,” and they don’t “provide for us [a way to] [sic] to stomp our foot and say ‘no more.’”¹⁷¹

Communities are multidimensional and ever-changing and as a result, must find a way to come together before engaging with corporate entities.¹⁷² Individuals often belong to multiple communities based on race, gender, age, profession, geographic location, and other identity-forming characteristics.¹⁷³ These identities may change over time and impact the way in which communities experience pollution. Who “represents” any particular “community” is not always clear and can easily change.¹⁷⁴ Corporate developers have also sometimes created and funded community groups to create grassroots support for a project.¹⁷⁵ Moreover, corporate developers have faced criticism for

169. See Anya Litvak, *Negotiating Community Benefits, Like Those with Shell in Beaver County, Takes a Village. So Does Mitigating Harm*, PITT. POST-GAZETTE (July 31, 2023, 3:37 PM), <https://www.post-gazette.com/business/powersource/2023/07/31/community-benefits-agreements-shell-beaver-county-cracker-plant/stories/202307300090> [<https://perma.cc/C9Q3-LEKP>] (presenting the dilemma that a community cannot leverage an opportunity to negotiate without appearing as if it endorses the company’s project).

170. *Id.* (internal quotes omitted).

171. Levy-Uyeda, *supra* note 156 (alteration in original).

172. See, e.g., Michelle Solomon, *Without Mapping Tools Environmental Justice Investments Could Be Just a Shot in the Dark*, UTIL. DIVE (Feb. 16, 2022), <https://www.utilitydive.com/news/without-mapping-tools-environmental-justice-investments-could-be-just-a-sh/618593> [<https://perma.cc/5PZG-MFEQ>] (“EJ communities are far from a monolith.”).

173. See Seema Kakade, *Environmental Evidence*, 94 U. COLO. L. REV. 757, 766 (2023) (“[W]e as individuals often belong to multiple communities and can change our perceptions of belonging to a certain community over time.”).

174. Baram, *supra* note 29, at 233 (noting that who participates is a threshold question that “requires a ‘stakeholder assessment’ process”).

175. See Catherine Fraser, *Community Benefits Agreements Offer Meaningful Opportunities to Include Voters’ Voices in Development*, DATA FOR PROGRESS (July 6, 2022), <https://www.dataforprogress.org/blog/2022/7/5/community-benefits-agreements-offer-meaningful-opportunities-to-include-voters-voices-in-development> [<https://per>

rejecting a community group's invitation to work together, preferring to work instead with a company's own hand-picked community advisory panel.¹⁷⁶ Thus, a large source of pre-agreement transaction costs lies in organizing citizens, identifying key stakeholders, interests, and issues.¹⁷⁷

B. Negotiation

In negotiating corporate-community contracts, community organizations are, not surprisingly, at a significantly disadvantaged bargaining position. Community leaders are fully aware that they are dealing with a stark imbalance of power, coming to the table with large, often multi-million-dollar companies.¹⁷⁸ That fact alone can be daunting for community groups on how to even engage. Yet, in a classic bargaining power case, a party to an agreement challenges the existence of the agreement, arguing that a significant power disparity existed between the parties and, therefore, the court should void the agreement.¹⁷⁹ In a corporate-community agreement, it is unclear that a community group would want a court to void an agreement, even if the terms reflect unequal bargaining power.

Community organizations can lack data and information that allow them to navigate the negotiation of a corporate-community contract. Communities struggle with access to data about pollution coming from facilities in their neighborhood because corporate facility owners are often under no legal obligation to make such information public.¹⁸⁰ As

ma.cc/DA5W-8M5Z] (using the development of Atlantic Yards/Pacific Park as an example of when the developer “funded front community groups to create a false appearance of grassroots support”).

176. Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters into “Good Neighbors” Through Collective Bargaining*, 10 N.Y.U. ENV'T L.J. 147, 173 (2002) (“Convincing the facility management to meet with community representatives is especially difficult if there is no leverage to use against the company, such as the threat of a lawsuit.”).

177. van de Biezenbos, *supra* note 25, at 636.

178. Levy-Uyeda, *supra* note 156 (“This is a commercial enterprise [we’re dealing with].” (internal quotes omitted)).

179. See Max Helveston & Michael Jacobs, *The Incoherent Role of Bargaining Power in Contract Law*, 49 WAKE FOREST L. REV. 1017, 1021–22 (2014) (cautioning that bargaining power has an ill-defined relationship with contract enforceability).

180. See Madison Condon, *Citizen Scientists, Data Transparency, and the Mining Industry*, 32 NAT. RES. & ENV'T 24, 24 (2017) (“[O]ne of the greatest impediments for community policing of industry is lack of access to data. While the Freedom of Information Act (FOIA) and similar state public records laws are meant to provide citizens with access to government collected pollution data (if the data is collected at

researchers have identified in the context of renewable energy siting, the knowledge necessary for decision making can be hidden by powerful actors.¹⁸¹ In addition, local knowledge can be sidelined as inferior to “expert” knowledge in ways that privilege corporations’ knowledge over communities.¹⁸² Thus, information asymmetry, in multiple and complex forms, is an ever present concern in corporate-community agreement negotiations.

Indeed, corporate-community agreements often include, as a benefit to communities, direct access to information on corporate operations.¹⁸³ For example, a long standing corporate-community agreement between a mining company and community groups included funding for mining and groundwater experts.¹⁸⁴ These experts advise the groups on how to engage in the science and technology behind the mining operations.¹⁸⁵ Such information has enabled the community groups to provide feedback on permit renewals, mine planning, and modifications to the agreement.¹⁸⁶ Thus, while benefits to communities in corporate-community agreements can advance distributive justice (e.g., the percentage of jobs staying local), they can also advance procedural justice (e.g., access to direct engagement with experts and decision-makers).

Community groups may face undue pressure to agree to terms on confidentiality, liquidated damages, and future rights.¹⁸⁷ In wind project development, communities have expressed feelings that GNAs pay out money in return for giving up rights to statutory and common

all), compliance with these disclosure requirements often is incomplete or untimely.”); see also Adam Babich, *The Unfulfilled Promise of Effective Air Quality and Emissions Monitoring*, 30 GEO. ENV’T L. REV. 569, 598 (2018) (providing examples of documents that might allow a community to hold a corporation more accountable).

181. See Salma Elmallah & Joseph Rand, “*After the Leases Are Signed, It’s a Done Deal*”: *Exploring Procedural Injustices for Utility-Scale Wind Energy Planning in the United States*, 89 ENERGY RSCH. & SOC. SCI. 1, 3 (2022), <https://www.sciencedirect.com/science/article/pii/S221462962200055X> [<https://perma.cc/Z6LQ-K74T>] (asserting that procedural justice requires “systematic efforts . . . to make information accessible to the public and decision-makers”).

182. *Id.* at 4.

183. See González & Saarman, *supra* note 158, at 40.

184. WORKING TOGETHER THE GOOD NEIGHBOR AGREEMENT, SIBANYE STILLWATER (2020), <https://reports.sibanyestillwater.com/2020/download/SSW-FS20-good-neighbor-agreement.pdf> [<https://perma.cc/8DNP-HV6M>].

185. *Id.*

186. *Id.*

187. See van de Biezenbos, *supra* note 28, at 48 (explaining that because community groups come into negotiations with very specific goals, they may—without realizing—end up agreeing to highly disadvantageous provisions in the process).

law claims, including for significant noise nuisance.¹⁸⁸ In some large commercial real estate development projects, CBAs have included provisions whereby the only remedy for breach is to obtain liquidated damages from the developer—“with the amount capped for all violations over the life of the project.”¹⁸⁹ In a CBA between community groups and a car manufacturer in Detroit, a community advocate opined that during the negotiation process, the groups “didn’t push for more environmental protections because they didn’t fully understand what the environmental impact would be and they were scared to lose the number of jobs being offered at the plant.”¹⁹⁰

C. Post-Agreement

Corporate-community agreements often include aspirational requirements for corporations, making enforceability post-agreement challenging for all parties involved.¹⁹¹ For example, a 2008 agreement that included housing and local hiring benefits for local communities to go along with the building of the new Atlantic Yards stadium in New York, has yet to come to fruition as of 2022.¹⁹² Critics have argued that

188. See *Bound & Gagged: Wind Industry Shuts Down Community Complaints Using Punitive Gag Clauses*, STOP THESE THINGS (Feb. 8, 2019), <https://stopthesethings.com/2019/02/08/bound-gagged-wind-industry-shuts-down-community-complaints-using-punitive-gag-clauses> [https://perma.cc/KVU9-CMKN] (providing that in exchange for \$5,000 to \$8,000 per year, you relinquish such rights and are bound to “never, ever” discuss the agreement or the suffering you experienced as a result); Cathi Orr, *Local Landowners, Don’t Let Your Liberties Be Gone with the Wind*, UNION-SUN & J. (Feb. 18, 2015), https://www.lockportjournal.com/opinion/local-landowners-dont-let-your-liberties-be-gone-with-the-wind/article_198f4c90-0a8e-5adb-94f9-acac0c61946c.html [https://perma.cc/45YG-WXMN] (listing negative aspects of GMAs).

189. See Gross, *supra* note 28, at 41 (describing the Bronx Market Terminal CBA as opposed to other CBA’s which included provisions that allowed for injunctive relief).

190. See Bryce Huffman, *How Detroit’s Community Benefits Program is Failing East Side Residents*, DETROIT BRIDGE (Dec. 23, 2021, 8:00 AM), <https://www.bridgedetroit.com/how-detroits-community-benefits-process-is-failing-east-side-residents> [https://perma.cc/RV9P-Y6QH] (explaining that the community benefits process is broken and flawed thus necessitating expansion to allow for stronger protections against environmental injustice).

191. See Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 29–30 (2010) (phrasing the developer’s promises as intentions rather than commitments weakens enforceability).

192. Neil deMause, *When Developers Promise Community Benefits, Who Holds Them Accountable?*, CITY LIMITS (June 17, 2022), <https://citylimits.org/2022/06/17/when-developers-promise-community-benefits-who-holds-them-accountable> [https://perma.cc/7C4N-WYPB].

the majority of housing units built under the Atlantic Yards agreement are not “affordable,” but rather “moderate-income apartments.”¹⁹³ In an agreement involving a municipal corporation and several labor community organizations, provisions regarding diversity hiring had not been fulfilled years later due to a lack of understanding between the parties about what was and was not occurring under the agreement.¹⁹⁴ In another agreement, community groups received a grocery store in a food desert, only to have the grocery store eventually close for lack of customers.¹⁹⁵ Benefits negotiated by community groups may simply be too vague and indeterminate to actually provide the benefit sought by the community. Community organizations may also struggle with monitoring and enforcing long-term compliance with corporate-community contracts.¹⁹⁶ In the GNA between community groups and a foundry in Portland, the agreement included seventeen items for the foundry to complete over a five-year period, where confirmation of completion required community signatories inspection.¹⁹⁷ As stated by the community organizations party to a GNA with a mining company in Montana, “[a]fter years of hard work and tough negotiations, we had ourselves a legally-binding [GNA]. . . . But, the job wasn’t done. Upholding the requirements of the GNA would prove to be even more work.”¹⁹⁸ The post-agreement time period can be lengthy and complex because it requires technical know-how, and organization of multiple community groups.

In addition, the post-agreement period brings successor liability concerns as corporate facilities and owners change hands or expand. With some agreements, if a corporate entity sells a facility post-agreement, the new corporate entity may not have any obligation to

193. *Id.*

194. Steph Kukuljan, *MSD, Community Groups Settle Discord over Diversity Issues*, ST. LOUIS BUS. J. (Jan. 25, 2018), <https://www.bizjournals.com/stlouis/news/2018/01/25/msd-community-groups-settle-discord-over-diversity.html> [<https://perma.cc/KP82-P53K>].

195. Fraser, *supra* note 175 (“Despite the strengths of the One Hill Neighborhood Coalition’s CBA, it was not a resounding success, as the grocery store created through the CBA has since closed, failing to draw enough customers to be self-sustaining.”).

196. See van de Biezenbos, *supra* note 25, at 640.

197. See González & Saarman, *supra* note 158, at 72–73 (stating that confirmation of completion may also involve documentation review by the neighborhood advisory committee or third-party emission testing).

198. *The Story of the Good Neighbor Agreement*, N. PLAINS, <https://northernplains.org/gna-history> [<https://perma.cc/BRR7-JY6Y>].

adhere to the benefits promised to the community in the agreement.¹⁹⁹ In addition, an agreement may only cover a certain footprint of a facility, such that if the corporate owner or operator expands in the future, the community group may not have an ability to impact corporate decision-making on the expanded portion without renegotiating the agreement.²⁰⁰ These concerns can be averted when the agreement's provisions attach to property, not the specific corporate entity that owns the property at the time of the agreement.²⁰¹

IV. NEW FRONTIERS

Environmental nonprofit organizations have advantages that propel them into a prime position to drive forward environmental justice through contractual vehicles. Taking the drivers' seat will also allow environmental nonprofits to expand their tools for advancing environmental justice at local, state, national, and even global levels. This Part advocates for environmental nonprofit organizations to play a pivotal role in environmental justice by developing new transactional legal practice groups to support communities involved in contracting relationships with corporations.

A. *Environmental Nonprofits*

Are corporate-community contracts akin to an environmental "moral hazard" problem, whereby we apply a "new" technology (or in this case idea) to temporarily fix problems without addressing the need

199. See, e.g., David A. Plymyer, *Is the Community Benefits Package at Port Covington Still Enforceable?*, BALT. BREW (May 13, 2021), <https://www.baltimorebrew.com/2021/05/13/is-the-community-benefits-package-at-port-covington-still-enforceable> [<https://perma.cc/W75C-H9S2>] (explaining that CBAs do not run with the land); Tom Lochner, *West Contra Costa Communities Worried About Fate of 'Good Neighbor Agreement'*, E. BAY TIMES, <https://www.eastbaytimes.com/2009/12/11/west-contra-costa-communities-worried-about-fate-of-good-neighbor-agreement> [<https://perma.cc/8CU5-ZVQD>] (last updated Aug. 15, 2016, 4:41 PM) ("Refinery spokesman Mark Hughes, however, said Dec. 4 that the [GNA] is being discussed 'at the corporate level.'").

200. See Levy-Uyeda, *supra* note 156 ("[T]he owners of two mines in Stillwater county and Sweet Grass county, seeks to expand. The contract negotiated 20 years ago doesn't account for that.").

201. See, e.g., *id.* ("Negotiation with the mine's owner took over a year, but the result is considered the 'Cadillac' of GNAs, because the contract applies directly to the mines themselves, regardless of who owns them.").

for deeper structural and behavioral reforms.²⁰² As Professor Kristen van de Biezenbos has argued, “[u]sing private contracts to fill regulatory gaps risks subverting the possibility of needed regulatory changes.”²⁰³ She further concludes that corporate-community contracts should be limited to situations where broader policy measures are not possible for political or other reasons.²⁰⁴ Professor Thalia González similarly asserts,

The decision by community organizations to negotiate an agreement with a profit-driven corporation as opposed to using traditional political channels for seeking regulatory reform ultimately calls into question the role of government in protecting its citizens from environmental harms [There is a] critical need for an environmental regulatory regime to take this responsibility off of communities and to adequately address the impacts of industrial pollution.²⁰⁵

Scholars are seemingly still undecided on whether the challenges associated with corporate-community contracts are simply too numerous. Yet, corporate-community agreements are overwhelmingly popular in the United States, with general voters, amongst all political affiliations, and with racial minority groups.²⁰⁶ Thus, before they are written off entirely, a concerted and large-scale effort to combat challenges with corporate-community contracts is in order.

Environmental justice advocates have been knocking on the doors of environmental nonprofit organizations for decades. Since the origins of environmental nonprofit organizations in the early nineteenth century, only white males were invited to join and allowed to participate; people of color were not allowed to participate in many of today’s big environmental nonprofit organizations for many years.²⁰⁷ In 1990, thirty years after the civil rights oriented environmental justice

202. Gernot Wagner & Daniel Zizzamia, *Green Moral Hazards*, HARV.’S SOLAR GEOENGINEERING RSCH. PROGRAM BLOG (Jan. 9, 2020), <https://geoengineering.environment.harvard.edu/blog/green-moral-hazards> [https://perma.cc/D3HR-PUQT] (“While moral hazard may, in fact, be a misnomer for what’s perhaps better described as ‘mitigation deterrence,’ the catchiness of the phrase has made this framing impossible to ignore. Moral hazard’s malleability and tendency to encapsulate incredible complexities makes it unhelpful as a guide for policy.”).

203. van de Biezenbos, *supra* note 25, at 639.

204. *Id.* at 640.

205. González & Saarman, *supra* note 158, at 78–79.

206. See Fraser, *supra* note 175 (reporting that fifty-nine percent of potential voters “support the use of CBAs on development projects”).

207. See Taylor, *supra* note 1 (questioning the lack of racial diversity did not arise until the 1960s, and even then, white leaders asserted that diversity was not a priority because it was not related to environmentalism).

movement began, “several environmental justice leaders cosigned a widely publicized letter to the ‘Big 10’ environmental groups . . . accusing them of racial bias in policy development, hiring, and the makeup of their boards, and challenging them to address toxic contamination in the communities and workplaces of people of color and the poor.”²⁰⁸

Indeed, some community organizations have failed to secure the support of environmental lawyers for enforcement challenges to pollution permits.²⁰⁹ As a board member of an environmental organization has described, “[e]nvironmental work has been historically focused on the needs of rich white males within this country. And that means that it has been exclusionary and that it has in some cases even not just benefited but also created issues with diverse communities.”²¹⁰

The very term “environmental” has been at the root of the friction between environmental nonprofit organizations and justice organizations. Environmental nonprofit organizations have historically prioritized conservation and nature as opposed to health and livelihoods of local and often marginalized communities.²¹¹ “[P]olar bears stranded on melting ice floes galvanized white-led organizations while Black, Latino and Indigenous Americans choked on polluted air.”²¹² In addition, conservation models of environmental “protection” have focused on approaches whereby “people are separated from the rest of nature,” leading to a misrecognition of the

208. Renee Skelton, Vernice Miller & Courtney Lindwall, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Aug. 22, 2023), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/K9GZ-VYM7>].

209. See Taylor Lilley & Brittany Wright, *Improving Representation in Environmental Law and the Charge for Environmental Justice*, MD. STATE BAR ASS'N (Sept. 21, 2021), <https://www.msba.org/improving-representation-in-environmental-law-and-the-charge-for-environmental-justice> [<https://perma.cc/T3KR-GUMA>] (“Environmental lawyers, like other subject matter experts are trusted for their technocratic perspective. In failing to adequately address environmental justice and support communities, environmental lawyers risk marshalling a partial justice.”).

210. Keecha Harris, Ali Webb & Sierra Fernandez, *What’s Required to Diversify Big Green?*, NONPROFIT Q. (Apr. 4, 2022), <https://nonprofitquarterly.org/whats-required-to-diversify-big-green> [<https://perma.cc/J3QN-GCY8>].

211. Zack Colman, *Environmental Groups’ Greatest Obstacle May Not Be Republican Opposition*, POLITICO (Feb. 5, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/02/05/environmental-movement-racial-reckoning-green-diversity-465501> [<https://perma.cc/AU3D-9X6Q>] (“Whereas legacy environmental groups were conceived with conservation in mind, environmental justice is a civil rights movement offshoot—labor, income inequality and racial justice organizers are closer kinfolk.”).

212. *Id.*

way certain communities, particularly Indigenous peoples, are interconnected with nature.²¹³ The issues are prevalent today as conservation groups grapple not only with protection of lands and waters in the face of climate change, but with deciding *which* lands and waters to prioritize—that lies at the heart of justice.²¹⁴

The community organizations that have been involved in corporate-community agreements have had as a key goal improvement in quality of life for local residents. The very beginnings of the environmental justice movement in the 1960s were rooted in the health struggles of people directly impacted by pollution, with multiple race, class, language, and wealth barriers.²¹⁵ Community organizations since then have formed within particular locales, sometimes beginning as a community of neighbors or mothers or parishioners and continuing to operate on consensus or through individuals that volunteer to lead.²¹⁶ Even when community groups do form as established small nonprofit organizations, it is often not clear who binds the community organization.²¹⁷ Environmental justice groups “take an approach that differs from the dominant green-group paradigm,” and they put “*people* at the center of climate change and other environmental issues, advocating for change that improves lives in the near term.”²¹⁸

213. Adrian Martin, Brendan Coolsaet, Esteve Corbera, Neil M. Dawson, James A. Fraser & Ina Lehmann et al., *Justice and Conservation: The Need to Incorporate Recognition*, 197 *BIOLOGICAL CONSERVATION* 254, 255 (2016), <https://www.sciencedirect.com/science/article/pii/S0006320716301045> [<https://perma.cc/K5UP-TMQP>].

214. See, e.g., Ronda Chapman, *Prioritizing Environmental Justice in Climate Conservation*, *TR. FOR PUB. LAND* (Feb. 13, 2023), <https://www.tpl.org/blog/prioritize-environmental-justice-push-climate-conservation-goals> [<https://perma.cc/4H25-TJGV>] (explaining how Trust for Public Land is working to ensure investments in green spaces benefit the communities who have been historically denied access to nature).

215. See *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/7BXS-YLHB>] (last updated July 24, 2023) (providing background and an interactive timeline).

216. See *What Is a CBO?*, U. MICH. SCH. PUB. HEALTH, <https://sph.umich.edu/ncbon/about/whatis.html> [<https://perma.cc/L6RY-WGC9>] (defining community-based organization).

217. See Richard S. Caputo, *Nonprofit Governance: Signatory Authority of Officers and the Importance of a Thorough Bylaw Review*, FOX ROTHSCHILD (Aug. 2012), <https://www.foxrothschild.com/publications/nonprofit-governance-signatory-authority-of-officers-and-the-importance-of-a-thorough-bylaw-review> [<https://perma.cc/8Y9A-598C>] (discussing a board’s power to bind an organization and highlighting common issues that may arise).

218. Lois R. DeBacker & Jacqueline Patterson, *Environmental Funders: The Problem Isn’t Just Diversity. It’s Access to Money.*, KRESGE FOUND. (Apr. 13, 2021), <https://kresge.org/news-views/environmental-funders-the-problem-isnt-just-diversity-its-access-to-money> [<https://perma.cc/X7PM-SGKV>].

Environmental nonprofit organizations continue to face challenges with incorporating dimensions of justice into their workplaces. As reported by *Politico* in recent years, “a culture of gender discrimination, sexual harassment and racial disparities at The Nature Conservancy . . . led to the departure of its top two officials,” and “persistent racial inequity at the National Audubon Society” caused “a workplace rife with intimidation and threats.”²¹⁹ Moreover, trust in public charities is down more generally with news on recent scandals involving large nonprofit organizations using donations to inflate CEO salaries.²²⁰

Yet, unlike business organizations, nonprofit organizations have the advantage of having “no owners” and therefore can be “the organization that strikes the delicate balance that considers all stakeholder interests.”²²¹ As Professor Henry Hansmann said in his seminal article in 1980, *The Role of Nonprofit Enterprise*, “[a] nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it.”²²² Nonprofits are creatures of state statutes just like corporations or limited liability companies, but prohibit distributing net earnings to private individuals.²²³ A nonprofit’s excess profits remain within the firm and are not distributed to management or owners. Moreover, “to achieve and maintain their tax-exempt status, nonprofit organizations must operate for the benefit of the public,” and “[a]s a result, nonprofit boards have historically been composed of volunteers” from the community.²²⁴ Therefore, environmental nonprofit organizations have a unique opportunity to fulfill environmental justice goals.

Environmental nonprofit organizations also have ample legal experience in transactional work already—they just might not realize

219. Colman, *supra* note 211.

220. See Ivy Tsang, *Big Green: A DAO’s Mission to Disrupt Philanthropy*, IDENTITY REV. (Jan 21, 2022), <https://identityreview.com/big-green-a-daos-mission-to-disrupt-philanthropy> [<https://perma.cc/S4CQ-V89X>] (reporting on Kimbal Musk’s philanthropic organization and discussing a survey that found a dip in public charity trust).

221. Molk & Sokol, *supra* note 36, at 1507.

222. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (defining “net earnings” as “pure profits—that is, earnings in excess of the amount needed to pay for services rendered to the organization,” such as compensation to any person for labor or capital provided).

223. *Id.* (highlighting the differences between nonprofit organizations and profit-driven entities).

224. Glenn T. Troyer, David E. Jose & Andrea D. Brashear, *Governance Issues for Nonprofit Health Care Organizations and the Implications of the Sarbanes-Oxley Act*, 1 IND. HEALTH L. REV. 175, 182 (2004).

it. While many environmental nonprofit organizations pride themselves on litigation work, because most cases settle, they also have significant expertise in drafting complex settlement agreements with corporations.²²⁵ As a result, they are likely familiar with envisioning contracts as systems, including “modular” contract design approaches where contracting parties can make changes to a single part without disturbing the rest of the system.²²⁶ They likely know the value of preliminary agreements, such as memoranda of understanding, letters of intent, term sheets, agreements in principle, and common interest agreements.²²⁷ Or when ancillary agreements may be helpful, such as trust agreements that hold funds from stipulated penalties in trust for later use by community members.²²⁸ They also likely understand the importance of what contract design scholars call “contract mechanics” (e.g., time periods to respond to pollution events) and the use of “codes” (e.g., define terms in ways that a book/treatise/statute defines the term).²²⁹ The settlement drafting experience from multiple other contexts are

225. See, e.g., *Sierra Club Settlement Agreement with Duke Energy Will Lower Rate Hike Burden on Customers*, SIERRA CLUB (Jan. 12, 2023), <https://www.sierraclub.org/press-releases/2023/01/sierra-club-settlement-agreement-duke-energy-will-lower-rate-hike-burden> [<https://perma.cc/AV9J-D59Z>] (discussing a settlement agreement that will reduce rate hikes for consumers as Duke Energy cleans up toxic coal ash deposits).

226. Spencer Williams, *Contracts as Systems*, 45 DEL. J. CORP. L. 219, 221–22, 245 (2021).

227. See Kenneth Duvall, *The Common Interest Privilege: What Exactly Is It, and When Does It Apply?*, AM. BAR ASS’N (Aug. 25, 2021), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2020-21/summer/common-interest-privilege-what-exactly-is-it-when-does-it-apply [<https://perma.cc/5V5N-HA3J>] (explaining that in matters involving multiple community groups, a “common interest agreement,” can help (and may be necessary) to get the groups to come together before entering into a negotiation process with a polluter).

228. See, e.g., *In re U.S. Steel Corp., Settlement Agreement and Order*, ¶ 9(A), https://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Signed-Agreement-2-10-2020.pdf [<https://perma.cc/U8V7-5FCU>] (placing ninety percent of a civil penalty for air pollution in a Community Benefit Trust).

229. See Jay A. Mitchell, *Contract Mechanics: What They Can Teach Us About Contracts* (Feb. 27, 2019) (unpublished manuscript) (on file with Author), <https://ssrn.com/abstract=3371892> (discussing the importance of contract mechanics); John F. Coyle, *Boilerterms*, 16 CAP. MKTS. L.J. 432, 433–34 (2021) (describing a drafting/design tool that would allow for certain contract clauses to have codes whose meaning is spelled out elsewhere). For example, instead of “[t]his Agreement shall be governed by the laws of the State of New York” write, “Boilerterm COL—Broad (New York)” where the meaning of this code would then be spelled out in a book maintained by an organization such as the U.S. Chamber of Commerce or the American Bar Association. *Id.* (internal quotes omitted).

significant skills and expertise that environmental nonprofit organization lawyers can bring to a transactional focused practice group.

Environmental nonprofit organizations also possess a range of non-legal expertise. They have staff with education and experience in politics, media relations, environmental engineering, the hard sciences, and others.²³⁰ As contract law scholars have opined, “contracts [are] core communication tools and business-critical economic instruments, and not merely . . . legal instruments.”²³¹ Non-legal expertise is vital to the long-term success of corporate-community contracts.

Lastly, environmental nonprofit organizations have access to funding from major grants and philanthropic donors. Research reflects that only about one percent of environmental grantmaking from twelve of the largest environmental funders went to environmental justice groups, and half of philanthropic funding on climate change goes to twenty national organizations.²³² Government administrative agencies also deliver services via nonprofit organizations through government grant funding with \$25 billion annually distributed to nonprofit organizations for activities “ranging from scientific research to health services and legal assistance for the poor.”²³³ The access to funding allows environmental nonprofit organizations the unique capacity to develop transactional legal practice groups.

B. *Transactional Legal Environmental Justice Practice*

Environmental nonprofit organizations could deepen their impact and advance environmental justice goals by building transactional

230. See, e.g., *Meet the Board*, SIERRA CLUB, <https://www.sierraclub.org/board-directors/meet-board> (highlighting the diverse backgrounds and superior qualifications of their leadership group).

231. Marcelo Corrales Compagnucci, Helena Haapio & Mark Fenwick, *The Many Lawyers and Dimensions of Contract Design*, U. COPENHAGEN (2022), https://static-curis.ku.dk/portal/files/279959423/The_Many_Layers_of_Contract_Design_SSRN_version_.pdf [<https://perma.cc/9ZNN-66M5>]; see also Peter Kamminga, *The Next Level in Contract Design: Incorporating Non-Contractual Mechanisms When Negotiating and Drafting Complex Contracts* 1, 3 (U.C. Hastings Coll.: Legal Stud. Rsch. Series: Rsch. Paper No. 115, 2014), <https://ssrn.com/abstract=2488080>; James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 NEB. L. REV. 874, 874–75 (2020) (describing that courts are not the only audience for contract designers, legislators are, too).

232. DeBacker & Patterson, *supra* note 218 (citing a 2020 report by the Building Equity and Alignment Initiative).

233. Rivers James, *supra* note 36, at 98.

legal practices. Transactional lawyers are typically pressed for time in contract drafting and design to “consummate a deal—not to produce the perfect contract.”²³⁴ In particular, an “environmental justice transactional legal practice group” could: (1) provide transactional legal services to community groups contracting with corporations; (2) fund and develop a new database of corporate-community agreements; and (3) innovate in the design of corporate-community agreements.

1. *Transactional legal services*

Environmental nonprofit organizations should consider the *kind* of help they can provide impacted communities. Environmental nonprofit organizations already have significant litigation practice groups that require extensive resources for activities like civil discovery, evidentiary hearings, or remedy implementation.²³⁵ What seems to be missing are significant transactional practice groups within large environmental nonprofit organizations.²³⁶ This is despite the fact that environmental transactional practice groups loom large within private law firms.²³⁷ Environmental nonprofit organizations are already seeing the import of increasing their direct representation services to community organizations in order to advance environmental justice.²³⁸ As one

234. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 2–3 (2013).

235. See, e.g., Alexandra Bowman, *Litigation*, NAT. RES. DEF. COUNCIL, <https://www.nrdc.org/about/litigation> [<https://perma.cc/2YJS-MY2H>].

236. *Equity & Justice*, NAT. RES. DEF. COUNCIL, <https://www.nrdc.org/issues/equity-justice> [<https://perma.cc/E2VM-Y9YK>] (describing “solutions” as inclusive of litigation, advocacy, and other fields, but not listing contracts or transactional law as a discrete area); *Defenders Work*, DEFS. WILDLIFE, <https://defenders.org/our-work> [<https://perma.cc/5PUG-2EN6>] (describing tools such as “policy analyses and advocacy, to litigation, innovative science and technology programs and field conservation” but not listing transactional or contract tools).

237. See, e.g., *Environmental Transactions*, LATHAM & WATKINS, <https://www.lw.com/en/practices/environment-land-and-resources/environmental-transactions> [<https://perma.cc/3FWD-SFLA>] (discussing the firm’s approach to environmental transactions); *Environmental Transactions*, HOLLAND & KNIGHT, <https://www.hklaw.com/en/services/practices/energy-and-environment/environmental-transactions> [<https://perma.cc/FZQ6-DMMQ>] (emphasizing the experience and successes of its Environmental Team); *Environmental*, KIRKLAND & ELLIS, <https://www.kirkland.com/services/practices/transactional/environmental> [<https://perma.cc/K6HG-DJ8Y>] (highlighting the size and scope of the work done by its Environmental Transactions practice group).

238. *Build a Justice-Centered Environmental Movement in Partnership with Communities and Allies*, EARTH JUST., <https://earthjustice.org/our-work/environmental-justice> [<https://perma.cc/5ZY3-94ND>] (highlighting the group’s work with community groups and its commitment to environmental justice).

attorney with the nonprofit Earthjustice said in 2020, his future goal was to: “help[] the environmental community break out of silos” through more diverse coalitions and clients, with a focus on “the needs and the realities that people are feeling on the ground.”²³⁹

Transactional legal practices at nonprofit environmental organizations could amplify community voices simply through careful choices of who the nonprofit organizations represent.²⁴⁰ It is easy for impacted communities to be left *out* of corporate-community contracts, with only certain kinds of community organizations (e.g., wealthy, conservation versus social justice oriented, English proficient) joining at the expense of other community organizations—recall as discussed earlier, communities are not monoliths.²⁴¹ Including community organizations that are inclusive of impacted people, as contracting parties (or additional contracting parties if in a multi-party agreement) further advances their voice, participation, and control over key decision-making that will occur under the agreement involving the operation of the polluting facility.²⁴² As such, simply the act of representation in contracting can achieve advances in justice.

2. *Environmental contracts database*

Environmental nonprofit organizations should use their access to large funders to establish a new corporate-community agreements database.²⁴³ Contract lawyers frequently use prior contracts as models in contract design—if they can find them. There exists no uniform library for environmental contracts, even though prior contracts are

239. Ellen M. Gilmer, *Meet Some Key Players in 2020 Environmental Litigation*, BLOOMBERG L. (Jan. 6, 2020, 6:01 AM), <https://news.bloomberglaw.com/environment-and-energy/meet-some-key-players-in-2020-environmental-litigation> [<https://perma.cc/KTT2-ZHVG>].

240. See, e.g., *Concerned Citizens of Cook County, SELC Secure Stringent Terms in Settlement Agreement with Spectrum Energy LLC*, S. ENV'T L. CTR. (Jan. 5, 2023), <https://www.southernenvironment.org/press-release/concerned-citizens-of-cook-county-selc-secure-stringent-terms-in-settlement-agreement-with-spectrum-energy-llc> [<https://perma.cc/Z8SZ-T5PD>] (discussing settlement negotiations that included a community group and agreement provisions giving the group a continued role in monitoring pollution).

241. See *supra* notes 172–74 and accompanying text; Colman, *supra* note 211 (discussing environmental nonprofits' historical marginalization of Black and Brown communities).

242. It is only the parties that get to negotiate, design, and enforce the contract. *Privity*, *supra* note 142.

243. Several questions arise as to whether such database would be publicly available, confidential, redacted for confidentiality, password protected for limited access, etc. This Article does not address these issues but acknowledges them.

highly influential in contract design. While all lawyers know how to find typical prior case precedent, a more complicated task for contract lawyers is in knowing how to find prior contracts. In general, contract lawyers must hunt for model contracts and templates when designing contracts. Contract lawyers may find models from prior contracts that their office has itself engaged in—that is, their law firm, government agency, or nonprofit legal office might maintain an internal “library” of prior model contracts.²⁴⁴ Contract lawyers may find models through publicly available sources, by searching the websites of organizations that are frequently contracting parties in similar kinds of contracts.²⁴⁵ Contract lawyers may also find models through publicly available databases, like the SEC EDGAR database of public filings, or in Westlaw or Lexis databases for transactional documents. As a result, the availability of contract models may depend on the contracting party’s legal counsel.

Models are useful either in whole or in part as contract lawyers design new contracts. Law students learn that legal sources like prior court opinions, treatises, statutes, and law review articles have mandatory and persuasive authority for courts in judicial proceedings. This idea of legal “precedent” ensures that litigating parties in similar factual or legal situations as other prior litigating parties are treated alike and are not subjected to a particular judge’s personal views.²⁴⁶ Yet, if courts defer to the contract itself in interpreting contracts, then the prior documents—which are highly influential for contract designers—are also *indirectly* persuasive for ultimate court decisions.²⁴⁷

Beyond corporate-community agreements, a database of environmental contracts may prove useful in advancing environmental justice in multiple types of contracts. Supply chain contracts drive a wide range

244. Matthew Jennejohn, Julian Nyarko & Eric Talley, *Contractual Evolution*, 89 U. CHI. L. REV. 901, 915 (2022) (discussing the use of precedent documents and how those “templates may be from prior deals that the law firm has done”).

245. The EPA civil cases and settlements webpage posts several (and various kinds) of settlement agreements. *Civil Cases and Settlements*, EPA, <https://cfpub.epa.gov/enforcement/cases> [<https://perma.cc/T9XV-8CU8>] (providing a list of example agreements).

246. John F. Coyle & Joseph M. Green, *Contract as Swag*, 124 PENN. ST. L. REV. 353, 362 (2020) (describing how contract lawyers, who have developed new contract language, may distribute that language to enhance their reputation as forward-thinking innovators and improve their firms’ brands); *Understanding Stare Decisis*, AM. BAR ASS’N (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decis [<https://perma.cc/Q6LC-USUU>] (explaining the role of precedent in the American judicial system).

247. Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV’T L. REV. 117, 134 (2020).

of changes to environmental quality by including requirements on waste management and use of toxic chemicals.²⁴⁸ Insurance contracts and merger and acquisition agreements dictate and define pollution and liability in ways that impact the clean-up of large toxic waste sites.²⁴⁹ Pollution permits include specific language on pollution monitoring that courts may interpret as ambiguous, thereby impacting data on pollution from facilities.²⁵⁰ Thus, the focus on transactional skills practice within environmental nonprofit organizations may prove useful on pollution issues for environmental justice communities, beyond the context of corporate-community agreements.

3. *Contract design innovation*

Environmental nonprofit organizations should also focus transactional practice groups on the design of corporate-community agreements. Professor Susan Chesler argues that contract drafting should be considered a vehicle for seeking and obtaining social change

248. See Michael P. Vandenberg, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 913 (2007) (“[M]ore than half of the largest firms in eight retail and industrial sectors impose environmental requirements on their domestic and foreign suppliers.”); Michael P. Vandenberg, *Governance by Contract: The Growth of Private Environmental Contracting*, Presentation at the MONTHLY LECTURE SERIES ON ENVIRONMENT, ENERGY AND NATURAL RESOURCES LAW at the University of Houston Law Center (Mar. 22, 2022), <https://www.law.uh.edu/enrcenter/MarieSklodowska-Curie/images/2022-0322.pdf> [<https://perma.cc/7B5K-DHDJ>] (arguing that “[s]upply-chain decarbonization will be a ‘game changer’ for the impact of corporate climate action”).

249. See Rebecca M. Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 BYU L. REV. 1215, 1217 (1999) (“[P]arties frequently spend more time and money litigating responsibility for cleanup costs than in actually cleaning up the sites.”); J. Wylie Donald & Craig W. Davis, *Carbon Dioxide: Harmless, Ubiquitous, and Certainly Not a “Pollutant” Under a Liability Policy’s Absolute Pollution Exclusion*, 39 SETON HALL L. REV. 107, 107–08 (2009) (examining whether carbon dioxide should be considered a “pollutant” as defined in a typical commercial general liability (CGL) insurance policy); John C. Buckley, *Reducing the Environmental Impact of CERCLA*, 41 S.C. L. REV. 765, 784 (1990) (discussing how environmental liabilities attach during corporate merger or acquisitions); Cole Rosengren, Jacob Wallace & Megan Quinn, *Tracking the Waste and Recycling Industry’s M&A Boom*, WASTE DIVE (Nov. 23, 2021), <https://www.wastedive.com/news/tracking-us-waste-recycling-mergers-acquisitions/610095> [<https://perma.cc/4WJM-8CPR>] (tracking recent merger and acquisition spending by the large firms in the waste industry).

250. See, e.g., Heraclio Pimentel & Rebecca Andrews, *U.S. District Court Holds Issuance of New NPDES Permit Does Not Moot Claims for Violations of Prior Permit if New Permit Is Stayed*, ARGENT COMM’NS GRP. (Jan 4, 2021), <https://argentco.com/post/u-s-district-court-holds-issuance-of-new-ndes-permit-does-not-moot-claims-for-violations-of-prior-permit-if-new-permit-is-stayed> [<https://perma.cc/V99E-85DJ>] (summarizing a court’s finding that an EPA permit’s reporting requirements were ambiguous).

and provides an example of drafting employment contracts with flexible work schedules to help retain employees and achieve broader goals of gender equality.²⁵¹ Professor Lipson argues that contracting parties may draft terms for suppliers to refrain from using child labor or to hire diverse employees in ways that even if likely unenforceable as contractual terms, can work to change business norms over time.²⁵² The legislature and the courts are not the only entities to look for with respect to achieving justice goals in contracts—so are the contracting parties themselves. If we assume a world in which justice actually serves the private interests of the contracting parties, then contracting parties should negotiate, design, and enforce the contract with justice in mind.

There is no one “model” corporate-community agreement that reflects all dimensions of environmental justice.²⁵³ As one environmental attorney said about an environmental enforcement settlement agreement, “[the agreement] isn’t perfect, settlement agreements never are.”²⁵⁴ However, like modern business contracts, corporate-community agreements have “contractual depth” that is important to recognize in contract drafting and design.²⁵⁵ As modern contracts have become more complicated, so has contract law theory and scholarship around contract design. The conventional notion of contract design has been fairly simplistic, thinking of contracts on a provision-by-provision basis.²⁵⁶ The thought is that contracting parties

251. Susan M. Chesler, *Using Private Law as a Vehicle for Social Change: A Feminist Approach*, 15 LAW J. SOC. JUST. 138, 142–43 (2022).

252. Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility*, 2019 WIS. L. REV. 1109, 1149–55 (2019).

253. See Siegel, *supra* note 176, at 180 (discussing the potential benefits of GNAs, “[i]f crafted effectively and enforced adequately”).

254. SELC *Op-ed: Why We Support the Chemours Consent Order*, S. ENV’T L. CTR. (Dec. 12, 2018), <https://www.southernenvironment.org/news/op-ed-why-we-support-the-chemours-consent-order> [<https://perma.cc/7JPE-R99Q>].

255. See Cathy Hwang & Matthew Jennejohn, *Contractual Depth*, 106 MINN. L. REV. 1267, 1270 (2022) (discussing how contracts written with multiple audiences in mind contain depth and multiple layers of meaning).

256. Cathy Hwang & Matthew Jennejohn, *Deal Structure*, 113 NW. U. L. REV. 279, 282 (2018) (describing how contract scholars “remain preoccupied with a classic, provision-by-provision analysis of contracts”); see also Williams, *supra* note 226, at 221 (“According to ‘contractual reductionism,’ a contract can be understood through each of its constituent terms. This reductionist view of contracts has influenced many of the key theoretical discussions in contract scholarship, including contract design, interpretation, and the role of the transactional lawyer.”); cf. Choi et al., *supra* note 234, at 2–3 (noting how the economics of the production process result in “good enough” contracts based on templates).

generally enter contracts for economically rational and carefully considered purposes, and therefore simply add or delete provisions when circumstances change.²⁵⁷ The goal then is to design a complete contract where “every possible contingency has been thought of and written into the contract.”²⁵⁸ However, in the modern business world, particularly when working with large community coalitions, drafting and designing agreements is anything but simple.

Contract drafting and design is an innovative process. There are times to include boilerplate provisions, and times to include customized terms.²⁵⁹ In addition, like other kinds of modern business contracts, corporate-community contracts have reasons to include a mix of terms that are easy to enforce but hard to negotiate up front (“rules”) and terms that are easy to negotiate up front but hard to enforce later on (“standards”).²⁶⁰ Moreover, like other kinds of modern business contracts, parties to a corporate-community agreement have multiple intended audiences, including courts (in case of breach), but also less obvious audiences such as market competitors and regulators and policymakers.²⁶¹ In addition, similarly situated contracts across one kind of sector (renewable, refinery, or electric power), might have patterns that are important to identify within the sector or with other sectors.

There is no limit to the kinds of new transitional or social justice-oriented provisions that might arise in corporate-community agreements which develop from an environmental contracts database. The ideals of transitional, transformative, and social justice advocate for *control* by impacted communities. In energy delivery, communities of color and critical race theory scholars advocate for community ownership over electric power, instead of investor-owned utilities that do not account

257. See Williams, *supra* note 226, at 224 (describing the reductionist approach to contract scholarship and its connection with theories of efficient contracting).

258. Hwang, *supra* note 115, at 665.

259. Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71, 86 (2018) (discussing the prevalence of boilerplate in similarly situated business contracts and a study showing that these contracts also include many non-standardized terms—one empirical study showed that agreements in the sample had only fifty percent of the same text as their predecessor contracts).

260. Hwang & Jennejohn, *supra* note 256, at 285 (providing an example of a rule, “deliver the goods on October 1, at 7 p.m. Eastern, unless it is already dark, in which case, deliver the next day,” versus a standard, “deliver the goods at a reasonable time”).

261. Hwang & Jennejohn, *supra* note 255, at 1270.

for pollution externalities and equity concerns.²⁶² In drinking water, community-owned and managed water systems for rural access are frequently discussed in developing countries like India and Ghana.²⁶³ Empowering communities to control the decisions impacting their lives is key to transformative processes, and we need transactional legal help from the nonprofit bar to get there.²⁶⁴ Contract design innovation could take corporate-community contracts to a new level by creating provisions that consider shifts in control and ownership over the facilities that directly impact communities.

CONCLUSION

The idea of advancing environmental justice through contract is not new. Frustrated by government environmental decision-making on pollution, community organizations have turned to corporate environmental decision-makers. The result has been the creation of corporate-community agreements whereby community organizations bargain for environmental benefits from corporations in exchange for the community organization's commitment to resolve opposition (or provide support) towards the corporation's polluting facility permit and license process.²⁶⁵ These corporate-community agreements have

262. Thomas M. Hanna, Johanna Bozuwa & Raj Rao, *The Power of Community Utilities*, CLIMATE & CMTY. PROJECT (Apr. 2022), https://www.climateandcommunity.org/_files/ugd/d6378b_00d50768f59640e5949920341b611465.pdf [<https://perma.cc/8N-CV-GL7L>] (“As non-profit utilities without faraway shareholders that are ultimately accountable to the local community, [community-owned] utilities have the potential to be an example for what an equitable, clean, and democratic energy system could look like.”); see also Edmond & Lily Safra Center for Ethics Harvard, *Public Lecture with Olúfemi Tááwò: “Reconsidering Reparations,”* YOUTUBE (Oct. 18, 2021), <https://www.youtube.com/watch?v=IS1taGQsHrU> (advocating for community ownership of power).

263. Emma Kelly, Kristen Lee, Katherine F. Shields, Ryan Cronk, Nikki Behnke & Tori Klug et al., *The Role of Social Capital and Sense of Ownership in Rural Community-Managed Water Systems: Qualitative Evidence from Ghana, Kenya, and Zambia*, 56 J. RURAL STUD. 156, 157–58 (2017); *Call for Community Ownership of Water Supply Infrastructure*, HINDU (Apr. 8, 2022, 10:28 PM), <https://www.thehindu.com/news/national/other-states/call-for-community-ownership-of-water-supply-infrastructure/article65304002.ece> [<https://perma.cc/4F7X-HGMA>].

264. See, e.g., Adam Davidson, *Guido Calabresi’s “Other Justice Reasons,”* 88 U. CHI. L. REV. 1625, 1626–27, 1629 (2021) (discussing the value of community building efforts in transformative-justice processes).

265. González & Saarman, *supra* note 158, at 61–62 (“GNAs have been defined as ‘instruments that provide a vehicle for community organizations and a corporation to recognize and formalize their roles within a locality . . . [in order to] foster sustainable development in a community by reconciling economic development with the

been fraught with challenges but offer multiple opportunities to advance environmental justice—with the right transactional legal counsel.

The time is ripe for environmental nonprofit organizations to develop transactional legal practice groups to add contractual strategies to the toolbox for growing environmental justice work. The advantage of thinking about transactional tools is that the contracting parties involved get to choose their own definitions for terms like “environmental” and “justice” and “community” that are relevant to any given context. This element of choice provides opportunities for organizational contracting parties to make contractual commitments that align with any number of interests that the organization may bring to the contract design process, including efficiency, price, relationships, regulatory compliance—and justice.²⁶⁶ As nascent industries in the climate and renewable sectors grow, including the latest on carbon removal, there will be an even greater need to turn justice promises for communities into something real around the globe.²⁶⁷

It is difficult to assess whether transactional legal practice groups focused on contractual tools will ultimately deliver measurable results on environmental justice. Whether justice has been delivered or perceived to have been delivered is in the eye of the individual or community to whom justice is meant to serve.²⁶⁸ Yet, contractual tools like corporate-community contracts hold promise for advancing all forms of environmental justice—distributive, procedural, corrective, and transitional. Empirical studies have found a relationship between perceptions of fair processes and satisfaction with substantive legal

community’s welfare.”); Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355, 361 (2013) (describing CBA’s as usually negotiated directly between the project developer and community representatives rather than a “development agreement” where the developer and a local government agency are the only contracting parties).

266. Hwang, *supra* note 115, at 663 (describing how business organizational parties are made up of multiple divisions and departments, each with its own purpose, goals, limitations, and intents).

267. See Nikki Batchelor, *Why Environmental Justice Could Make or Break Carbon Removal*, XPRIZE FOUND. (Feb. 7, 2023), <https://www.xprize.org/prizes/carbonremoval/articles/why-environmental-justice-could-make-or-break-carbon-removal> [<https://perma.cc/46PB-H5R2>] (discussing the need to encourage organizations in the environmental sector to adopt approaches to carbon removal that focus on environmental justice).

268. Jane H. Aiken & Stephen Wizner, *Measuring Justice*, 2013 WIS. L. REV. 79, 80 (2013).

outcomes.²⁶⁹ In some studies, researchers have found that people's perceptions of procedural justice were positively related to overall satisfaction—regardless of outcomes.²⁷⁰ In other studies, like one done with claimants for the September 11th Victim Compensation Fund, researchers have found that, despite overall satisfaction with the process, overall perceptions of justice still correlated to the outcome or amount of compensation received.²⁷¹ Thus, procedural justice is both distinct from, and interwoven with, corrective and distributive justice.²⁷² The beauty of transactional legal tools is that it allows communities to have a direct seat at the table to determine themselves what measure of justice means the most and when and where.

269. See Jenness & Calavita, *supra* note 58, at 42 (“[W]hen people perceive a decision-making process to be procedurally fair, they are likely to be satisfied with the outcome even when it does not favor them.”).

270. *Id.*

271. See Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. PUB. POL’Y 75, 95–96 (2007) (noting that “although individuals distinguish between process and outcome, there is overlap between these elements of justice”).

272. See Solum, *supra* note 58, at 192 (examining the interplay of substantive and procedural laws within the framework of procedural justice).