

PIPELINE STRUGGLES: CASE STUDIES IN GROUND UP LAWYERING

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Bridging the intersection between theory and practice, this Article explores conceptualizations of the role of the lawyer in the context of fights over pipeline infrastructure. Focusing on recent battles over the Dakota Access Pipeline, the Atlantic Coast Pipeline, and the lesser-known Portland Montreal Pipeline, the authors argue that recent struggles over pipelines bolster a “from the ground up” theory of change where lawyers support rather than supplant community-led efforts. The authors write as clinical law educators grappling both with the effectiveness of legal strategies for protecting the natural environment and environmental justice, and with curricular choices for students seeking to pursue systemic change and social justice through the law. Part I of the Article provides an overview of the literature on community lawyering and its application in the environmental and environmental justice context. Part II introduces pipeline fights as further context for the community lawyering discussion. Part III delves into the three case studies that afford greater exploration of the relationship between legal work and community-based movements. Part IV then discusses the implications of these recent pipeline fights for the theory of change and role of lawyering. The authors end with recommendations based on their conclusion that community lawyering principles were instrumental in achieving successful outcomes in each case study.

TABLE OF CONTENTS

<i>Introduction</i>	378
I. <i>Community Lawyering</i>	381
A. <i>Process-Based Lawyering</i>	381
B. <i>Public Interest Lawyering</i>	382
C. <i>Community Lawyering</i>	384
D. <i>The Community-Driven Lawyer Supporting Community-Based Transformation</i>	388
E. <i>Community-Driven Lawyering in the Context of Environmental Justice</i>	391
II. <i>Pipelines in the United States</i>	398
A. <i>Context</i>	398
B. <i>Legal Background</i>	405
1. <i>Federal Permitting</i>	405
2. <i>NEPA</i>	405

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3. <i>Environmental Justice</i>	409
4. <i>The Endangered Species Act & Beyond</i>	412
5. <i>Constitutional Issues</i>	413
III. <i>Pipeline Case Studies</i>	415
A. <i>Dakota Access Pipeline</i>	415
1. <i>DAPL and Opposition by the Standing Rock Sioux</i>	418
2. <i>Litigation</i>	420
3. <i>Lessons Learned</i>	425
B. <i>Atlantic Coast Pipeline</i>	426
1. <i>Overview</i>	426
2. <i>The Role of the Lawyer</i>	428
C. <i>Portland Montreal Pipeline</i>	431
1. <i>Overview</i>	431
2. <i>Observations and Role of Lawyers</i>	434
3. <i>Lessons Learned</i>	436
IV. <i>Analysis and Conclusions</i>	436
A. <i>Defining Change</i>	437
B. <i>Measures of Success in Achieving Systemic Change</i>	440
C. <i>Successful Outcomes?</i>	442
D. <i>Lessons for the Future</i>	444
<i>Conclusion</i>	445

INTRODUCTION

*“One day when the glory comes,
It will be ours. It will be ours.”*

—Glory, by John Legend and Common¹

For decades scholars have been writing about community lawyering as a way to achieve broad social change and applying it to the environmental context. This theory of lawyering, which describes the use of legal tools to support community movements, contrasts with impact litigation models focused on achieving landmark successes in court, which early civil rights pioneers and larger environmental groups traditionally have employed. Both approaches to lawyering have their advantages and disadvantages and have received ample support and criticism in legal scholarship.

In this Article, we explore conceptualizations of the role of the lawyer in the context of fights over pipeline infrastructure, and, in particular, propose that these recent struggles over pipelines bolster a “from the ground up” theory of change where lawyers support rather than supplant community-led efforts. We have chosen pipelines as a helpful context for this discussion because recent

1. JOHN LEGEND & COMMON, GLORY (Columbia Records 2014).

battles over the Dakota Access Pipeline, the Atlantic Coast Pipeline, and the lesser-known Portland Montreal Pipeline, have involved significant community engagement as well as legal efforts.² Moreover, pipelines implicate issues that are simultaneously national and local in character and have often involved community-based environmental justice claims regarding racial justice and indigenous rights. At a national level, pipelines maintain, create, and enable the expansion of fossil fuel energy systems while competing with renewable energy development. The significance of pipelines is not lost on environmental groups, many of which target pipelines in campaigns to mitigate greenhouse gas emissions and decarbonize energy systems. While communities along or at the termini of a pipeline often share some of these same concerns, they also face more direct, though equally lasting, threats from pipeline infrastructure, ranging from the threat of pipeline spills to air pollution to the desecration of sacred spaces.³ Pipeline battles therefore offer a helpful framing for our discussion given the breadth of issues they present and the range of interested parties.

The timing of this discussion is important given the shift in the federal judiciary, which has grown less hospitable to efforts to bend the arc of the law toward justice.⁴ With the Supreme Court occupied by a majority that appears ready to limit access to the courts for environmental litigants and scale back the

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2. The authors have varying degrees of connection to the three case studies. Professor Engelman Lado was one degree of separation from the struggles over the Dakota Access Pipeline as a member of the legal staff at Earthjustice when the organization was beginning to get involved in supporting the communities challenging the pipeline. Engelman Lado had no direct relationship with cases brought by the Southern Environmental Law Center and others challenging the Atlantic Coast Pipeline that went to the Fourth Circuit and Supreme Court, described *infra* in Part III.B. In the final months of the struggle, however, the Environmental Justice Clinic at Vermont Law School filed a civil rights complaint challenging the approval of a permit for the pipeline by the North Carolina Department of Environmental Quality with EPA, which was rejected as unripe because of the pendency of litigation. Professor Rumelt co-authored briefs of amici curiae on behalf of members of Congress in the Dakota Access Pipeline litigation at the district court and D.C. Circuit. Professor Rumelt also advised community and environmental groups in connection with the Portland Montreal Pipeline matter and co-authored a brief of amici curiae of community and regional environmental groups in the First Circuit appeal.
 3. See, e.g., Louise Erdrich, Opinion, *Not Just Another Pipeline*, N.Y. TIMES (Dec. 28, 2020), <https://perma.cc/879E-WCMT> (arguing that the proposed expansion of Enbridge's Line 3 pipeline is "a breathtaking betrayal of Minnesota's Indigenous communities — and the environment").
 4. For critique of the theoretical foundations of the shift of the federal judiciary since the Warren Court, see generally Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993); Lino A. Graglia, *Constitutional Theory: The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789 (1987); LOUIS LUSKY, BY WHAT RIGHT: A COMMENT ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION (1975).

federal government's role in environmental protection,⁵ impact litigation, at least as it has been traditionally conceived and fought, may not result in the systemic change it once (arguably) could. Ground up strategies that view grassroots movements as the primary agents of change, rather than the courts, may prove more effective and deserve careful consideration by environmental law and environmental justice practitioners, as well as legal educators.

This Article bridges the gap between theory and practice. The authors write as clinical law educators grappling both with the effectiveness of legal strategies for protecting the natural environment and environmental justice, and with curricular choices for students seeking to pursue systemic change and social justice through the law. Given the constellation of interests faced by our community-based clients, what lawyering models are calculated to make a difference and what skills do our students need to advocate effectively? For environmental justice practitioners, community-based strategies are grounded in a theory of change centering individual and social transformation,⁶ which in turn pressures institutional transformation, and rests on foundational principles of procedural justice. By contrast, many public interest environmental law practitioners, many an outgrowth of what Luke Cole and Sheila Foster described as the "second wave" of environmentalism, deploy an "insider strategy based on litigation, lobbying, and technical evaluation"⁷ with a focus on courts as the most important vehicle for change.⁸

In Part I, we provide an overview of the literature on community lawyering and its application in the environmental and environmental justice contexts. In Part II, we introduce pipeline fights as further context for the community lawyering discussion. Part III delves into three case studies that afford greater exploration of the relationship between legal work and community-based movements. Part IV then discusses the implications of these recent pipeline

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5. See, e.g., Patrick Parenteau, Opinion, *The Trump Court and the Erosion of Environmental Law*, THE HILL (Nov. 1, 2020), <https://perma.cc/Y7VN-A2Q6> (discussing ideological shifts on the scope of the Commerce Clause, standing, nondelegation, and the "major questions" doctrine); Mark Nevitt, *The Remaking of the Supreme Court: Implications for Climate Change Litigation and Regulation*, 42 CARDOZO L. REV. 101 (2020); Beth Gardiner, *With Justice Barrett, a Tectonic Court Shift on the Environment*, YALE ENV'T 360 (Oct. 26, 2020), <https://perma.cc/T6PL-PFUX>.
 6. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 151–56 (2001). For more on theories of change, which describe how and why a particular effort works based on the systemic study of the links between activities, outcomes, and the context of an effort, see generally Carol Hirschon Weiss, *Nothing as Practical as Good Theory: Exploring Theory-Based Evaluation for Comprehensive Community Initiatives for Children and Families*, in NEW APPROACHES TO EVALUATING COMMUNITY INITIATIVES (James P. Connell et al. eds., 1995).
 7. COLE & FOSTER, *supra* note 6, at 29.
 8. See *id.* at 30 ("As the executive director of the Sierra Club Legal Defense Fund stated in 1988, 'Litigation is the most important thing the environmental movement has done over the past fifteen years.'" (citation omitted)).

fighters for the theory of change and role of lawyering. We end the article with recommendations based on our conclusion that community-lawyering principles were instrumental in achieving successful outcomes in each case study.

I. COMMUNITY LAWYERING⁹

This section traces the evolution of theories of lawyering, from process-based to value-laden concepts of the public interest, to community-based models; then leading to today's dialectic tension between practitioners of impact litigation, who can rightly take credit for playing a role in addressing or holding the line on social ills in court, and community-based lawyers, who provide legal assistance to activists and organizations seeking transformation through community engagement.

A. Process-Based Lawyering

The 1958 Report of the Joint Conference on Professional Responsibility (“Joint Committee”) of the Association of American Law Schools (“AALS”) and the American Bar Association (“ABA”) brought a traditional, “process-based” notion of lawyering into full view at a time when public interest law was in its early stages.¹⁰ Established by the ABA and the AALS, the Joint Committee sought to produce a “reasoned statement of the lawyer’s responsibilities, set in the context of the adversary system.”¹¹ At that time, laymen, lawyers and law students alike were concerned over charges that the lawyer had become “nothing but a hired brain and voice,” unable to convey the values of either the adversarial legal system or its tacit restraints.¹² The Report of the Joint Committee was intended to clear the air. Nonetheless, the Report reiterated the view that the legal profession acts as guardian of formal procedures—of “adjudication”—which stand as the rightful pillars of a sound democratic society.

The Joint Committee categorized the major services provided by lawyers. For example, “[t]he lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client’s interest.”¹³ The lawyer facilitates the adjudicative process by presenting issues in an adversarial manner, which ultimately leads to a

9. Portions of this literature draw heavily on Marianne Engelman Lado, *Litigation and Structural Change in Low-Income Communities: Toward a New Conceptualization of the Role of National Legal Campaigns*, ASPEN INST. ROUNDTABLE ON COMPREHENSIVE CMTY. INITIATIVES (July 1, 1998), <https://perma.cc/E32J-8FXT>. The authors thank the Aspen Institute for providing permission to rely on this earlier publication.

10. See Lon L. Fuller et al., *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

11. *Id.*

12. *Id.*

13. *Id.* at 1160.

more reasoned decision on the part of the decisionmaker. By rationally representing the self-interest of the client, the advocate-lawyer contributes to the good of the whole.¹⁴ As counselor, a role related to but distinguishable from advocate, the lawyer employs detachment and reasoning to provide clients with objective appraisals of various courses of action.¹⁵ The Joint Committee also suggested the best way a lawyer could provide public services was through the creation and sustenance of a sound private practice: “Private legal practice, properly pursued, is, then, itself a public service.”¹⁶

A lawyer’s work was, thus, seen as value neutral, except (a) it owed allegiance to a process by which democratic government was said to be maintained and perpetuated,¹⁷ (b) it was premised on a faith in the value of everyone having their day in court, and (c) the allocation of legal work was based on the market. Consistent with this view, lawyers are considered officers of the court for those who can pay, perhaps with some correction for those who have serious grievances and are seen as deserving of pro bono assistance. One paying client is generally as good as any other paying client.

B. Public Interest Lawyering

In response to a legal system that systematically denied the privileges of citizenship on the basis of race, Black members of the bar pioneered a different, value-laden model of lawyering.¹⁸ Lawyers would be deliberate in selecting cases, representing clients whose claims would help to reveal injustice or to establish precedent that would lead, eventually, to the transformation of legal principles they considered inequitable. As far back as 1887, after the Supreme Court ruled that the Civil Rights Act of 1875¹⁹ was unconstitutional, Everett

14. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (1776) (theorizing that private pursuits of enlightened self-interested individuals inevitably lead to the creation of a public good).

15. Fuller et al., *supra* note 10, at 1161.

16. *Id.* at 1162.

17. Indeed, the Joint Committee stated that the lawyer’s loyalty ran “not to persons, but to procedures and institutions.” The committee continued, “[t]he lawyer’s role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.” *Id.*

18. For purposes of this article, we rely primarily on the terms Black and Black, Indigenous, and People of Color (“BIPOC”) in deference to current usage and the importance of self-identification. The terms Black and African American are used interchangeably, though each has its own history and significance in an array of contexts. See Linda Kathryn Larkey et al., *What’s in a Name?: African American Ethnic Identity Terms and Self-Determination*, 12 J. LANGUAGE & SOC. PSYCH. 302, 302–03 (1993). In using this language, we recognize, as Critical Race Theory holds, that racial classifications are products of social relations and invention. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* 9 (3d ed. 2017).

19. 18 Stat. 335.

James Waring, a Black lawyer in Baltimore, joined together with a number of other African Americans to form the group called the Brotherhood of Liberty.²⁰ Waring outlined the role of litigation in challenging oppression based on race:

We should organize the country over. Raise funds and employ counsel. Then, if an individual is denied some right or privilege, let the race make his wrong their wrong and test the cause in law. . . . Some may say that this is futile—that we shall fail. Suppose we do at first, do we not know that in the end, phoenix-like, there will emerge from a sea of failures glorious success.²¹

The Brotherhood intended to test infringements of the rights of Black Americans in court and in fact began a tradition of lawyering that perhaps culminated in Charles Hamilton Houston and Thurgood Marshall's well-known legal campaign to overturn *Plessy v. Ferguson*.²²

Houston and Marshall took Waring's approach one step farther. As described by Mark Tushnet and others, under Houston and Marshall's leadership, the NAACP (and later the NAACP Legal Defense & Educational Fund, Inc. ("LDF")) developed and implemented the idea of "systematic planning to accomplish social change through litigation."²³ They selected cases for their contribution to long-range strategies, in their case, the attack on segregation. According to the NAACP Annual Report for 1934, Houston and Marshall's campaign was "a carefully planned one to secure decisions, rulings and public opinion on the broad principle instead of being devoted to merely miscellaneous cases."²⁴

The NAACP's model of public interest lawyering sought to leave its imprint on the law, thereby realizing social change. Marshall and Houston moved beyond the traditional, process-based model of lawyering by giving content to what, at least in the eyes of the Joint Committee, had been a profession mainly

20. For more details, see Marianne L. Engelman Lado, *A Question of Justice: African American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, 1172–78 (1995).

21. Everett James Waring, *The Colored Man Before the Law*, 3 A.M.E. CHURCH REV. 496, 504 (1887), reprinted in part in A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 695–96 (Herbert Aptheker ed., 1951) (under the heading: *Mutual United Brotherhood of Liberty, 1887*).

22. 163 U.S. 537, 552 (1896) (upholding the constitutionality of segregation).

23. MARK TUSHNET, THE NAACP STRATEGY AGAINST SEGREGATED EDUCATION: 1925–1950, at 33 (1987); see also RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality (1975).

24. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in CRITICAL RACE THEORY 5–6 (Kimberlé Crenshaw et al. eds., 1995). Note, however, that the scholarly focus on Thurgood Marshall's approach has created a revisionist mischaracterization of Marshall as a lawyer who cared more for principle than for clients.

concerned with process. Public interest now meant litigation on the basis of broad principles of justice; if the lawyer was to be a guardian, he or she would have to work in the service of social change, and not merely as a standard bearer of the system of due process.

With Thurgood Marshall at the helm, the LDF had unparalleled success, and its approach is followed today by a range of organizations seeking to transform the law. These include not only organizations to overcome forms of discrimination, from Legal Momentum (formerly the NOW Legal Defense Fund), LatinoJustice PRLDEF, the Mexican American Legal Defense and Educational Fund, and environmental groups such as Earthjustice, but even, ironically, groups such as the Center for Individual Rights, which litigates against the positions taken by the LDF on behalf of its clients.²⁵ As David Schultz and Stephen Gottlieb wrote:

Since *Brown v. Board of Education* . . . Americans have turned as never before to the courts for assistance in reforming society. Citizens have attempted to reform institutions such as schools, prisons, mental hospitals, and malapportioned legislatures through filing suit. Some laud these efforts as necessary to protect minority rights, ensure continued access to the political process, or otherwise to remedy legal wrongs. Others complain that such judicial activity is counter majoritarian, that it undermines confidence in local legislatures, or that it allots to the judiciary a task which it is ill-equipped to undertake. Despite their differences, however, both critic and reformer alike seem to share the functionalist faith in which modern legal thought seems so firmly grounded, the faith that courts can, for better or worse, change society.²⁶

C. Community Lawyering

Derrick Bell, legal scholar and former LDF staff attorney, criticized the public interest model of lawyering for shifting the locus of control from client to lawyer.²⁷ A national litigation campaign required centralization. Plaintiffs, who were recruited by the legal staff, retained the right to leave their cases at any time, but did not exercise control over their cases. To the extent that the

25. For an example of such litigation, see *Case Listing*, THE CTR. FOR INDIVIDUAL RTS., <https://perma.cc/UDQ5-KLLD> (describing victory in defense of a California resident accused of housing discrimination).

26. David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL'Y 63, 64–65 (1996) (citations omitted).

27. DELGADO & STEFANCIC, *supra* note 18, at 36–37 (describing Bell's identification of the tension between lawyers and clients).

conception of a remedy held by a community group seeking legal assistance diverged from the definition of the “cause” or the overall strategy developed by the legal staff, the community group (which was otherwise unlikely to be able to afford a private attorney) had the choice of conforming or foregoing representation.

Bell articulated his critique of this model of public interest lawyering in his article, “Serving Two Masters”:

It is essential that lawyers ‘lawyer’ and not attempt to lead clients and class. Commitment renders restraint more, not less, difficult, and the inability of black clients to pay handsome fees for legal services can cause their lawyers, unconsciously perhaps, to adopt an attitude of ‘we know what’s best’ in determining legal strategy. Unfortunately, clients are all too willing to turn everything over to lawyers.²⁸

The idea that Thurgood Marshall and the NAACP were, in the 1940s and 1950s, pursuing only the objective of reform of the law, abstract and detached from the people that might benefit from change, is revisionist and fails to reflect the more complex relationship between the legal campaign, its lawyers, and clients and community residents.²⁹ But the shift in control from client to lawyer and from community to cause lies at the foundation of subsequent critiques of Marshall’s model of public interest lawyering.

Gerald López and others have argued that such nationally based lawyers become self-styled “political heroes” who are themselves instruments of oppression.³⁰ Public interest lawyers, he writes, are “preeminent problem solvers,” rushing to cure situations of injustice, even though they know little about the cultural, political, and socioeconomic structures of subordination.³¹ By assuming leadership positions in proactive campaigns, López suggests, lawyers relegate community members to roles of passivity and obedience.³² López argued that most left-leaning or progressive lawyers become too attached to their roles

28. Bell, *supra* note 24, at 17.

29. See generally KLUGER, *supra* note 23; CONSTANCE CURRY, *SILVER RIGHTS* (1995) (telling the story of a family in Sunflower County, Mississippi, that sent their children to desegregate an all-white school system, and describing their relationship with activists and organizations working nationally).

30. GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 24 (1992).

31. See *id.*; see also Letter from Richard Moore, SouthWest Organizing Project, to Jay D. Hair, National Wildlife Federation 1–2 (Mar. 16, 1990), <https://perma.cc/86TT-MUBV> (echoing López with the argument that environmental organizations, while often claiming to represent the interests of communities of color, “play an equal role in the disruption of our communities” and fail to recognize community members as full participants in decisions affecting their lives).

32. See LÓPEZ, *supra* note 30; see also Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1754 (1994).

as experts and professionals and excessively concerned with advocating for the cause rather than the client's best interest.³³ He calls this "regnant lawyering" and charges that regnant lawyers (a) consider themselves the preeminent problem-solvers in most situations they find themselves trying to alter; (b) believe their profession to be an honorable calling and see themselves as aesthetic if not political heroes, working largely alone to make statements through their (more than their clients') cases about society's injustices; and (c) are ignorant of and try little to learn whether and how formal changes in law penetrate the lives of subordinated people.³⁴

López offered an alternative model, a vision of "rebellious lawyering." This involves grounding advocacy "in the lives and in the communities of the subordinated themselves," collaborating with others in strategic planning, joining coalitions, and developing the sensibilities and skills tailored to the collective fight for social change.³⁵ Rebellious lawyers have to know how to work with, and not merely on behalf of, women, low-income communities, people of color, people who are LGBTQ or have a disability, the elderly, and others.³⁶ Lawyers, he contends, "must open themselves up to being educated by those with whom they come in contact, particularly about the traditions and experiences of life on the bottom and at the margins."³⁷ In contrast to the regnant lawyers of earlier days, López's "rebellious lawyers" are deeply involved in the communities in which they live and work, try to educate members of the community about their rights, and work directly with clients and service agencies.³⁸ If regnant lawyering is portrayed as paternalistic and patronizing, then rebellious lawyering is cooperative and mutually respectful.³⁹

How useful, though, are the methods and characteristics of the rebellious lawyer, rooted in a particular community, to those assessing potential roles for national legal efforts in facilitating community empowerment and social change? The vision of rebellious lawyering has limited guidance for a national office aspiring to have nationwide impact. López advocates, for example, that the lawyer become deeply involved in the daily life of the community within which he or she works.⁴⁰ The rebellious lawyer practices the way and in the

33. See LÓPEZ, *supra* note 30. Legal processes and forums can also divert resources and attention from the community and its narrative. See, e.g., Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and Justice*, 47 AM. U. L. REV. 221, 244 (1997) ("[W]here the communities are able to participate in the legal process to fight facilities, often they are required to focus on objections that are peripheral to their substantive concerns.") (quoting Michael Gerrard).

34. See LÓPEZ, *supra* note 30.

35. *Id.* at 38.

36. *Id.* at 37.

37. *Id.*

38. *Id.* at 70.

39. *Id.* at 29, 37.

40. *Id.* at 38.

place the clients live—close to the ground. If there is theory in this lawyer's work, it originates out of practice. Maintaining a broad, long range goal must never supersede the daily, incremental accomplishments that make real differences in the lives of clients. Problem-solving, then, is rarely for the "cause." Or, more accurately, the "cause" is served by solving problems for the community and its people. Perhaps most telling, López's accounts of rebellious lawyering—based on real or fictitious lawyers—don't focus on national organizations in any significant way.⁴¹ Lawyers working for national organizations are portrayed as regnant.⁴²

Perhaps the critique of regnant lawyers and the focus on community lawyering belies doubt about the utility of national legal campaigns, a position shared by writers arguing that *Brown v. Board of Education*⁴³ and its progeny had minimal impact.⁴⁴ Without fully rebutting this position, and at the risk of oversimplifying, the authors suggest that impact litigation nonetheless has a number of interrelated purposes of value. First, and perhaps most importantly, as challenges to discriminatory, exclusionary, or otherwise harmful practices, lawsuits bring relief to a plaintiff or group of plaintiffs. This relief may be injunctive (prospective) or compensatory (for example, by awarding damages). Such cases may have precedential value and may serve as a deterrent to other policymakers or wrongdoers. Second, impact litigation builds a record regarding undesirable practices, a record that can be used by community members and advocates to educate others and to support legislative and administrative change. In this vein, Cornel West has argued that legal work can play a significant role in educating the public on the fundamental principles and workings of our political arrangements. Such legal work, West argues, constitutes "one of few buffers against cultural conservatism that recasts the law in its own racist . . . image," it "helps keep alive memory traces left by past progressive movements of resistance," and it serves "as a basis for the next wave of radical action."⁴⁵ Finally, impact litigation constitutes a direct assault on a law, policy, or

41. See generally *id.*

42. See *id.* at 16.

43. 347 U.S. 483 (1954).

44. See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 155–56 (2d ed. 2008); see also MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER* 229, 232–33 (1987) (arguing that civil rights prosecutions and laws were less significant factors in decreasing racial violence than restraints imposed by Southern political culture); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10–11 (1994) (arguing that racial change would have come regardless of *Brown*, though contending that federal legislative intervention was necessary). *But see* Schultz & Gottlieb, *supra* note 26, at 66–67 (noting that Rosenberg's evaluation of the effectiveness of law reform fails to inquire whether social change would occur if courts did not seek to effect change, without regard to whether court mandates are effectively implemented).

45. Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1799–1800 (1990). As has been noted elsewhere, the role of an attorney in rendering grievances and

practice that community members identify as harmful, unjust, or otherwise inequitable.⁴⁶

Moreover, there is a presumptuousness to the conception that the lawyer should get involved in all aspects of the social movement. Though perhaps community-based lawyers who live and practice in the same location and who work on cases as both lawyer and resident should have freer rein to play a wider range of roles, the national lawyer has to be careful to set parameters and avoid supplanting local leadership.

D. *The Community-Driven Lawyer Supporting Community-Based Transformation*

With this in mind, and acknowledging Bell and López's call for a shift in control back to clients, this Article suggests a fourth model of lawyering, one in

words into legal narrative is necessarily fraught with danger. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1300–02 (1992). But see James B. White, *Translation as a Mode of Thought*, 77 CORNELL L. REV. 1388, 1396–97 (1992).

46. Scholars downplaying the significance of *Brown* advance and rely upon an overly simplified measure of the impact of court action and ignore the subtle ways in which litigation and judicial mandates inspire and complement activism and affect social mores and, ultimately, behavior. For example, in *The Hollow Hope*, Gerald Rosenberg argues that there is “no evidence” that civil rights litigation inspired student organization and bravery. ROSENBERG, *supra* note 44, at 142. He notes, “The [Southern Christian Leadership Conference] was founded in the winter of 1957,” but then discounts any possible influence by *Brown* or civil rights litigation: “The moving force behind it was not the inspiration of *Brown* but an attempt to capitalize on the success of the Montgomery bus boycott.” *Id.* at 143. In Martin Luther King, Jr.’s own account of the Montgomery bus boycott, however, King wrote about the influence of *Brown* and the work of the NAACP lawyers on the movement in Montgomery. King suggested that the Supreme Court’s decision on desegregation “might help to explain why the protest occurred when it did,” although it could not explain why it took place in Montgomery, in particular. MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 64 (1958). In fact, in the course of the protest, King and other community members filed suit in federal district court, “asking for an end of bus segregation on the grounds that it was contrary to the Fourteenth Amendment.” *Id.* at 151. Robert Carter of the NAACP’s legal staff represented the Montgomery residents, arguing that local segregation laws were inconsistent with *Brown*: “This injustice and inconsistency in the segregation laws was the object of Bob Carter’s brilliant attack,” King wrote. *Id.* at 152. The widespread impact of *Brown* is poignantly illustrated in Patricia Williams’ recent recounting of how the case affected her father’s thinking. She quotes her father:

[A]fter *Brown* I remember it dawning on me that I could have gone to the University of Georgia. And people began to talk to you a little differently; I remember [the white doctor who treated Williams’ family in Boston, where she grew up] used to treat us in such a completely offhand way. But after *Brown*, he wanted to discuss it with us, he asked questions, what I thought. He wanted my opinion and I suddenly realized that no white person had ever asked what I thought about anything.

PATRICIA WILLIAMS, *THE ROOSTER’S EGG* 23 (1995) (parentheticals modified).

line with Bell's proscription: "It is essential," he wrote, "that lawyers 'lawyer' and not attempt to lead clients and class."⁴⁷

Perhaps public interest lawyers, with one eye on how a case might affect legal standards, should see themselves as technical advisors to communities and community movements. Once a community's interest is determined to be within the ambit of a legal organization's mission, the questions become (a) whether and in what way legal services, broadly defined, would be useful,⁴⁸ (b) whether the community's interest would be better served by some other organization or form of assistance, and (c) whether resources are available to staff and to carry out the effort, among others.⁴⁹ Just as a corporation or an individual with financial means can hire a law firm to explore the range of possible legal actions to redress perceived wrongs, or even to go on the offensive, this model suggests that a community group harmed by a civil rights violation, for example, might obtain legal representation, even if the claims fit into no national strategy for law reform.

The community-driven model is a hybrid. Unlike the approach advocated by the Joint Committee, it is not value neutral and process-based. Instead, it

47. Bell, *supra* note 24, at 17. See also Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for 'Facilitative' Lawyering?*, 1 CLINICAL L. REV. 639, 658 (1994–95), outlining a "facilitative model" of lawyering, whereby the attorney is "more the oiler of the social change machine than its motor." Marsico is similarly critical of community lawyering, arguing that the model put forward by López and others blurs, to the point of eliminating, the distinctions between lawyers and lay people and between legal and nonlegal tasks, and compromises the client's autonomy, which at minimum must include the freedom to choose and retain an attorney to perform defined tasks. Marsico contends that differentiation between lawyers and clients should be preserved. *Id.* at 654.

48. Such legal services may include traditional impact litigation, legal actions based on state or local law, litigation-related administrative advocacy, or transactional lawyering. In *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993), for example, Ann Southworth discusses aspects of what she terms "creative lawyering." These include the role of the lawyer as "technical assistant" who can "help implement plans by identifying sources of capital, analyzing regulatory schemes, negotiating on the client's behalf, structuring relationships, drafting agreements, and navigating procedural and political obstacles." *Id.* at 223. The lawyer can also help to incorporate local organizations, assist with applications for tax exemptions, draft bylaws, advise on liability issues, and provide other legal services that are critical to the viability of community organizations and require a lawyer's technical skills. See *id.* at 226. See also ANN SOUTHWORTH, *THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, CHILDREN IN POVERTY* 10–16 (1989).

49. Case selection criteria at the Environmental Justice Clinic at Vermont Law School, for example, include consideration of the merits of the case, whether the clinic has the resources or capacity to provide excellent representation, alignment with the clinic's mission to serve the Environmental Justice Movement, as well as value in teaching and adherence to rules of ethics. The clinic also considers whether the client has the ability to seek legal counsel elsewhere, client capacity to make decisions, expertise needed, and breadth of impact, among other things. EJ Clinic Manual Draft 13–14 (May 25, 2020) (unpublished manuscript) (on file with author).

assumes that public interest law firms will define their mission, the ambit of their work, in value-laden ways. Even the most community-driven public interest practice will exercise some discretion in selecting cases—and should acknowledge their role in meting out what might be a scarce resource in a legally underserved market,⁵⁰ but the premise is that the community-driven lawyers will be transparent in applying criteria to case selection and will aim to support community capacity building.

Unlike the traditional public interest model, cases adhering to the community-driven model are largely community generated, and the underlying issues need not be susceptible to remedy by litigation that is necessarily replicable or otherwise of precedential weight.⁵¹ Legal activities are intended to complement community-based strategies and build community capacity rather than prioritizing a national strategy for law reform. And yet the lawyer may be at a national organization, not living in the particular neighborhood where a case arises but nonetheless listening to and providing legal support for community-based strategies. As Everett Waring did more than a century ago, a civil rights or public interest law office can provide legal assistance to those who suffer from infringement of certain rights—for example, deprivation of civil rights—but no longer define its area of expertise by court or statute, or its primary allegiance to reform of the law. Community-driven lawyering allows lawyers to select cases for their potential to address community concerns and in support of community priorities, whether or not the claims align with a long-term strategy for law reform. Neither is community-driven lawyering necessarily sufficiently rebellious to please Gerald López, as lawyers defer to community members on questions of political organizing and other forms of advocacy. Lawyers are technical assistants, and while personal connections to community-based concerns are likely to help their practice,⁵² they need not reside in or be of the commu-

50. Public interest legal practices are constrained not only by the need to align case selection with their own mission, but also by rules of professional responsibility. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020) (duty not to abuse legal procedure by filing frivolous actions or defenses).

51. The community-driven lawyer is parallel to and can draw from models of community-based participatory research. *See* Steve Wing, *Environmental Justice, Science, and Public Health*, in ESSAYS ON THE FUTURE OF ENVIRONMENTAL HEALTH RESEARCH (Thomas J. Goehl ed., 2005), <https://perma.cc/ZS2K-WHTY> (calling environmental health scientists to provide technical assistance to communities and to be both ready to learn from community experience and to shape research questions in response to community concerns).

52. A full discussion of the value of community connection, including the benefits of shared cultural experiences and racial and ethnic identity, is outside the scope of this paper. *Cf.* Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1 (2008) (arguing that legal services organizations serving Black clients should employ Black staff attorneys, who are more likely to gain a client's trust and to communicate more effectively with clients).

nity to represent and partner with communities. Although litigation must coordinate with community activities, lawyers should admit the limits of their expertise. We want to be clear: lawyers should defer not because the other activities are presumed less worthy, but instead because lawyers are usually the least qualified to lead.

E. Community-Driven Lawyering in the Context of Environmental Justice

As stated by Dr. Robert Bullard, a founder of the Environmental Justice Movement, “Environmental justice embraces the principle that all people and communities have a right to equal protection and equal enforcement of environmental laws and regulations.”⁵³ Environmental justice is decidedly race-conscious and aims to address the disproportionate burden of pollution placed on Black, Indigenous, people-of-color (“BIPOC”) communities and low-income communities and, in turn to ensure that the benefits of clean air and fresh water are also available to all without regard to race, nationality, or income. As Dr. Bullard has written:

America is segregated and so is pollution. Race and class still matter and map closely with pollution, unequal protection, and vulnerability. Today, zip code is still the most potent predictor of an individual’s health and well being. . . . Reducing environmental, health, economic and racial disparities is a major priority of the Environmental Justice Movement.⁵⁴

As articulated in the Principles of Environmental Justice, drawn up at the First National People of Color Environmental Leadership Summit, held in Washington, DC in 1991, core concepts include not only distributive justice, but also procedural justice, demanding “the right to participate as equal partners at every level of decision-making,” and claims of substantive justice, affirming “the right to be free from ecological destruction,” safe workplaces, and the right to “ensure the health of the natural world for present and future generations.”⁵⁵

Executive Order 12,898, signed by President Clinton in the wake of the First National People of Color Environmental Leadership Summit and responding to recommendations from the burgeoning Environmental Justice Movement,⁵⁶ contains provisions to ensure greater public participation on the

53. DR. ROBERT BULLARD (2020), <https://perma.cc/CJ4Z-GCF9>.

54. *Id.*

55. *Principles of Environmental Justice*, 1991 PROC. FIRST NAT’L PEOPLE OF COLOR ENV’T. LEADERSHIP SUMMIT (United Church of Christ Comm’n for Racial Just., Washington, D.C.); see also Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV’T L. REP. 10681 (2000).

56. UNITED CHURCH OF CHRIST COMM’N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC

one hand, and requirements that agencies identify and address “disproportionately high and adverse human health or environmental effects” of their programs, policies, and activities on BIPOC and low-income communities on the other.⁵⁷ As Dr. Bullard and others have noted, the impetus for the Movement and for change “came from people of color, grassroots activists, and their ‘bottom-up’ leadership approach. Grassroots groups organized themselves, educated themselves, and empowered themselves to make fundamental change in the way environmental protection is administered in their communities.”⁵⁸

In their book *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, Luke Cole and Sheila Foster described the theory of change embodied by the Environmental Justice Movement’s ground up advocacy strategy.⁵⁹ On an individual level, participants in the movement at the community level move from “being a bystander to being a participant in a struggle,”⁶⁰ coming to realize that they can speak out and have agency on issues affecting their lives. In turn, as more people engage, their self-empowerment leads to community transformation, allowing community-based organizations to recognize and exercise influence over their health and welfare. A successful environmental justice grassroots campaign may “break the cycle of quiescence and transform a community’s mood from a feeling of hopelessness to one of empowerment.”⁶¹ Community transformations then can cause change at institutional levels, compelling changes in law and policy,⁶² and, ultimately, lead to changes in narrative and power across society.⁶³ This “ground up” strategy of “institution building and organizing,” together with external factors such as the opening of opportunities within larger political structures, has been credited with success in achieving change.⁶⁴

CHARACTERISTICS OF COMMUNITIES AND HAZARDOUS WASTE SITES, at xv (1987) (urging the President “to issue an executive order mandating federal agencies to consider the impact of current policies and regulations on racial and ethnic communities”); see also Robert D. Bullard & Glenn S. Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56 J. SOC. ISSUES 555, 560–61 (2000) (describing factors leading to EO 12,898).

57. Exec. Order No. 12,898, 3 C.F.R. 859 (1995), reprinted as amended in 42 U.S.C. § 4321.

58. Bullard & Johnson, *supra* note 56, at 560.

59. See generally COLE & FOSTER, *supra* note 6.

60. *Id.* at 151.

61. *Id.* at 157.

62. See *id.* at 159–64.

63. See *id.* at 164–65.

64. David N. Pellow, *Environmental Justice and the Political Process: Movements, Corporations, and the State*, 42 SOCIO. Q. 47, 48 (2001) (ascribing success in the Farm Workers Movement to a ground up strategy) (relying on Craig Jenkins & Charles Perrow, *Insurgency of the Powerless: Farm Worker Movements (1946-1972)*, 42 AM. SOCIO. REV. 249 (1977)).

The role of the lawyer in this context is, in Luke Cole's words, to be "part of a broader push toward social and economic justice"⁶⁵ by assisting communities in their efforts to exert control over decisions affecting their health and welfare. Examples of legal efforts used in the legal services movement to build the capacity of clients to take this control included, for example:

Increasing client information through community education about legal and other processes; improving clients' personal skills by training lay advocates to represent themselves and others in administrative fora; increasing collective strength by organizing client groups; improving links between and among client groups, both locally and nationally; and increasing client control over resources.⁶⁶

In addition, however, lawyers also may file lawsuits "with the larger framework of social action and client empowerment, not mere legal victory in mind."⁶⁷

As Cole suggested, litigation on behalf of environmentally overburdened BIPOC and low-income communities⁶⁸ may play a role but lawyers have many arrows in the quiver—the goals and functions of legal work are multiple, not solely to have a judge agree with legal arguments. Functions also include conducting factual and legal investigations, providing community members with information about the underlying issue and their options, communications, organizing, and public education and training, in tandem and in support of organizational work by the client group. Consistent with a lawyer's ethical

65. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 634 (1992).

66. *Id.* at 657–58.

67. *Id.* at 658.

68. Given the centrality of race, national origin, and income in the distribution of environmental benefits and burdens in the United States and across the world, and historic and current disparities in power on the basis of race, national origin, and income, this Article focuses on representation of environmentally overburdened BIPOC and low-income communities. See Helen Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 *WASH. U. J.L. & POL'Y* 121, 123–24 (2009) (defining environmental justice communities as low-income communities and communities with a majority population who are people of color, and adding that while this description is coupled with information about whether the populations bear disproportionate pollution burdens or enjoy fewer environmental benefits, the additional information is usually redundant because of the relationship between the race and income on the one hand and pollution levels on the other). Recently, the availability of demographic, environmental, and health data at a granular level and the visual representation of layers of data in federal and state environmental justice mapping tools has facilitated greater consensus around which communities are shouldering the greatest impacts of the cumulative effect of environmental exposure when considered with other social determinants of health. See, e.g., *CalEnviroScreen*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT, <https://perma.cc/H9SA-J9GY> (mapping tool allowing comparison of cumulative impacts by census tract).

obligations, claims brought in a legal proceeding must be meritorious.⁶⁹ At the same time, legal activity may take multiple forms and have multiple functions, for example:

- To obtain a decisive court ruling or, subject to a court ruling, a policy change, for example as a result of an order for injunctive relief issued by a court;⁷⁰
- To build a record—for example, through public records requests under state or federal freedom of information law⁷¹ or through discovery;⁷²
- To open a process for public participation and create space for community voices in the political process—for example, by asserting rights to public participation under the National Environmental Policy Act (“NEPA”);⁷³
- To create leverage for a group left out of the decision-making process and possible restoration, for example, through alternative dispute resolution allowing for face-to-face dialogue and creative, cooperative problem-solving;⁷⁴ and
- To reinforce a narrative inclusive of community experience that otherwise might not be raised or allowed in a policy-making forum.⁷⁵

69. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . .”). Notably, the Model Rules allow for “a good faith argument for an extension, modification or reversal of existing law.” *Id.*

70. *See* Kang, *supra* note 68, at 136–45 (discussing whether and when litigation might be a useful strategy for addressing community-based environmental pollution).

71. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552.

72. *See, e.g.*, Clifford E. Douglas et al., *Epidemiology of the Third Wave of Tobacco Litigation in the United States: 1994–2005*, 15 TOBACCO CONTROL iv9, iv10 (2006) (describing role of tobacco litigation in contributing to “the cause of tobacco control by uncovering key information about tobacco industry misconduct, in part through the discovery and publication of millions of previously confidential internal tobacco company documents”).

73. *National Environmental Policy Act*, 42 U.S.C. §§ 4321–4370.

74. Community groups filing civil rights complaints with EPA, for example, can consider participating in alternative dispute resolution. *See, e.g.*, *Conflict Prevention and Resolution Center*, EPA, <https://perma.cc/3YK4-JZXL>.

75. For example, filing civil rights claims alleging discrimination on the basis of race, color or national origin under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, centers issues of race that are often ruled by state agencies as outside the boundaries of procedures governing permitting. *See, e.g.*, Summation of Comments Received and Response-to-Comments: Proposed Arrowhead Landfill Renewal & Modification, ALA. DEP’T OF ENV’T MGMT., Permit 53-03, at 18–19 (Feb. 10, 2017) (responding to concerns about the racially disproportionate impact of a landfill, the Alabama Department of Environmental Management argued that “it does not site landfills” and that it “only permits the operation of landfills” and that it was, therefore not responsible for the impacts of siting decisions).

The overarching goal of these legal activities, though, is supporting community-based movement building and claims. Success is not generally measured by whether the lawyer obtains an injunction or a clear court ruling but, rather, whether the work advances community-based goals, with the term “community” here intended to include both residents of local, geographically discrete areas and, also, a larger community of environmental justice organizations.⁷⁶

In their article on the secondary effects of bringing civil rights litigation to advance environmental justice, environmental justice legal scholars Gregg P. Macey and Lawrence E. Susskind discussed the benefits for communities of legal action even if claims fail in court.⁷⁷ Macey and Susskind argue that the litigation strategy employed in *West Dallas Coalition for Environmental Justice v. EPA*,⁷⁸ for example, which was reliant on scientific proof of impacts, diminished the perceived value of emphasizing community-based experience and diverted attention from coalitional work.⁷⁹ Ultimately, evaluation of their case study cautions that the development and adoption of a legal strategy in support of community goals should “consider the characteristics of client organizations, their expectations, or the paths that they could traverse.”⁸⁰ In a similar vein, Helen Kang concluded, based on her experience representing communities of color and low-income communities, that litigation can have both positive and negative impacts on progress toward community goals.⁸¹ Drawing on three questions asked by Luke Cole,⁸² she proposed asking whether legal strategies would educate people, build a movement, and “address the cause rather than the symptoms of a problem.”⁸³ She concluded that while litigation generates press, it fails to capture the nuances of community-based experience.⁸⁴ Moreo-

76. Any invocation of the concept of community must also recognize heterogeneity within geographically discrete areas and the importance of mechanisms to identify common ground and address potential tensions. See, e.g., Brian D. Christens, *Public Relationship Building in Grassroots Community Organizing: Relational Intervention for Individual and Systems Change*, 38 J. CMTY. PSYCH. 886, 887 (2010) (highlighting relationship-building as a mechanism to increase the community cohesion needed to effectuate change at individual and systems levels); Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 640 (1994).

77. See Gregg P. Macey & Lawrence E. Susskind, *The Secondary Effects of Environmental Justice Litigation: The Case of West Dallas for Environmental Justice v. EPA*, 20 VA. ENV'T L.J. 431, 453 (2001).

78. No. CA 91-CV-2615, 1998 WL 892122 (N.D. Tex. Aug. 14, 2000) (mem.) (granting motion to dismiss claims that EPA had failed to take effective action to prevent, remedy, or clean up pollution that was hazardous to the health of a low-income BIPOC community on jurisdictional and other legal grounds).

79. See Macey & Susskind, *supra* note 77, at 455–56.

80. *Id.* at 473.

81. See Kang, *supra* note 68, at 140–45.

82. See Cole, *supra* note 65, at 668–70.

83. Kang, *supra* note 68, at 140–41.

84. See *id.* at 142.

ver, litigation can make organizing more difficult.⁸⁵ On the other hand, litigation can offer “case-specific solutions” to proposals for new or expanded facilities or what Kang calls “wrongheaded regulations that [environmental justice] groups are attempting to fight.”⁸⁶ In other words, there is a role for legal work in support of community-based movements to advance environmental justice. This Article builds on this literature, finding that recent successes in the pipeline cases were predicated on a model of legal work that self-consciously complemented and supported rather than supplanting community-based activism by centering the authority of the client and deferring to the larger community-based movement on organizing and communications strategies.

Comparing and critiquing various legal strategies for increasing the leverage of communities,⁸⁷ and, particularly, whether to emphasize what has been termed “procedural justice” versus conflict resolution in the siting of polluting facilities have been the focus of significant discussion, advocacy, and legislation since the dawn of the formal Environmental Justice Movement in the 1990s.⁸⁸ Kristen Van De Biezenbos, for example, writes about energy democracy, and how with energy projects closer and closer to residential neighborhoods, law has been slow to respond to the pushback from communities affected by the projects. Her work suggests an urgency to shifting gears to legal tactics focused on negotiation with market players: “[I]f some way to adequately incorporate community participation in the energy project approval process is not found, it seems likely that citizen trust in the relevant state and federal regulatory systems will continue to erode, and resistance to energy projects will continue to increase accordingly.”⁸⁹ Van De Biezenbos argues that emphasis on procedural justice is misplaced and that “what is needed is a system for resolving conflicts of interest among stakeholders in energy projects.”⁹⁰ Choices among competing

85. *See id.* at 142–43.

86. *Id.* at 143.

87. *See, e.g.*, Kristen Van De Biezenbos, *Negotiating Energy Democracy*, 33 J. LAND USE & ENV'T L. 331, 331–33 (2018).

88. *See, e.g.*, *Principles of Environmental Justice*, *supra* note 55, at ¶¶ 2, 5, 7 (demanding that public policy be based on mutual respect, affirming the right of self-determination, and demanding “the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation”); CONN. GEN. STAT. § 22a-20a (2020) (Connecticut Environmental Justice Law passed in 2009 and revised in 2020, which requires applicants for electric generating and other “affecting facilities” to develop and implement public participation plans); David N. Pellow, *supra* note 64, at 55 (discussing the emergence of the Good Neighbor Agreement model as a “vehicle for a community organization and a corporation to recognize and formalize their roles within a locality and to foster sustainable development” in light of strengthened role of the private sector and decreased policy-making capacity of the state) (quoting Sanford Lewis & Diane Henkels, *Good Neighbor Agreements: A Tool for Environmental and Social Justice*, 23 SOC. JUST. 134, 138 (1998)).

89. Van De Biezenbos, *supra* note 87, at 332 (citation omitted).

90. *Id.*

tactics is an interesting corollary to our topic, but this Article, by contrast, explores case studies shedding light on the effectiveness of legal support for community engagement as leverage for policy change using all tactics available. Rather than evaluating competing tactics, we focus on the role of lawyers as technical assistance providers, navigating legal forums, offering analysis of options, and having the agility to use a range of laws and tools in support of community-driven transformation, consistent with social justice goals.

Our articulation of community lawyering in the context of environmental justice harkens back to the description of the lawyer as a predictor, advisor, and professional who can provide information about the relative risks and possibilities of success of alternative courses of action. People trained in the law can offer information about legal proceedings, help to navigate the opportunities for input during public review processes, assess the likelihood of success in legal forums, and provide representation, where appropriate, in court. The community resident or organization in an environmentally overburdened location or facing new threats to health and welfare, however, are the experts in their circumstances and should determine the goals and direction of action. Oliver Wendell Holmes provided perhaps the most influential description of the predictive role of the lawyer: “People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find when the danger is to be feared.”⁹¹ The lawyer’s job, then is to study sufficiently to predict outcomes in the courts. In this iteration, though, the role of the lawyer does not require separation of law and morality. As Holmes stated, “[w]hen I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law.”⁹² Lawyers serving communities in the environmental justice context engage in case selection based on mission, which in turn incorporates values. At the same time, legal practice requires clear-eyed assessment of options, predicting outcomes while nonetheless recognizing that argument and circumstances may also shape those outcomes, which are perhaps bounded⁹³ but not determinate.⁹⁴

As scholar Alice Kaswan wrote, “[n]otwithstanding the role of environmental laws in causing environmental injustice, the environmental justice litera-

91. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

92. *Id.* at 459.

93. See, e.g., Brandon L. Bartels, *The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court*, 103 AM. POL. SCI. REV. 474, 475 (2009) (finding that the application of strict scrutiny analysis constrains ideological voting).

94. See Anthony D’Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513, 514 (1989) (reviewing literature on indeterminacy); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983) (describing the argument for the destabilization of a deterministic view of rights in favor of recognition for the normative underpinnings of law and the transformative power of indeterminacy).

ture does acknowledge that environmental litigation may be an effective tool in challenging an undesirable facility.”⁹⁵ She continued: “The environmental justice literature also acknowledges that the complex procedural requirements imposed by many environmental laws can assist communities concerned about environment problems.”⁹⁶

II. PIPELINES IN THE UNITED STATES

A. Context

Our core inquiry delves into the role lawyers play, whether through traditional top-down impact litigation or community lawyering, in achieving systemic change. As we have noted in the Introduction, pipeline controversies provide a useful context for this discussion because they simultaneously implicate national and local issues. Pipelines are aptly described as the “arteries” of our nation’s energy infrastructure. They transport enormous volumes of crude oil and natural gas from far-off energy-producing regions, including tar sands oil-producing regions in western Canada and various shale formations in North Dakota, Texas, and West Virginia. These so-called “unconventional” oil and gas producers have long sought additional pipeline capacity to get their product to refineries and processors since absent or constrained pipeline infrastructure significantly affects their profitability.⁹⁷

Tar sands oil is “unconventional” because it is mined from sandy deposits impregnated with bitumen, processed to remove sand, and then diluted with less viscous hydrocarbons and sometimes heated for transport by pipeline.⁹⁸ This process makes tar sands oil more energy intensive and results in far more significant localized environmental damage than conventional crude oil.⁹⁹ Tar

95. Kaswan, *supra* note 33, at 275.

96. *Id.* at 276.

97. See, e.g., Simon Romero, *Mr. Sandman, Bring Me Some Oil; Suncor Energy Is Turning Canadian Tar into Energy*, N.Y. TIMES (Aug. 31, 2004), <https://perma.cc/8X3T-A8TT>; James Kanter, *How Big Are the Risks for Oil Majors Like BP and Shell That Exploit Tar Sands?*, N.Y. TIMES (Sept. 17, 2008), <https://perma.cc/HL5V-UZTY>; Jeffrey Jones, *Canada’s Clogged Oil Pipeline System*, REUTERS (Dec. 14, 2010), <https://perma.cc/P7ZM-PHKG>; Ian Austen, *Route Proposals May Ease an Oil Pipeline Bottleneck*, N.Y. TIMES (Nov. 16, 2011), <https://perma.cc/VKQ5-YHD4>.

98. Elizabeth McGowan & Lisa Song, *The Dilbit Disaster: Inside the Biggest Oil Spill You’ve Never Heard of, Part 1*, INSIDE CLIMATE NEWS (June 26, 2012), <https://perma.cc/8UVE-JPSQ>.

99. See, e.g., *The Costly Compromises of Oil from Sand*, N.Y. TIMES (Jan. 7, 2009), <https://perma.cc/US5P-H2NY> (referencing a Rand Corporation study that estimated tar sands oil generates about ten to thirty percent more greenhouse gases than conventional crude); John Cushman, Jr., *Carbon Footprint of Canada’s Oil Sands Is Larger than Thought*, INSIDE CLIMATE NEWS (Apr. 4, 2017), <https://perma.cc/9J6Y-NV4X> (reporting that an Enbridge

sands oil sells at a discount due to its distance from refineries along the Gulf Coast and bottlenecks in pipeline infrastructure.¹⁰⁰ Older studies suggest that tar sands projects become unprofitable when prices are below sixty-five dollars to seventy-five dollars per barrel,¹⁰¹ although the break-even point may be around fifty dollars per barrel or lower.¹⁰² Oil fracked from the Bakken shale region faces similar competitive disadvantages due to geographic remoteness and higher production costs. Bakken oil is among the costliest to produce and must be transported longer distances to refineries compared to competitors in other regions.¹⁰³ “The average break-even price needed for a Bakken producer is about \$45 a barrel.”¹⁰⁴ A loss of pipeline capacity drives the price of crude down as inventories grow,¹⁰⁵ and low or nonexistent margins can drive capital investment away from new developments or expansion of existing projects.

Halting pipeline construction and operation is therefore an important part of national environmental organizations’ efforts to mitigate climate change impacts and decarbonize energy systems.¹⁰⁶ At the risk of overgeneralizing, national environmental groups have been focused on (and received substantial funding to address) climate mitigation and decarbonization rather than the disproportionate impacts these projects have on environmental justice communities.¹⁰⁷ Community groups seek fundamental shifts in the paradigm that has led to despoliation of the environment and climate change, but they also prioritize

study showed tar sands carbon footprint is 632 kilograms carbon dioxide per barrel, which is twenty-one percent greater than the average crude oil refined in the United States).

100. Kevin Orland, *With Oil at Record Low, Canada Is First Price-War Casualty*, BLOOMBERG (Mar. 18, 2020), <https://perma.cc/K865-9QZQ>.
101. Ian Austen, *Lower Oil Prices Strike at Heart of Canada’s Oil Sands Production*, N.Y. TIMES (Feb. 2, 2015), <https://perma.cc/BZ29-4QLH>.
102. See, e.g., Nia Williams, *Canada’s Oil Sands Survive, but Can’t Thrive in a \$50 Oil World*, REUTERS (Oct. 18, 2017), <https://perma.cc/9ZXG-FC8Q>; *Costs of Canadian Oil Sands Projects Fell Dramatically in Recent Years; But Pipeline Constraints and Other Factors Will Moderate Future Production Growth, IHS Markit Analysis Says*, BLOOMBERG (May 1, 2019), <https://perma.cc/JM2N-WBEV>.
103. Derek Brower, *Bakken Pain Reflects Long Road Back for US Shale*, FIN. TIMES (May 7, 2020), <https://perma.cc/Q4AF-2FR3>.
104. *Id.*
105. See, e.g., Tim Shufelt, *Canadian Crude Discount Widens to Highest Level in a Year After Keystone Pipeline Oil Spill*, GLOBE & MAIL (Nov. 5, 2019), <https://perma.cc/QAA4-XDCL> (describing the discount on Canadian crude oil following a rupture on TC Energy Corporation’s Keystone pipeline that took it out of service).
106. This strategy can manifest in several forms, including litigation, direct lobbying, mobilizing public participation, protests, and economic boycotts. See, e.g., David B. Spence, *Regulation and the New Politics of (Energy) Market Entry*, 95 NOTRE DAME L. REV. 327, 331 (2019) (discussing the various dynamics of opposition to proposed energy infrastructure).
107. See, e.g., *Bloomberg Philanthropies and Sierra Club’s Beyond Coal Campaign Reaches Landmark Closure of 318th U.S. Coal Plant, on Track to Retire All Coal Plants by 2030*, BLOOMBERG (Sept. 15, 2020), <https://perma.cc/C7JZ-XR43> (describing Bloomberg Philanthropies’ \$174 million investment in Sierra Club’s U.S. Beyond Coal campaign).

localized impacts and risks these pipeline projects bring along with issues of procedural and distributive environmental justice.¹⁰⁸ Local impacts like pipeline spills and pollution often fall disproportionately on BIPOC and low-income communities.¹⁰⁹ Communities may also face significant barriers for meaningful involvement in the process of environmental decision-making and strive for self-determination.¹¹⁰

These concerns define what kind of systemic change groups—and the lawyers who represent them—are after and how to actualize that change. For example, the top-down approach might look to disrupt fossil fuel development by establishing legal precedent under NEPA that requires greater discussion and analysis of climate impacts for federal approval.¹¹¹ But the long-term impact of the judicially enforced requirement for further discussion of climate change may be of limited value in creating systemic change without more.¹¹² In this narrow sense, the top-down approach is subject to criticism as a theory of law reform or community-based change. As scholars have noted for decades,

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108. See Robin Lanette Turner & Diana Pei Wu, *Environmental Justice and Environmental Racism: An Annotated Bibliography and General Overview, Focusing on U.S. Literature, 1996–2002*, BERKELEY WORKSHOP ON ENV'T POL., INST. OF INT'L STUD. 1 (2002) (arguing that environmental justice activists and scholars broaden the concept of the environment from a “people-free biophysical system idealized by deep ecologists” to a “geographical system integrally linking to people and society through everyday, ordinary activities and relationships”); see also Kristian Gareau, *Pipeline Politics: Capitalism, Extractivism, and Resistance in Canada* 9 (Dec. 2016) (M.A. Thesis, Concordia University), <https://perma.cc/M42K-E77K> (noting that movements to resist pipelines in Canada have involved not only “the usual suspects of environmental advocacy, i.e.: environmentalists and environmental nongovernmental organizations,” but also residents who live close to pipeline routes).
 109. See generally Dara O'Rourke & Sarah Connolly, *Just Oil? The Distribution of Environmental and Social Impacts of Oil Production and Consumption*, 28 ANN. REV. ENV'T & RES. 587 (2003) (reviewing research on the global distribution of impacts of oil production and consumption); Ramon Jacobs-Shaw, *What Standing Rock Teaches Us About Environmental Racism and Justice*, HEALTH AFFS. BLOG (Apr. 17, 2018), <https://perma.cc/K2PK-8QMY> (arguing that the risks of even minor oil spills in vulnerable communities “could be catastrophic,” especially for indigenous tribes and others reliant on potentially affected water sources for their livelihood).
 110. See, e.g., Walter H. Mengden IV, *Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline*, 41 AM. INDIAN L. REV. 441, 450–51 (2017) (“Even with executive orders, promulgated agency rules, and legislation, tribes are still not involved in government actions that impact its people . . .”).
 111. See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357, 1374–75 (D.C. Cir. 2017) (holding that FERC violated NEPA by failing to quantify downstream greenhouse gas emissions from three new interstate natural gas pipelines or explaining why it could not have done so).
 112. NEPA and other “purely procedural” cases also run into the federal judiciary’s willingness to remand violations without enjoining the pipeline project. See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 8 (2008) (vacating a preliminary injunction against the Navy for use of mid-frequency active sonar machines that may disturb marine mammals); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 108 (2017) (remanding the case without vacating the Corps’s environmental assessment).

law reform through the courts can be less effective or trigger backlash if not accompanied by broader ground-up change.¹¹³ More broadly, law reform may be of little consequence if economic disruption achieves the desired result. For example, research has shown that cheap and abundant natural gas is perhaps the leading cause of coal's decline in North American energy makeup, not regulatory reform.¹¹⁴ The space left open by disruption in fossil fuel markets may be filled by renewable energy production, storage, and infrastructure, and electrification of the transportation sector as costs in these competitive sectors decline and become attractive to investors.¹¹⁵

Systemic change from the local perspective may overlap in areas of national concern, but concerns about local and cultural issues—including process-based concerns—may also be prioritized. Local concerns have focused on issues of pipeline spills, air pollution, aesthetics, local deindustrialization, and desecration of sacred spaces. Communities often feel marginalized in the legal processes that authorize major pipeline projects and may seek systemic change to address social justice concerns.¹¹⁶

Beginning in the early 2000s, national environmental groups such as the Sierra Club and National Wildlife Federation began targeting fossil fuel infrastructure projects in an effort to mitigate climate change. One of the most well-known projects, TransCanada's Keystone XL pipeline, garnered significant attention because it would connect tar sands oil production in western Canada to

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113. Kevin K. Washburn, Lara, Lawrence, *Supreme Court Litigation, and Lessons from Social Movements*, 40 TULSA L. REV. 25, 39–40 (2013) (discussing relationship between legal victories and public support in the context of tribal and gay rights); see also BRENNAN CTR. FOR JUST., LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENT, at ii (Jennifer Weiss-Wolf & Jeanine Chirlin eds., 2015) (quoting Abraham Lincoln stating, “[p]ublic sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed.”).
114. See, e.g., Matt Egan, *What Killed Coal? Technology and Cheaper Alternatives*, CNN BUS. (Aug. 21, 2018), <https://perma.cc/PG8T-LHSM>; Walter J. Culver & Mingguo Hong, *Coal's Decline: Driven by Policy or Technology?*, 29 ELEC. J. 50, 51 (2016) (finding the decline in coal is a result of cheap natural gas); Cary Coglianese & Daniel E. Walters, *Whither the Regulatory “War on Coal”? Scapegoats, Saviors, and Stock Market Reactions*, 47 ECOLOGY L.Q. 1, 2 (2020) (finding “no systemic evidence consistent with a ‘war on coal’ [regulations] based on investor assessments of the [coal] industry’s financial prospects in the wake of new regulatory developments”).
115. See, e.g., Nina Chestney, *U.S. Clean Energy Investment Hits New Record Despite Trump Administration Views*, REUTERS (Jan. 16, 2020), <https://perma.cc/CGN2-ERKW> (describing a twenty-eight percent growth in renewable energy investment and quoting Ethan Zindler, the head of Americas at Bloomberg New Energy Finance, as stating, “U.S. clean energy investment set a new record by a country mile” despite lack of support from the Trump Administration).
116. See, e.g., Kristen A. Carpenter & Angela R. Riley, *Standing Tall: The Sioux’s Battle Against a Dakota Oil Pipeline Is a Galvanizing Social Justice Movement for Native Americans*, SLATE (Sept. 23, 2016), <https://perma.cc/S6RS-T73Q> (describing the Sioux’s opposition as a legal battle, a social movement, and “(another) last stand” for many American Indians).

North American oil refineries along the United States' Gulf Coast.¹¹⁷ Termed the continent's biggest "carbon bomb,"¹¹⁸ the tar sands region in western Canada represents 162 billion barrels of recoverable oil,¹¹⁹ the third largest source on Earth.¹²⁰ Expanding pipeline capacity from the region to refineries already equipped to process heavy crude oil would further contribute to what former President George W. Bush once called America's "addiction to oil."¹²¹ With few other means to mitigate these impacts directly in Canada, American groups targeted pipeline infrastructure.

Interstate pipeline projects are often multi-billion-dollar, multi-generational investments backed by politically connected Fortune 500 companies.¹²² Pipeline operators therefore wield enormous power in the halls of Congress and agencies that regulate pipelines when compared to the influence of the communities raising concerns and living in proximity to pipeline projects.¹²³ The power of the industry is amplified by upstream and downstream energy players that hope to take advantage of added pipeline capacity, which can relieve supply bottlenecks and yield greater output. Perhaps because of these powerful actors and a difficult legal landscape, a multi-pronged approach to community representation, with strong community voices, is necessary.

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117. See *Keystone XL Pipeline*, U.S. DEP'T OF STATE, <https://perma.cc/5H6K-K29Q> (describing project and linking to the presidential permit for the Keystone XL Pipeline, among other documents); Melissa Denchak, *What Is Keystone Pipeline?*, NAT. RES. DEF. COUNCIL (Jan. 20, 2021), <https://perma.cc/YCC3-T5K4> (describing the Keystone project and environmental battle over the approval process).
 118. See Elizabeth McGowan, *NASA's Hansen Explains Decision to Join Keystone Pipeline Protests*, REUTERS (Aug. 29, 2011), <https://perma.cc/6KPV-KKFP> (interviewing James Hansen, who is quoted as referring to Keystone XL as the "fuse to the biggest carbon bomb on the planet").
 119. CAN. ASS'N OF PETROL. PRODUCERS, CANADA'S OIL SANDS FACT BOOK 3 (2020), <https://perma.cc/Q78R-WZ2Y>.
 120. See BP, STATISTICAL REVIEW OF WORLD ENERGY 14 (69th ed. 2020), <https://perma.cc/6DDJ-K348> (Canada's 162 billion barrels of proven tar sands reserves ranks third in total proved reserves after Venezuela (303.8 billion barrels) and Saudi Arabia (297.6 billion barrels)).
 121. Elisabeth Bumiller & Adam Nagourney, *Bush: 'America Is Addicted to Oil'*, N.Y. TIMES (Feb. 1, 2006), <https://perma.cc/T7XL-57CN>.
 122. For example, several Fortune 500 companies have major investments in DAPL, including Energy Transfer LP, Phillips 66, Marathon Petroleum Corp., and Enbridge Inc. See Tim McLaughlin & Liz Hampton, *Dakota Pipeline Investors Could Face Major Hit After Adverse Ruling*, REUTERS (July 6, 2020), <https://perma.cc/VD36-X5H7>.
 123. See generally JOHN NOËL, CLEAN WATER ACTION/CLEAN WATER FUND, THE CHILLING EFFECT OF OIL & GAS MONEY ON DEMOCRACY (2016), <https://perma.cc/3K49-QZTX>; Lindsay Renick Mayer, *Big Oil, Big Influence*, PBS (Aug. 1, 2008), <https://perma.cc/LJT4-CQ3S>.

From a community perspective, the fight against energy infrastructure may seem impossible, until success makes it seem inevitable.¹²⁴ In fact, the Congressional Research Service (“CRS”) has attributed at least some credit to widespread public opposition for the halt in the construction of both oil refineries and nuclear power plants between 1970 and 2008.¹²⁵ In 2008, the CRS reported, “public acceptance remains an overriding concern in proposals by energy companies to site electric power transmission lines, liquefied natural gas (“LNG”) terminals, natural gas pipelines, wind farms, and other energy facilities in many parts of the country.”¹²⁶ Although a full discussion of laws affording and limiting community engagement in energy infrastructure projects is outside the scope of this Article, historically and more recently, Congress and federal agencies have enacted laws to limit public participation and promote the development of projects.¹²⁷ Although multiple reports herald the success of NEPA in improving governmental decision-making,¹²⁸ for example, in its final months in office, the Trump Administration finalized development-friendly – and pipeline friendly—changes to NEPA regulations, elevating rhetoric around

124. Conversation with Reverend Mac Legerton, Executive Director, Center for Community Action, in Lumberton, N.C. (July 2020) (on file with Marianne Engelman Lado) (discussing a case where Engelman Lado’s clinic represented Friends of the Earth and Rev. Legerton’s group).

125. See PAUL W. PARFOMAK, CONG. RSCH. SERV., RL34601, COMMUNITY ACCEPTANCE OF CARBON CAPTURE AND SEQUESTRATION INFRASTRUCTURE: SITING CHALLENGES 2 (2008); see also NAT’L COMM’N ON ENERGY POL’Y, SITING CRITICAL ENERGY INFRASTRUCTURE 1–2 (2006) (discussing approaches for defusing local opposition and overcoming other barriers to siting energy projects across sectors).

126. PARFOMAK, *supra* note 125, at 2 (“Many energy infrastructure projects viewed by policy makers to be in the national interest have been canceled by developers or have failed to win state or local siting approval.”).

127. See *id.* (explaining that the Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. §§ 1651–1656, limits regulatory and legal challenges to the Trans-Alaska Pipeline by environmental, Native American, and community groups; the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 12, 16, 25, 26, 30, & 42 U.S.C.), streamlines “the federal licensing process for new nuclear power plants”; the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594 (codified at 16 U.S.C. § 824p), increases federal authority to approve interstate electric transmission projects” and grants “regulators ‘exclusive’ authority to approve the siting of onshore LNG terminals”); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1508, 1515–1518) (streamlining development of infrastructure projects subject to NEPA)).

128. See, e.g., THE P’SHP PROJECT ET AL., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT (2010), <https://perma.cc/V54X-XP28>.

efficiency over environmental protection and public participation in decision-making.¹²⁹

Despite a record of success and a number of federal, state, and local avenues for challenging a project,¹³⁰ opposition to infrastructure can feel daunting. A recent study of NEPA litigation found that between 2001 and 2013, the federal government prevailed in the majority of cases—that is, the government won in 63.3 percent of NEPA cases,¹³¹ lost to challengers 18.6 percent of the time, and obtained what the authors called neutral outcomes in 18.1 percent of cases.¹³² In response to claims that NEPA poses undue barriers to development, research has focused on whether NEPA compliance and litigation is burdensome,¹³³ yet from a community perspective, the hurdles to mounting and prevailing in a legal challenge—including identifying legal counsel to take the case, overcoming distrust with lawyers with environmental expertise,¹³⁴ raising funds for costs,¹³⁵ developing organizational capacity for decision-making, and coming to consensus about strategy—may feel insurmountable.¹³⁶ The question becomes, as Macey and Susskind posed in their case study about the pursuit of civil rights claims to advance environmental justice, why community-based organizations pursue legal remedies even when they fail in court.¹³⁷

We thus use three pipeline case studies to explore what they tell us about the theory of change, and, centrally, the role of the lawyer. Based on our review, we argue for a theory of change rooted in community-driven action.

129. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (reducing timelines for consideration of environmental impacts in even large and complex energy projects, for example).

130. *See, e.g.*, National Environmental Policy Act, 42 U.S.C. § 4321; Clean Air Act, 42 U.S.C. § 7401; Federal Water Pollution Control Act, 33 U.S.C. § 251.

131. John C. Ruple & Kayla Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENV'T L. 479, 512 (2020) (explaining that “wins” includes judgments for defendants and dismissals without settlement).

132. *Id.*

133. *Id.* at 514 (concluding that NEPA litigation does not appear to be unduly burdensome).

134. *See* Kaswan, *supra* note 33, at 262–68 (discussing history of friction between environmental and environmental justice groups).

135. *See id.* at 273–74.

136. *See* Kang, *supra* note 68, at 138–40 (discussing limitations to the availability and effectiveness of legal forums for pursuing environmental justice, including time and money, constraints on remedies, and the tendency of litigation to devalue community expertise and displace community-based leadership).

137. Macey & Susskind, *supra* note 77, at 431.

B. Legal Background

1. Federal Permitting

There is no overarching federal permit required to construct and operate an interstate crude oil pipeline.¹³⁸ Pipeline litigation under federal law therefore often involves some approval from federal agencies required for crossing discrete locations along the pipeline route like international borders,¹³⁹ federally held land,¹⁴⁰ or navigable waterways.¹⁴¹ These federal actions often require compliance with NEPA,¹⁴² a common thread in pipeline litigation that also provides one of the few legal hooks for direct review of environmental justice concerns.¹⁴³ Many litigants therefore challenge an agency's compliance with NEPA.¹⁴⁴

Natural gas pipelines are subject to an overarching approval process under the Natural Gas Act as implemented by the Federal Energy Regulatory Commission ("FERC").¹⁴⁵ FERC's decision to issue a "certificate of public convenience and necessity" is subject to NEPA review.¹⁴⁶ We will therefore start with an overview of NEPA and environmental justice, followed by a short description of other statutes and issues raised by our case studies that have formed the basis for legal challenges.

2. NEPA

Congress passed NEPA in 1970 with the twin goals of obligating federal agencies to consider "every significant aspect of the environmental impact of a

138. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 33 (D.C. Cir. 2015).

139. *See, e.g., Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1028 (D. Minn. 2010) (Alberta Clipper Pipeline crossing U.S.–Canada border); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1075 (D.S.D. 2009) (Keystone Pipeline crossing U.S.–Canada border).

140. *See, e.g., U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1839 (2020) (Weeks Act, National Trails System Act, Mineral Leasing Act).

141. The Clean Water Act authorizes states to veto federally permitted projects that would violate state water quality standards. *See* 33 U.S.C. § 1341(a)(1) (water quality certification).

142. 42 U.S.C. § 4332(C).

143. *See, e.g., Sierra Club*, 803 F.3d at 33; *Indigenous Env't Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 570–72 (D. Mont. 2018), *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 7 (D.D.C. 2020).

144. *See, e.g., Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1307 (D.C. Cir. 2014) (FERC violated NEPA review of proposed natural gas pipeline).

145. *See* 15 U.S.C. § 717f(c) (requiring a company to obtain a certificate of "public convenience and necessity" from FERC to build or operate a natural gas pipeline for use in interstate commerce).

146. *See, e.g., Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 102 (D.C. Cir. 2014).

proposed action” and ensuring agencies “will inform the public that [they] have considered environmental concerns in [their] decisionmaking process.”¹⁴⁷ NEPA’s “action forcing” provision requires federal agencies to draft an environmental impact statement (“EIS”) for any “major Federal action[] significantly affecting the quality of the human environment.”¹⁴⁸ NEPA “does not mandate particular results, but simply prescribes the necessary process.”¹⁴⁹ Federal agencies may therefore take environmentally harmful actions so long as they first take a “hard look” at the environmental consequences of their action.¹⁵⁰ By completing an EIS before approving a proposed action, NEPA “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”¹⁵¹ It also “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.”¹⁵² An agency’s failure to comply with NEPA’s procedural requirements may prevent the federal agency from taking the proposed action, but only if the court is satisfied that injunctive relief is proper.¹⁵³

NEPA’s myriad of procedural requirements may serve as the basis for a lawsuit.¹⁵⁴ These range from public participation¹⁵⁵ to evaluating the “cumulative” impacts of a proposed project,¹⁵⁶ to evaluating “reasonable alternatives.”¹⁵⁷ Parties can also challenge an agency decision not to prepare an EIS, which is captured in an environmental assessment (“EA”) and finding of no significant

147. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

148. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); *see also* 42 U.S.C. § 4332(C).

149. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

150. *Id.* (citing *Kleppe*, 427 U.S. at 410 n.21).

151. *Id.* at 349.

152. *Id.*

153. Courts must consider whether a NEPA violation warrants injunctive relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

154. *See* 40 C.F.R. § 1500.1 (2020). The Trump Administration promulgated new NEPA regulations in 2020. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). These regulations are the subject of litigation and are likely to be reversed by the Biden Administration. *See* Complaint, *California v. CEQ*, No. 30-cv-6057 (N.D. Cal. filed Aug. 28, 2020); Dawn Reeves, *With Mallory at CEQ Helm, White House Expected to Undo NEPA Rollbacks*, INSIDE EPA (Dec. 24, 2020). Since it appears unlikely that the Trump NEPA regulations will survive, this Article focuses on the prior version of the regulations.

155. *See* 40 C.F.R. § 1506.6 (2020) (enumerating requirements for public participation in the NEPA process).

156. *See, e.g., Am. Rivers v. FERC*, 895 F.3d 32, 55 (D.C. Cir. 2018) (holding FERC’s cumulative impacts analysis of dam relicensing in EIS was arbitrary and capricious).

157. *See, e.g., Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66 (D.C. Cir. 2011) (rejecting claim that agency failed to consider reasonable range of alternatives in EIS).

impact (“FONSI”).¹⁵⁸ Parties may therefore challenge the adequacy of the EA, seeking a court order requiring the agency to complete an EIS and enjoining the proposed action until the agency fully complies with NEPA.¹⁵⁹

NEPA offers national environmental organizations and local communities an opportunity to litigate climate change- and safety-related issues in court, albeit through the lens of procedural violations like failing to take a “hard look” at foreseeable environmental consequences.¹⁶⁰ Raising these issues in a NEPA claim offers an avenue that might otherwise be foreclosed. For example, litigants can challenge an agency’s missing or defective analysis of reasonably foreseeable greenhouse gas emissions resulting from a major energy infrastructure project.¹⁶¹ This means agencies cannot sweep the issue under the rug and avoid public scrutiny.

NEPA also provides an avenue for judicial review on matters of pipeline safety. The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) within the U.S. Department of Transportation implements the Pipeline Safety Act. PHMSA sets safety standards for the design, construction, and operation and maintenance of interstate crude oil pipelines.¹⁶² But without a permitting requirement, there is no procedure for halting construction until a community’s safety concerns are addressed. The Pipeline Safety Act, moreover, expressly preempts state and local efforts to set more stringent pipeline safety standards.¹⁶³ Communities therefore have few realistic options to challenge pipeline safety issues in court.¹⁶⁴ But parties can raise pipeline safety issues in a

158. 40 C.F.R. § 1501.5 (2020). Only actions that “*significantly* affect the quality of the human environment” require an EIS. 42 U.S.C. § 4332(C) (emphasis added).

159. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 440 F. Supp. 3d 1, 8 (D.D.C. 2020) (holding that the U.S. Army Corps of Engineers violated NEPA by failing to prepare an EIS in light of an inadequate EA).

160. 49 U.S.C. §§ 60101–60141.

161. *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1363 (D.C. Cir. 2017) (holding FERC’s failure to estimate downstream power-plant carbon emissions that proposed pipeline would enable violated NEPA). *But see* *Earthreports, Inc. v. FERC*, 828 F.3d 949, 952 (D.C. Cir. 2016) (holding FERC’s failure to consider greenhouse gas impacts from upstream users of proposed LNG facility did not violate NEPA).

162. *See* 40 C.F.R. pt. 195.

163. 49 U.S.C. § 60104(c).

164. Efforts to address pipeline safety issues through federal regulation are also daunting. For example, Congress sought to improve pipeline safety regulations by passing the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904 (codified at 49 U.S.C. §§ 60138–60140). Section 4 requires PHMSA to issue regulations, if appropriate, requiring the use of automatic or remote-controlled shutoff valves, or equivalent technology to improve pipeline safety. 49 U.S.C. § 60102(n). PHMSA only recently gave notice of a proposed rulemaking. Pipeline Safety: Valve Installation and Minimum Rupture Detection Standards, 85 Fed. Reg. 7162 (proposed Feb. 6, 2020).

NEPA challenge, including concerns that are beyond the requirements of PHMSA's safety standards.¹⁶⁵

Even successful NEPA claims are impermanent and perhaps even pyrrhic. NEPA is a procedural statute requiring agencies to look before they leap. It does not require agencies to take any particular action on a proposed project. The direct impact of judicial review on an agency's compliance with NEPA may ultimately come down to a single factor: delay.¹⁶⁶ Moreover, the judiciary's willingness to remand NEPA violations without vacatur or injunctive relief has arguably softened the blow of violating NEPA¹⁶⁷ and encouraged project sponsors, including pipeline companies, to create momentum to help ward off a possible injunction under the traditional four-part balancing test.¹⁶⁸ It is therefore doubtful that NEPA can provide the transformative change through the courts that social justice lawyers sought and arguably won through the courts on civil rights issues.

Significantly, when considering the role of litigation in supporting community-based movement building, NEPA has been a crucial law for BIPOC

165. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 26 (D.D.C. 2020) (holding the Corps violated NEPA when it failed to rebut expert critiques regarding pipeline company's leak-detection system, operator safety records, adverse conditions, and worst-case discharges in EA); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1049 (D.C. Cir. 2021) (holding that Corps violated NEPA by not resolving a substantial dispute raised by the Tribe over a worst-case discharge calculation that was not required under PHMSA regulations).

166. Ted Hamilton, *The Virtues of Uncertainty: Lessons from the Legal Battles over the Keystone XL Pipeline*, 18 VT. J. ENV'T L. 222, 224 (2016).

167. *See* Sarah Axtell, *Reframing the Judicial Approach to Injunctive Relief for Environmental Plaintiffs in Monsanto Co. v. Geertson Seed Farms*, 38 ECOLOGY L.Q. 317, 334 (2011) (arguing the four-part test for injunctive relief "threatens the ability of many environmental parties to obtain protection from projects that violate the law").

168. Generally, only a short segment of an interstate crude oil pipeline requires federal authorization. Companies have therefore constructed entire pipelines except for that segment requiring approval. This strategy arguably tips the equitable scales towards finishing pipeline construction and operation given the sizeable investments and customer expectations that oil will flow in relatively short order. *But cf.* *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 106 (D.D.C. 2017) ("If projections of financial distress are sufficient to prevent vacatur, the Court fears that agencies and third parties may choose to devote as many resources as early as possible to a challenged project—and then claim disruption in light of such investments. Such a strategy is contrary to the purpose of NEPA, which seeks to ensure that the government 'looks before it leaps.'"). Companies are also constructing pipelines using one capacity figure only later to expand capacity once federal approval has been won and the pipeline is fully constructed. *See, e.g.*, Phil McKenna, *Standing Rock Asks Court to Shut Down Dakota Access Pipeline as Company Plans to Double Capacity*, INSIDE CLIMATE NEWS (Aug. 20, 2019), <https://perma.cc/34DQ-T8KU> (reporting that Energy Transfer is seeking a capacity expansion from state regulators after the Corps completed its environmental review following remand in the Standing Rock Sioux Tribe litigation). This tactic avoids NEPA review of the higher-risk scenario until after the pipeline is already operational.

and low-income communities.¹⁶⁹ Indeed, EO 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, identified the NEPA process as one of the primary vehicles for achieving environmental justice.¹⁷⁰ The Presidential Memorandum accompanying EO 12,898 directed *all* agencies to utilize NEPA to analyze environmental, health, economic, and social effects of federal actions, including effects on BIPOC and low-income communities; develop mitigation measures that address significant effects of actions on BIPOC and low-income communities; and to provide opportunities for public input in decision making.¹⁷¹ Moreover, agencies are required to provide opportunities for effective community participation in the NEPA process.¹⁷²

3. *Environmental Justice*

On February 11, 1994, President Clinton signed EO 12,898, which was intended to “address environmental justice in minority populations and low-income populations.”¹⁷³ EO 12,898 requires each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities” on BIPOC and low-income populations.¹⁷⁴ Although the terms of EO 12,898 are binding on federal agencies, they are not in their own right judicially enforceable.¹⁷⁵

169. See *Promising Practices for EJ Methodologies in NEPA Reviews*, FED. INTERAGENCY WORKING GRP. ON ENV'T JUST. & NEPA COMM. (Mar. 2016), <https://perma.cc/5YGA-XEA9>.

170. Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended* in 42 U.S.C. § 4321.

171. Memorandum on Environmental Justice, 1 PUB. PAPERS 241 (Feb. 11, 1994).

172. *Id.*

173. Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

174. *Id.* § 1–101, 3 C.F.R. 859, 859 (1995); see also *Tackling the Climate Crisis at Home and Abroad*, Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629–30 (Jan. 27, 2021) (amending EO 12,898 to create a White House Environmental Justice Interagency Council and requiring the development of clear performance measures to ensure accountability for strategies to address environmental injustice); *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, Exec. Order 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) (requiring, among other things, consultation with historically underrepresented and underserved communities in carrying out activities to advance equity under the order).

175. Exec. Order 12,898 § 6–609, 3 C.F.R. 859, 863 (1995) (“This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person”); *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) (“An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not . . . subject to judicial review.”). If successful, legislative proposals to codify the terms of EO 12,898 would affect judicial en-

There are, however, avenues for bringing environmental justice claims challenging procedural inadequacies or the disproportionate impact of a decision on BIPOC or low-income communities to court. If, for example, an agency's analysis of whether a major federal project would have a disproportionately high and adverse human health or environmental impact on BIPOC or low-income populations may be unreasonable, courts have authority to review the agency's action to determine whether it is arbitrary and capricious in violation of the Administrative Procedure Act ("APA").¹⁷⁶ As the D.C. Circuit wrote, once an agency exercises discretion to include an environmental justice analysis pursuant to its evaluation of impacts under NEPA, "that analysis . . . is properly subject to 'arbitrary and capricious' review under the APA."¹⁷⁷ Moreover, analysis under NEPA regulations and guidance issued by the Council on Environmental Quality ("CEQ") has required consideration of cumulative, direct, indirect impacts,¹⁷⁸ as well as whether there are disproportionately high and adverse impacts on BIPOC and low-income populations or Indian tribes, or "interrelated cultural, social, occupational, historical, or economic factors" that may amplify effects, or particular impacts that may be experienced by Indian Tribes "due to a community's distinct cultural practices."¹⁷⁹ An agency's failure to identify whether such factors exist, particularly in the context of evidence in the record of potential impacts, is also subject to judicial review.¹⁸⁰

forceability. See Environmental Justice Act of 2019, S. 2236, 116th Cong. (2019); Environmental Justice for All Act, H.R. 5986, 116th Cong. (2020).

176. 5 U.S.C. §§ 551–559, 701–706; Section 706(2) requires courts reviewing agency action to "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See also, e.g., *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (reviewing adequacy of environmental justice analysis determining "whether a project will have a disproportionately adverse effect on minority and low income populations" within the context of an environmental assessment pursuant to NEPA).
177. *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004); see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 136 (D.D.C. 2017) (relying on *Communities Against Runway Expansion*, 355 F.3d 678).
178. But see Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,343 (CEQ removed the definition of "cumulative impact" and revised the definition of "effects" by striking references to "direct," "indirect," and "cumulative" impacts).
179. CEQ, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 14 (1997), <https://perma.cc/ZGQ2-7K7R>; see also *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 136–37.
180. See, e.g., *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 140 (finding the failure of the Corps to take a hard look at the environmental justice implications of the project arbitrary and capricious); *Crenshaw Subway Coal. v. L.A. Cnty. Metro. Transp. Auth.*, No. CV 11–9603, 2015 WL 6150847, at *30 (C.D. Cal. Sept. 23, 2015) (reviewing agency's environmental justice analysis); *Mid States Coal. for Progress*, 345 F.3d at 541 (reviewing adequacy of environmental justice analysis determining "whether a project will have a disproportionately ad-

State environmental justice laws provide additional grounds for judicial review.¹⁸¹ In *Friends of Buckingham v. State Air Pollution Control Board*,¹⁸² for example, the Fourth Circuit recently found that the Virginia State Air Pollution Control Board's review of the impact of a compressor station that was a part of the proposed Atlantic Coast Pipeline project and would have been located in historic Union Hill, Virginia, failed to comply with the state mandate "to consider the potential for disproportionate impacts to minority and low income communities."¹⁸³ The Fourth Circuit found "the Board's failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis"¹⁸⁴ and vacated the permit, remanding the matter to the Board for further proceedings.¹⁸⁵

Finally, community members can bring litigation or administrative actions under civil rights laws such as Title VI of the Civil Rights Act of 1964¹⁸⁶ to challenge actions that are discriminatory on the basis of race, color, or national origin by public agencies and private actors that receive federal funds. In the wake of *Alexander v. Sandoval*,¹⁸⁷ the 5–4 Supreme Court decision finding no private right of action to enforce claims that actions have an unjustified disparate impact under Title VI, claims of intentional discrimination can be brought to court while communities asserting that a project has an unjustified racially disproportionate impact must be filed with the federal agency that provides federal funding to the alleged discriminator.¹⁸⁸

verse effect on minority and low income populations" within the context of an environmental assessment pursuant to NEPA).

181. See PUB. L. RSCH. INST., UNIV. OF CAL., ENVIRONMENTAL JUSTICE FOR ALL (4th ed. 2010) (reviewing state environmental justice laws).

182. 947 F.3d 68 (4th Cir. 2020).

183. *Id.* at 87 (quoting the brief of the respondents acknowledging the requirement of state law).

184. *Id.* at 92.

185. *Id.* at 93; see also David J. Mitchell, *Judge Delays Crucial Permit for Formosa Plastics Plant; Requires Deeper Analysis of Racial Impacts*, ADVOCATE (Nov. 18, 2020), (reporting on state court ruling requiring Louisiana Department of Environmental Quality to complete an environmental justice analysis of the impact of air emissions on Black residents living in proximity to a proposed facility).

186. 42 U.S.C. §§ 2000d–2000d-7.

187. 532 U.S. 275 (2001).

188. See, e.g., Letter from Marianne Engelman Lado et al. to Lilian Dorca, EPA (Feb. 6, 2020) (asserting claims under Title VI of the Civil Rights Act of 1964 and EPA regulations against the North Carolina Department of Environmental Quality); Letter from John D. Runkle & Kristin Wills to EPA (May 15, 2018) (asserting claims under Title VI and EPA regulations). If successful, the Environmental Justice Act of 2019, S. 2236, 116th Cong. (2019), and Environmental Justice for All Act, H.R. 5986, 116th Cong. (2020) would also afford a private right of action to enforce disparate impact claims.

4. *The Endangered Species Act & Beyond*

The Endangered Species Act¹⁸⁹ (“ESA”) “is a comprehensive scheme with the broad purpose of protecting endangered and threatened species.”¹⁹⁰ Section 7(a)(2) of the ESA is particularly relevant in pipeline challenges because it requires federal agencies to ensure their actions are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat.¹⁹¹ This substantive requirement is met through a complex set of procedures designed to determine whether the species or habitat are “jeopardized” by the proposed action and whether the adverse impacts may be avoided or minimized. The agency considering an action must consult with the appropriate wildlife agency if the action “may affect” a listed species or critical habitat.¹⁹² If so, the action agency must, with certain exceptions, initiate formal consultation with the appropriate wildlife agency.¹⁹³ Formal consultation concludes with the wildlife agency issuing a “biological opinion,” which states whether the action would likely jeopardize the continued existence of listed species or adversely modify designated critical habitat.¹⁹⁴ If the wildlife agency renders a “jeopardy” opinion, it must also include “reasonable and prudent alternatives” or indicate that, to the best of its knowledge, none exist.¹⁹⁵

An agency’s compliance with the ESA is subject to judicial review. For example, in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*,¹⁹⁶ the court held that the Army Corps of Engineers (“the Corps”) acted arbitrarily and capriciously when it failed to initiate consultation before issuing a nationwide permit under section 404 of the Clean Water Act¹⁹⁷ for the discharge of dredged and fill material.¹⁹⁸ The court enjoined the Corps from authorizing any dredge or fill activities for the construction of new oil and gas pipelines, including the Keystone XL pipeline, under the nationwide permit pending compliance with the ESA and other environmental statutes.¹⁹⁹

189. 16 U.S.C. §§ 1531–1544.

190. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1106 (9th Cir. 2012) (citing *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698 (1995) and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)).

191. Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2).

192. 50 C.F.R. § 402.14(a) (2019). Whether an action “may affect” a listed species or critical habitat is evaluated in a “biological assessment.” *Id.* § 402.12.

193. *Id.* § 402.14(b)–(c).

194. *Id.* § 402.14(h)(1).

195. *Id.* § 412.14(h)(2).

196. 454 F. Supp. 3d 985 (D. Mont. 2020), *amended by* 460 F. Supp. 3d 1030 (D. Mont. 2020), *appeal filed*, No. 20-35432 (9th Cir. May 20, 2020).

197. 33 U.S.C. §§ 1251–1388.

198. 454 F. Supp. 3d at 991–94.

199. 460 F. Supp. 3d at 1049.

5. Constitutional Issues

Constitutional issues also arise when state and local governments attempt to regulate or halt pipeline projects. These federalism issues stem from the Commerce Clause and the Supremacy Clause. Under the Supreme Court's so-called dormant Commerce Clause jurisprudence, states (and by implication local governments) cannot discriminate against or overly burden interstate commerce. Similarly, the Supremacy Clause prohibits state and local regulation in areas that are preempted by federal law.

Preemption issues arise when states seek to impose "safety standards" on interstate natural gas or crude oil pipelines.²⁰⁰ States are also preempted from regulating the siting of interstate natural gas pipeline facilities and related infrastructure such as LNG terminals.²⁰¹ The Pipeline Safety Act, however, does not preempt state siting authority over crude oil pipelines.²⁰²

Dormant commerce clause principles serve to prevent "economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."²⁰³ However, "within the realm of authority left open to them, under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal."²⁰⁴

The major issue in dormant Commerce Clause cases is whether the state law is subject to strict scrutiny, which puts state and local governments in the difficult position of arguing that the challenged law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."²⁰⁵ Notably, there is only one case that has upheld a state law that discriminates against out-of-state businesses on its face.²⁰⁶ Courts will apply strict scrutiny in several situations. Most commonly, courts will apply strict scrutiny where a state law discriminates against interstate commerce on its face,

200. 49 U.S.C. § 60104(c).

201. Natural Gas Act, 15 U.S.C. § 717b(e)(1) ("[FERC] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion or operation of an LNG terminal."). With respect to LNG facilities, states retain authorities under the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465, the Clean Air Act, 42 U.S.C. §§ 7401–7671q, and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388. 15 U.S.C. § 717b(d).

202. 49 U.S.C. § 60104(e) (providing that the Pipeline Safety Act does not authorize the Department of Transportation to prescribe location or routing of a pipeline facility).

203. *Dep't of Revenue v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)).

204. *Id.* at 338 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

205. *Or. Waste Sys. v. Dep't of Env't Quality*, 511 U.S. 93, 101 (1994) (quoting *New Energy Co.*, 486 U.S. at 278); *see also Maine v. Taylor*, 477 U.S. 131, 138 (1986).

206. *See generally Maine*, 477 U.S. 131 (upholding Maine statute banning importation of baitfish into the state).

in effect, or where that is the law's intent. Courts will also apply strict scrutiny to state laws "that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation."²⁰⁷ Finally, courts will apply strict scrutiny where "the practical effect of the regulation is to control conduct beyond the boundaries of the State."²⁰⁸

If the state or local law is neutral, that is, it does not discriminate against out-of-state interests, but still impacts interstate commerce incidentally, the courts will apply a balancing test. This test is described in *Pike v. Bruce Church, Inc.*,²⁰⁹ in which the Supreme Court stated:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.²¹⁰

While there are ways that states and local governments can affect pipelines and related infrastructure, they must tread carefully to avoid constitutional infirmities and perhaps defend their efforts in court at great cost. Legislators are unlikely to act without substantial political support from their constituents. This need for political support lends itself to the "from the ground up" theory of change and its emphasis on building movements.

207. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997) (citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 579 (1959) (conflict in state laws governing truck mud flaps); then citing *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (train lengths); and then citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987) ("[T]his Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations.")).

208. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

209. 397 U.S. 137 (1970).

210. *Id.* at 142.

III. PIPELINE CASE STUDIES

A. Dakota Access Pipeline

A view of social justice or impact lawyering that envisions representation in court leading to a game-changing pronouncement or injunction from the bench is rooted in a simplified and overly linear view of progress.²¹¹ In fact, change is messy: even well-argued cases grounded in law can lose, and hard-won principles and orders handed down by courts are not infrequently overturned by subsequent court decisions or changes in statutory law. Achieving a community objective often involves a confluence of factors, whether a challenge to the placement or expansion of a polluting facility in an already environmentally overburdened community of color or, at a systems level, an effort to compel reliance on safer and more sustainable sources of energy. Though the authors believe that individual and collective action have meaningful impacts and that legal work, too, can add to the confluence of factors that tip the balance or create momentum, sometimes it seems the stars also need to be aligned.

The struggle to stop the construction of the Dakota Access Pipeline (“DAPL”) by the Standing Rock Sioux Tribe and its allies reflects these complexities. After the Corps received an application by Dakota Access, LLC for permits and permission to construct and operate DAPL,²¹² the Standing Rock Sioux garnered attention and generated momentum for their opposition to DAPL by organizing everything from horseback rides to marches and demonstrations.²¹³ In the spring of 2016, thousands of supporters traveled to North Dakota in support of the Tribe, many camping for extended periods of time in the grassland, joining protests, and ultimately clashing with police.²¹⁴ Children marched in demonstrations daily,²¹⁵ a group of veterans arrived to protect the

211. Critiques of linear views of how change occurs and whether purposeful reforms constitute meaningful progress—that is, improved wellbeing in society—are well beyond the scope of this Article. *But see* Mario Coccia, *A Critique of Human Progress: A New Definition and Inconsistencies in Society*, QUADERNI IRCRES, Apr. 2018, at 51 (discussing inconsistencies and complexities within the concept of progress).

212. *Dakota Access Pipeline*, U.S. ARMY CORPS OF ENG'RS, <https://perma.cc/JR7C-597H>.

213. *Treaties Still Matter: The Dakota Access Pipeline*, NAT'L MUSEUM OF THE AM. INDIAN, [hereinafter *Treaties Still Matter*] <https://perma.cc/H5L9-9MPX>.

214. *See* Jack Healy, *Occupying the Prairie: Tensions Rise as Tribes Move to Block a Pipeline*, N.Y. TIMES (Aug. 23, 2016), <https://perma.cc/B8WQ-V72H>; Evelyn Nieves, *Opposing a Pipeline near Sacred Sioux Sites*, N.Y. TIMES (Oct. 6, 2016), <https://perma.cc/38DQ-N3KJ>.

215. Healy, *supra* note 214. Youth activism also included a relay run from the Standing Rock Reservation to Washington, DC, where participants delivered a petition with more than 140,000 signatures. *See Treaties Still Matter*, *supra* note 213.

protesters,²¹⁶ and opposition to DAPL received sustained top-line national attention.²¹⁷

The power of community-driven change seemed to reach an apex when, in response to the months of protests, on December 4, 2016, the Obama Administration announced its decision not to grant an easement for DAPL to cross Lake Oahe in North Dakota and, instead, to consider alternative routes.²¹⁸ Chief Arvol Looking Horse stated, “[w]e made it,” celebrating the decision.²¹⁹ As Andrew C. Revkin, New York Times Opinion writer on climate, wrote: “Activism matters. Social media in this case absolutely mattered.”²²⁰ In the words of a pipeline proponent, the decision was a “rejection of the entire regulatory and judicial system.”²²¹ Though couched as a negative, this opinion reflects the impact of the ground-up approach taken by the Tribe. By stepping forward as a community and taking direct action, the Standing Rock Sioux overcame a regulatory system that had failed to protect the rights of subordinated communities.²²²

The euphoria surrounding this “ground up” victory was short lived, however, and President Trump reversed the decision on his fourth day in office.²²³ By February 2017, the BBC reported that the yearlong protest “appears to be

216. Christopher Mele, *Veterans to Serve as ‘Human Shields’ for Dakota Pipeline Protesters*, N.Y. TIMES (Nov. 29, 2016), <https://perma.cc/UWA4-LWCZ>.

217. See, e.g., *Protesters Stand Strong Despite Blizzard*, CNN (Dec. 8, 2016), <https://perma.cc/2W2F-ZSEM>; *Company Building Dakota Access Pipeline Asks Court to End Delays as Protests Erupt*, FOX NEWS (Nov. 15, 2017), <https://perma.cc/TTS5-T2SW>; Healy, *supra* note 214.

218. Kris Maher & Will Connors, *Dakota Pipeline Project Halted as Obama Administration Denies Permit for Last Leg*, WALL ST. J. (Dec. 5, 2016), <https://perma.cc/3DQQ-TBHQ>; Jack Healy & Nicholas Fandos, *Protesters Gain Victory in Fight over Dakota Access Oil Pipeline*, N.Y. TIMES (Dec. 4, 2016), <https://perma.cc/6LSS-PKHL>.

219. *Tribe Chief on Dakota Pipeline: ‘We Made It’*, CNN (Dec. 4, 2016), <https://perma.cc/D6KP-APCR>.

220. Andrew C. Revkin, Opinion, *Facing Standing Rock Campaign, Obama Administration Blocks Dakota Pipeline Path*, N.Y. TIMES (Dec. 4, 2016), <https://perma.cc/55F6-VJRA>.

221. Eric Wolff, *Obama Administration Blocks Dakota Pipeline, Angering Trump Allies*, POLITICO (Dec. 4, 2016) <https://perma.cc/YFN7-DKYU> (statement of Craig Stevens, Midwest Alliance for Infrastructure Now).

222. See Gareau, *supra* note 108, at 112 (discussing the increasing role of “people power” as a means of compelling action on climate change and, in particular, infrastructure development in Canada).

223. See Memorandum on Construction of the Dakota Access Pipeline, 2017 DAILY COMP. PRES. DOC. 67 (Jan. 24, 2017); see also Peter Baker & Coral Davenport, *Trump Revives Keystone Pipeline Rejected by Obama*, N.Y. TIMES (Jan. 24, 2017), <https://perma.cc/M2MD-SSYX>.

nearing its end.”²²⁴ How strong could the ground up theory of change be if an oil-friendly administration could reverse course with the stroke of a pen?²²⁵

A few months later, on June 14, 2017, a federal judge ordered a new environmental review in the case, ruling that the environmental assessment prepared by the Corps inadequately addressed the Tribe’s fishing and hunting rights and had insufficiently addressed whether DAPL would have disproportionate adverse human health and environmental impacts on the Tribe.²²⁶ Native American news source Indianz.com quoted Standing Rock Sioux Tribe Chair Mike Faith as saying: “Today is a historic day for the Standing Rock Sioux Tribe” and its many supporters.²²⁷ It turned out, however, the fight was far from over. In fact, rather than vacating the permits and easements approved by the Corps pending compliance with NEPA, the district court ordered further briefing on remedy, allowing the project to continue without interruption.²²⁸ As Jan Hasselman, an attorney at the nonprofit Earthjustice, which represented the Standing Rock Sioux, emphasized, the court’s ruling didn’t prevent oil from ultimately flowing through DAPL.²²⁹ As one component of a

224. *Dakota Pipeline Protesters Leave Site After Year-Long Occupation*, BBC NEWS (Feb. 23, 2017), <https://perma.cc/RC89-QGZM>. Over months, the Corps sought to clear protesters, asserting ownership of the land, and in February, the local sheriff’s department imposed deadlines for vacating the land, arresting remaining activists. See Lynda V. Mapes, *Police Arresting Holdouts, 100 Demonstrators Refuse to Leave Pipeline Protest Camp*, SEATTLE TIMES (FEB. 23, 2017), <https://perma.cc/AAL6-P5WB>.

225. Yet another example is the Keystone XL pipeline. Following considerable public opposition, President Obama denied TransCanada Keystone Pipeline LP’s application for a presidential permit. Notice of a Decision to Deny a Presidential Permit to TransCanada Keystone Pipeline LP for the Proposed Keystone XL Pipeline, 80 Fed. Reg. 76,611 (Dec. 9, 2015). Though challenged in court, *Indigenous Env’t Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561 (D. Mont. 2018), *order amended and supplemented*, 369 F. Supp. 3d 1045 (D. Mont. 2018), *appeal dismissed and remanded*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019), President Trump ultimately approved the Keystone XL Presidential Permit, see Presidential Permit—Authorizing TransCanada Keystone Pipeline, L.P., to Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Canada, 2020 DAILY COMP. PRES. DOC. 553 (July 29, 2020). Ongoing litigation put Keystone XL on hold once again, giving the incoming Biden Administration an opportunity to deny the presidential permit before the pipeline is fully constructed and operational. See *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 460 F. Supp. 3d 1030 (D. Mont. 2020) (enjoining the Corps from authorizing any dredge or fill activities for Keystone XL under Nationwide Permit 12 on remand to the Corps for violating the ESA when it issued the permit), *stay app. denied*, 141 S. Ct. 190 (July 6, 2020) (rejecting a request from the Trump Administration to stay the injunction for the Keystone XL pipeline).

226. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017).

227. Kevin Abourezk, *‘A Historic Day’: Tribes Celebrate Victory over Dakota Access as Pipeline Operator Strikes Back*, INDIANZ.COM (July 7, 2020), <https://perma.cc/5R4H-4J66>.

228. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 147–48.

229. Abourezk, *supra* note 227.

larger social movement, the legal victory did, however, inject additional life into the effort, which over time impacted the ultimate viability of the pipeline.²³⁰

1. *DAPL and Opposition by the Standing Rock Sioux*

The DAPL project involved the construction and operation of more than 1,000 miles of pipeline designed to transport more than 570,000 barrels of North Dakota Bakken crude oil per day to Patoka, Illinois.²³¹ In 2014, Dakota Access, LLC submitted applications to the Corps for approval of permits for water crossings falling under the jurisdiction of the Clean Water Act²³² and the Rivers and Harbors Act of 1899.²³³ Although no government approval was needed for portions of the pipeline project that cut across private lands, the Corps had jurisdiction over those segments that crossed approximately 202 federally regulated water crossings.²³⁴ In addition, DAPL triggered obligations under the National Historic Preservation Act²³⁵ (“NHPA”), which requires consultation with Indian tribes, identification of properties that may be affected by the project, assessment of impacts of the project, and evaluation of mitigation and alternatives.²³⁶

In particular, DAPL crosses Lake Oahe, a reservoir on the Missouri River that borders the Standing Rock and Cheyenne River Sioux Reservations, traversing the lake 0.55 miles north of the Standing Rock Reservation.²³⁷ As the District Court hearing the case brought by the Standing Rock and Cheyenne Sioux Tribes acknowledged, Lake Oahe has “special significance” for the Tribes:

Its creation necessitated the taking of approximately 56,000 acres of some of ‘the best land’ from the Standing Rock’s Reservation, as well as 104,420 acres of Cheyenne River’s trust lands. Today, the Standing Rock members rely on Lake Oahe’s waters to service “homes, a hospital, clinics, schools, businesses, and government buildings throughout the Reservation” and to support agriculture and industrial activities. The Lake is also the primary source of water for the Chey-

230. *Standing Rock Sioux Tribe v. Army Corps of Eng’rs*, 471 F. Supp. 3d 71, 87–88 (D.D.C. 2020) (vacating the Corps’s decision to grant Dakota Access, LLC an easement and ordering the shutdown of the pipeline).

231. U.S. ARMY CORPS OF ENG’RS, *supra* note 212.

232. 33 U.S.C. § 1344.

233. *Id.* § 407 (regulating the deposit of refuse in navigable waters).

234. U.S. ARMY CORPS OF ENG’RS, *supra* note 212; *see* *Standing Rock Sioux Tribe v. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 114 (D.D.C. 2017).

235. 54 U.S.C. §§ 300101–307108.

236. *Id.* § 300101. *See generally* Mengden, *supra* note 110, at 449–50.

237. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 114.

enne River Reservation. Both Tribes consider the waters to be “sacred” and “central to [their] practice of religion.”²³⁸

Indeed, by 2015, the Standing Rock Sioux passed a resolution in opposition to the project stating, “the Dakota Access Pipeline poses a serious risk to the very survival of our Tribe and . . . would destroy valuable cultural resources.”²³⁹ In particular, the Sioux raised concerns that oil spills from the pipeline would threaten their water supply and cultural resources.²⁴⁰ The resolution asserted that DAPL violated the treaty rights of the Tribe under the Fort Laramie Treaty of 1868, which provided for the “undisturbed use and occupation” of the Great Sioux Reservation and established the Standing Rock Indian Reservation “as a permanent homeland for the Hunkpapa, Ynaktonai, Cuthead and Blackfoot bands of the Great Sioux Nation.”²⁴¹ The Tribe noted recent oil spills upstream from the reservation and risks to fish and wildlife posed by oil and gas pipelines such as DAPL.²⁴² In particular, the Sioux’s resolution raised concerns about horizontal drilling in the construction of the pipeline and risks of the project to the “life giving Missouri River.”²⁴³ The Tribe called on the Corps to reject applications for river crossings and for the Secretary of the Interior “to fully exercise the trust responsibility and ensure that the Federal Government rejects the Dakota Access Pipeline.”²⁴⁴ The Great Plains Tribal Chairman’s As-

238. *Id.* (citations omitted); see also *Standing Rock Sioux Tribe Passes Resolution Opposing the Dakota Access Pipeline*, LAST REAL INDIANS (Feb. 26, 2016), <https://perma.cc/KZC9-PZKL> (describing threat to sites of historical and cultural significance to the Northern Plains tribes). Notably, although this discussion focuses on the role and strategy of the Standing Rock Sioux, many tribes became involved in activism and litigation—as plaintiffs, intervenors, or amici—to challenge DAPL, including not only the Standing Rock Sioux and Cheyenne River Sioux, but also the Yankton Sioux, Oglala Sioux, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, the Lower Brule Sioux Tribe, the Lumbee Tribe of North Carolina, the Nez Perce Tribe, the Nottawaseppi Huron Band of the Potawatomi, the Red Lake Band of Chippewa Indians, the Winnebago Tribe of Nebraska, and the Yurok Tribe. See *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032 (D.C. Cir. 2021) (Nos. 20–5197, 20–5201).

239. Standing Rock Sioux Tribe Res. 406-15, *quoted in full in Standing Rock Sioux Tribe Passes Resolution Opposing the Dakota Access Pipeline*, *supra* note 238.

240. The risk of leaks was not just theoretical. See Alleen Brown, *Five Spills, Six Months in Operation: Dakota Access Track Record Highlights Unavoidable Reality – Pipelines Leak*, INTERCEPT (Jan. 9, 2018), <https://perma.cc/E4ZJ-F9KN>.

241. Standing Rock Sioux Tribe Res. 406-15.

242. *Id.*

243. *Id.*

244. *Id.*

sociation, which is comprised of sixteen tribal leaders from North Dakota, South Dakota, and Nebraska, also opposed DAPL.²⁴⁵

The Standing Rock notified the Corps of its objections, filing comments raising concerns that the draft EA inadequately addressed the risks posed by the pipeline's construction and operations to the Lake's water and the Tribe's rights, inadequately considered issues of environmental justice, and failed to take account of DAPL's proximity to the Reservation.²⁴⁶ Two days after the Corps released the EA, the Tribe filed litigation to stop construction.²⁴⁷ The Tribes brought suit on procedural and substantive grounds but never relied solely or even primarily on the courts for deliverance. Instead, they continued to organize, raising funds, joining with a coalition of tribes, environmentalists, and social justice activists, and attracting attention.²⁴⁸ Thousands of supporters came to the Dakotas, increasing the visibility of their claims.²⁴⁹ Even when North Dakota authorities cleared the campsite of protesters in early 2017, Tom Goldtooth, Executive Director of the Indigenous Environmental Network, vowed to continue the fight. "The closing of the camp is not the end of a movement," he said, "It is a new beginning. They cannot extinguish the fire that Standing Rock started."²⁵⁰

2. *Litigation*

A full recounting of the journey of legal claims against the Corps is a subject for another time. At the time of writing the complete story has yet to unfold.

The Standing Rock's initial litigation sought declaratory and injunctive relief under the NHPA, NEPA, the Clean Water Act, and the Rivers and Harbors Act.²⁵¹ In 2016, the Tribe filed a motion to enjoin the construction of

245. *Id.*; see also Great Plains Tribal Chairmen's Association Brief as Amicus Curiae in Support of Intervenor-Plaintiff Cheyenne River Sioux Tribe's Motion for Temporary Restraining Order at 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 16–1534) (explaining the DAPL would "deeply injure the interests and rights of all the member tribes of the [Great Plains Tribal Chairmen's Association]"). See generally GREAT PLAINS TRIBAL CHAIRMEN'S ASS'N, <https://perma.cc/57B3-5YP6>.

246. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 20–21 (D.D.C. 2016) (describing the Tribe's comments on the draft EA); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d at 115.

247. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 116.

248. See Anne Helen Petersen, *The Dakota Access Pipeline Protest Is Unprecedented – and 150 Years in the Making*, BUZZFEED NEWS (Sept. 15, 2016), <https://perma.cc/L5DW-LQKB>.

249. *Id.*

250. Mitch Smith, *Standing Rock Protest Camp, Once Home to Thousands, Is Razed*, N.Y. TIMES (Feb. 23, 2017), <https://perma.cc/K6HE-LZFK>.

251. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016).

the pipeline with the court, arguing that the Corps failed to conduct consultations required by the NHPA.²⁵² The Tribe invoked procedural protections in the NHPA requiring that the Corps “take into account the effect” of its actions on property of cultural and religious significance to Indian tribes and, then provide the tribes with “a reasonable opportunity to comment.”²⁵³ The district court denied the injunction,²⁵⁴ finding that the Tribe had failed to demonstrate that an injunction would prevent harm to cultural sites from the construction of the pipeline, in part because the construction had already taken place.²⁵⁵ Although the decision dealt a blow to the legal effort, the campaign on the ground, including organizing, protests, and social media, continued to build.²⁵⁶ And the effort seemed to pay off: on the same day that the court issued its adverse opinion, the Departments of Justice, the Interior, and the Army released a joint statement announcing that the construction of the pipeline crossing Lake Oahe would “not go forward” pending reconsideration by the Corps regarding the location of the pipeline.²⁵⁷ The joint statement acknowledged that the Tribes had raised “important issues” and that the controversy had “highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects.”²⁵⁸

That fall, the Tribes weighed in, sending the Corps supplemental information regarding the EA’s analyses and urging the Corps to deny the easement.²⁵⁹ In January of 2017, the Army Corps published a notice of intent to prepare an EIS,²⁶⁰ noting that the decision to authorize a pipeline to cross Lake Oahe merited “additional analysis, more rigorous exploration and evaluation of

252. *Id.* at 7.

253. National Historic Preservation Act, 54 U.S.C. § 306108 (2014); 54 U.S.C. § 302706(b) (2014) (requiring federal agencies carrying out responsibilities under 54 U.S.C. § 306107 to consult with “any Indian tribe . . . that attaches religious and cultural significance to property” of traditional religious and cultural importance to the tribe that is eligible for inclusion on the National Register of Historic Places).

254. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 37.

255. *Id.* at 34.

256. *See, e.g., Jim Dalrymple II, What You Need to Know About the Dakota Oil Pipeline and the Native Americans Trying to Stop It*, BUZZFEED NEWS (Sept. 9, 2016), <https://perma.cc/6MLQ-3X3F> (story updated the same day as the adverse district court decision focusing on the “big campaign” of the Standing Rock Sioux Tribe and its allies to stop the pipeline).

257. *Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, OFF. OF PUB. AFFS., U.S. DEP’T OF JUST. (Sept. 9, 2016), <https://perma.cc/2SZ5-EVHU>.

258. *Id.*

259. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 117–18 (D.D.C. 2017).

260. Dep’t of the Army, Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC’s Request for an Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5543 (Jan. 18, 2017).

reasonable siting alternatives, and greater public and tribal participation and comments.”²⁶¹ As Judge James Boasberg subsequently commented, however, “elections have consequences, and the government’s position on the easement shifted significantly once President Trump assumed office on January 20, 2017.”²⁶² On January 24, President Trump signed two presidential memoranda to facilitate approval for pipelines—the first encouraging TransCanada Keystone Pipeline, L.P. to “promptly re-submit its application” to construct and operate the Keystone XL Pipeline between Alberta, Canada and refineries in the United States²⁶³ and directing the Secretary of State to take actions “to facilitate its expeditious review”²⁶⁴ and the second directing federal agencies including the Corps “to expedite reviews and approvals for the remaining portions of the Dakota Access Pipeline.”²⁶⁵ In short order, the Corps determined that the final EA and FONSI satisfied requirements for NEPA and that no EIS was necessary to grant an easement.²⁶⁶ On February 8, 2017, the Corps issued the easement and in March, Dakota Access, LLC completed construction of the pipeline.²⁶⁷

On March 7, 2017, the district court rejected a motion made by the Cheyenne River Sioux Tribe to enjoin the flow of oil through the pipeline.²⁶⁸ Its motion rested on the argument that the grant of an easement under Lake Oahe substantially burdened the free exercise of religion protected by the Religious Freedom Restoration Act²⁶⁹ (“RFRA”).²⁷⁰ A few days later, Judge Boasberg also rejected a motion for an injunction pending an appeal of his decision.²⁷¹ Again, however, adverse court rulings didn’t stop the protests. Instead, just as the court

261. *Id.* at 5544.

262. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 119.

263. Memorandum on Construction of the Keystone XL Pipeline, 2017 DAILY COMP. PRES. DOC. 68 § 2 (Jan. 24, 2017).

264. *Id.* at §3

265. *President Trump Takes Action to Expedite Priority Energy and Infrastructure Projects*, THE WHITE HOUSE (Jan. 24, 2017), <https://perma.cc/3EVZ-FKA8> (summarizing Memorandum on Construction of the Dakota Access Pipeline, 2017 DAILY COMP. PRES. DOC. 67 § 2 (Jan. 24, 2017)).

266. *See Standing Rock Sioux Tribe*, 255 F. Supp. at 119.

267. *Id.* at 120.

268. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77 (D.D.C. 2017)

269. 42 U.S.C. §§ 2000bb to 2000bb-4.

270. *See Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 88, 93 (rejecting RFRA claim on the grounds that it was untimely and that the easement’s impact on the practice of religion was unlikely to be substantial).

271. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534, 2017 WL 1402139 (D.D.C. Mar. 14, 2017). Notably, the tribes filed an unopposed motion to voluntarily dismiss the appeal of the district court’s decision on the RFRA claim after succeeding under NEPA. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 17-5043, 2017 WL 4071136 (D.C. Cir. May 15, 2017) (dismissing appeal).

was issuing these decisions, the Tribe led a four-day protest in Washington, DC, including a two-mile march and rally with thousands of supporters in front of the White House, trying to continue building the campaign, swaying public opinion, and influencing policy.²⁷² In June, the pipeline became fully operational and oil started flowing through the pipeline.²⁷³

The same month, claims alleging violations of NEPA brought by both the Standing Rock and Cheyenne River Sioux Tribes met with greater success.²⁷⁴ The Tribes argued that the Corps failed to take the required hard look at the impacts of the construction and operation of the pipeline in its environmental assessment.²⁷⁵ Although the court found that the Corps “substantially complied with NEPA in many areas” and rejected the argument that the grant of the easement violated the Corps’s trust responsibility to protect the Tribe’s treaty rights,²⁷⁶ it agreed with the Tribes that the Corps failed to “adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline’s effects are likely to be highly controversial.”²⁷⁷ In particular, the court found that the environmental justice analysis conducted by the Corps, which limited its analysis of the potential adverse effects of oil spills to an area with a radius of 0.5 miles around the pipeline’s crossing of the Lake, was arbitrary and capricious.²⁷⁸ As the court noted, the Standing Rock Reservation was 0.55 miles from the site, just eighty yards outside the buffer,²⁷⁹ and the impact of any spill was not likely to be limited to 0.5 miles.²⁸⁰

At this point, however, the district court was unwilling to vacate DAPL’s permits and easement, which would have stopped the flow of oil at least until the Corps came into compliance with NEPA.²⁸¹ Instead, the court ordered the parties to brief the question of remedy, and in October 2017, upon finding that the EA was “potentially lawful,” the court decided against vacating the easement and permits while the Corps revisited its EA.²⁸²

272. Lauren Gambino, *Native Americans Take Dakota Access Pipeline Protest to Washington*, THE GUARDIAN (Mar. 10, 2017), <https://perma.cc/M4MG-6KER>.

273. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 120 (D.D.C. 2017).

274. *Id.* at 111–12.

275. *Id.* at 123.

276. *Id.* at 112, 145.

277. *Id.* at 112.

278. *See id.* at 137–40.

279. *Id.* at 137.

280. *Id.* at 138–40.

281. *Id.* at 147–48.

282. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 103 (D.D.C. 2017).

As the court subsequently noted, events in the fall of 2017 provided support for the Tribes' concerns about the potential impact of the pipeline.²⁸³ In November, the Keystone Pipeline leaked 210,000 gallons of oil near the boundaries of the Lake Traverse Reservation, "highlighting the potential impact of pipeline incidents on tribal lands."²⁸⁴ The court noted the potential for oil spills "to wreak havoc on nearby communities and ecosystems"²⁸⁵ and imposed monitoring requirements on the project.²⁸⁶

Soon news outlets revealed that DAPL had also leaked oil in 2017.²⁸⁷ Although the spills were considered minor, the story highlighted "a fact that regulators and industry insiders know well: Pipelines leak."²⁸⁸ Finally, fast forwarding to decisions in March of 2020, the district court held that the Corps violated NEPA by concluding the EIS was unnecessary, given the level of controversy surrounding the pipeline's leak-detection system and scientific questions about the potential impact of leaks.²⁸⁹ In July, the court found vacatur, or vacating the decision by the Corps, was "the only appropriate remedy" in the case, even though it meant shutting down the pipeline.²⁹⁰ In weighing factors relevant to a decision to vacate an agency's action during remand, the court considered the argument by the Tribes and amici that current economic conditions had caused "a precipitous collapse in oil prices, demand, and production,"²⁹¹ which no doubt had some bearing on the calculus. The court, however, found that its remedy would nonetheless cause "significant disruption," even with the low price and demand for oil.²⁹² On January 26, 2021, the D.C. Circuit affirmed the district court's order vacating the easement while the Corps prepares a new EIS, rejecting the Army Corps's argument that its EA and FONSI were supported by a rational assessment that there was a low risk of an oil spill.²⁹³ The court found that an EIS "is perhaps especially warranted where

283. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 280 F. Supp. 3d 187, 190 (D.D.C. 2017).

284. *Id.*

285. *Id.* at 191 (citing *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 107).

286. See *id.* at 191–92.

287. Brown, *supra* note 240; Sam Levin, *Dakota Access Pipeline Has First Leak Before It's Fully Operational*, GUARDIAN (May 10, 2017), <https://perma.cc/E7UU-JWTD>.

288. Brown, *supra* note 240.

289. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 17–26 (D.D.C. 2020); see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 471 F. Supp. 3d 71, 82 (D.D.C. 2020) ("The Court has had ample opportunity to consider the serious deficiencies in the Corps' decision not to prepare an EIS . . . and it finds no 'possibility that the [agency] may find an adequate explanation for its actions.'" (citations omitted)).

290. *Standing Rock Sioux Tribe*, 471 F. Supp. 3d at 87.

291. *Id.* at 83 (citing the Tribe's remedy brief).

292. *Id.* at 87–88.

293. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1049–50, 1054 (D.C. Cir. 2021).

an agency explanation confronts but fails to resolve serious outside criticism, leaving a project's effects uncertain."²⁹⁴ The D.C. Circuit, however, reversed the district court's order enjoining DAPL to shut down the pipeline and empty it of oil.²⁹⁵

3. *Lessons Learned: The Role of the Legal Effort in the Movement*

The fight waged by the Standing Rock Sioux and its allies was extraordinarily successful in attracting attention, sustaining momentum, and ultimately, having an impact on the fate of the pipeline. The Tribe took center stage. Attention focused on the campsite, protests, and mobilization, which, in turn, built momentum for greater organization and community involvement. Fundamentally, this chapter in history is about ground up organizing.

Moreover, though litigation emerged as a key strategy, the legal effort appears to have complemented but not supplanted community leadership and the growing strength of the indigenous effort. Small details are telling: Earthjustice press releases highlighted the Standing Rock Sioux Tribe and listed tribal as well as Earthjustice contacts,²⁹⁶ and leaders from the Standing Rock and other tribes spoke for themselves.²⁹⁷ Notably, Earthjustice, formerly the Sierra Club Legal Defense Fund, was one of the "green groups" criticized historically by environmental justice leaders for extractive practices.²⁹⁸ Indeed, its founding story reinforces an image of the organization as a group of "visionary lawyers" who are at the center of the story, taking a case that "climbed all the way to the U.S. Supreme Court."²⁹⁹ Now, however, though the legal action aligned with the organization's priorities—including legal effort "to avoid climate catastrophe,"³⁰⁰ Earthjustice litigated in tandem with base-building and in support of community-directed goals.

Significantly, though litigation was the proximate cause for the district court's 2020 decision to shut down the pipeline during the pendency of the EIS, the 2016 decision by the Obama Administration to put a hold on the construction of the pipeline crossing under Lake Oahe and to initiate consulta-

294. *Id.* at 1043.

295. *Id.* at 1054.

296. *See, e.g., Judge Orders Dakota Access Pipeline to Shut Down*, EARTHJUSTICE (July 6, 2020), <https://perma.cc/G6K6-YJAH>.

297. *See* Abourezk, *supra* note 227 (quoting Standing Rock Sioux Tribe Chairman Mike Faith, Cheyenne River Sioux Tribe Chairman Harold Frazier, Cheyenne River citizen and lead attorney for Cheyenne River Nicole Ducheneaux, and others).

298. Letter from Moore to Hair, *supra* note 31, at 1–2 ("Although environmental organizations . . . often claim to represent our interests, in observing your activities it has become clear to us that your organizations play an equal role in the disruption of our communities.").

299. *Our History*, EARTHJUSTICE, <https://perma.cc/6883-R7PJ> (describing Earthjustice case leading to recognition of standing to sue for private citizens).

300. *Climate and Energy*, EARTHJUSTICE, <https://perma.cc/ZG6P-GKWF>.

tion with the Tribes responded primarily to community activism. The district court had just upheld the Corps's compliance with NEPA, and yet the Administration decided to address "important issues" raised by the Tribes "regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally."³⁰¹ Pressure from the legal effort has added leverage, but the Tribes built their power through multiple means, including public education, communication, organizing, and forming alliances.

Finally, the success of the movement to stop DAPL from encroaching on Sioux land has been affected by factors that are hard to predict and even more difficult to control, such as the price of oil and who sits in the seats of power. Movements need agility and resilience, and legal efforts can provide additional tools to support the movement. Though NEPA has been interpreted as procedural and not determinative of particular outcomes,³⁰² the 2017 and 2020 legal victories created leverage and forced the government to take additional steps, which provided opportunities to add their perspectives to the public record.³⁰³

B. Atlantic Coast Pipeline

1. Overview

The Supreme Court's decision in *U.S. Forest Service v. Cowpasture River Preservation Ass'n*³⁰⁴ is perhaps the best known case in the legal fight over the Atlantic Coast Pipeline ("ACP") a 600-mile gas pipeline proposed by Dominion Energy, Duke Energy, and Southern Company to bring natural gas from northern West Virginia through Virginia and into North Carolina.³⁰⁵ Attorneys at the Southern Environmental Law Center ("SELC") and the Sierra Club Environmental Law Program, representing a number of environmental organi-

301. OFF. OF PUB. AFFS., U.S. DEP'T OF JUST., *supra* note 257.

302. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 113 (D.D.C. 2017).

303. *See, e.g.*, Press Release, Chairman Mike Faith, Jr., STANDING ROCK SIOUX TRIBE (Mar. 11, 2019) (on file with authors) (describing critique of Army Corps's study on the potential impacts of DAPL); *see also* Robinson Meyer, *The Standing Rock Sioux Claim Victory and Vindication' in Court*, ATLANTIC (June 14, 2017), <https://perma.cc/A337-W7RC>; Lisa Friedman, *Standing Rock Sioux Tribe Wins a Victory in Dakota Access Pipeline Case*, N.Y. TIMES (Mar. 25, 2020), <https://perma.cc/7CQC-VCVA>.

304. 140 S. Ct 1837 (2020).

305. KATHY KUNDEL & LORNE STOCKMAN, THE VANISHING NEED FOR THE ATLANTIC COAST PIPELINE (2019), <https://perma.cc/6G3C-QK73>. Note that opponents believed that the pipeline was intended to terminate in South Carolina. *See Canceling the Atlantic Coast Pipeline*, FRIENDS OF THE EARTH (July 14, 2020) [hereinafter FRIENDS OF THE EARTH], <https://perma.cc/TYN5-222B>.

zations,³⁰⁶ brought suit against the U.S. Forest Service to challenge its decision to issue special use permits for the construction of portions of the pipeline that would pass under the Appalachian Trail in the George Washington National Forest.³⁰⁷ In a 7–2 decision with Justice Thomas writing for the majority,³⁰⁸ the Supreme Court held that the Forest Service had authority under the Mineral Leasing Act³⁰⁹ to grant rights-of-way through lands within national forests crossed by the Appalachian Trail, despite the role that the National Park System plays in administration of the trail.³¹⁰

Yet the Supreme Court’s decision was only one chapter in a larger effort in the courts and in the streets to stop the construction and operation of the pipeline. Opponents raised any number of concerns. For example, Friends of the Earth, an activist environmental organization with a significant footprint in North Carolina, described the ACP’s impacts as follows:

It would have generated 67 million metric tons of climate pollution a year—equal to 20 coal plants. It would have run through the Appalachian Trail, required 38 miles of mountaintop removal, and damaged farmland, forest, wildlife and habitats. And it would have disproportionately harmed low wealth, African American and Indigenous communities.³¹¹

Friends of the Earth highlighted national impacts, including increasing reliance on gas from hydraulic fracking and delaying the transition to renewables, as well as adverse effects on particular communities, including the Lumbee Tribe of Robeson County, North Carolina, and a historic Black community in Union Hill, Virginia.³¹²

Despite the victory in the Supreme Court in June, on July 5, 2020, the energy companies announced that they were cancelling the ACP and engaging

306. Plaintiffs included Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Virginia Wilderness Committee, Sierra Club, and Wild Virginia, Inc. *Cowpasture*, 140 S. Ct. at 1841.

307. *Id.* at 1841–42.

308. *Id.* at 1841. Justice Ginsburg joined the opinion of the Court except as to the portion of the opinion regarding whether the Department of the Interior assigned responsibility to the National Park Service, Part III-B-2. *See id.* at 1848–50.

309. 30 U.S.C. §§ 181–263.

310. *Cowpasture*, 140 S. Ct. at 1841.

311. FRIENDS OF THE EARTH, *supra* note 305; *see also Atlantic Coast Pipeline*, APPALACHIAN VOICES, <https://perma.cc/RLL8-ZU6V> (“If built, the pipeline would harm countless family farms, national forest land and historic sites and impair streams and drinking water supplies. Further, it would threaten the health and safety of nearby residents, worsen the impacts of climate change, and impede investments in energy efficiency and renewable energy.”)

312. FRIENDS OF THE EARTH, *supra* note 305.

in closure activities.³¹³ Friends of the Earth's response attributed the change in plans to community-based activism: "Thanks to the power of grassroots activism, the Atlantic Coast Pipeline will not be built."³¹⁴ The organization explained that ever since Dominion and Duke Energy announced their plans in 2014, they "faced some of the stiffest community and environmental opposition in the country," leading to delays and cost overruns.³¹⁵ The many outstanding permits and changing market for gas were also part of the context for the decision.³¹⁶

Similar to the role litigation played in the DAPL fight, the legal work of the SELC, Sierra Club, and others to stop the ACP contributed to the momentum built by community-based advocates but the decisive blow was not struck in court. Friends of the Earth pointed out that more than 156,000 affiliated activists spoke to policymakers at the state and federal levels and financial institutions, marched, protested at the Supreme Court, and attended shareholder meetings. "This project ended," the organization concluded, "because of the activists taking to the streets and making it clear that we will not stand by while fossil fuel projects poison the bodies, land, air and water of Indigenous, Black and Brown communities."³¹⁷

2. *The Role of the Lawyer*

Rather than outline all of the litigation and legal work initiated by the SELC and other lawyers to stop the construction and operation of the ACP, this section will focus on two efforts to shine a spotlight on the particular effects of the proposal on BIPOC communities. These cases helped to lift up environmental justice claims, working in tandem with community activists and organizers.

Like Earthjustice, the SELC has historically been a green organization focused on "all the things" people in the Southeast love about their region—"clean water, healthy air, mountains and forests, the coast."³¹⁸ Its self-description puts lawyers, rather than communities, at the center of the story: "SELC strengthens laws, we make government agencies do their job, and when neces-

313. *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, ATL. COAST PIPELINE, <https://perma.cc/L47T-APWA>.

314. FRIENDS OF THE EARTH, *supra* note 305.

315. *Id.*

316. See *SELC's Pipeline Team Reflects on the Path to Victory*, S. ENV'T L. CTR. (July 9, 2020), <https://perma.cc/34UH-PMZ9> (discussing the lack of need for the project); *Atlantic Coast Pipeline Problems Persist Despite Supreme Court Decision*, S. ENV'T L. CTR. (June 15, 2020), <https://perma.cc/8T97-J8KK> (listing eight permits the ACP still required at the time the Supreme Court decision was issued); KUNKEL & STOCKMAN, *supra* note 305, at 4 (updated forecasts show reduced demand for natural gas).

317. FRIENDS OF THE EARTH, *supra* note 305.

318. *About SELC*, S. ENV'T L. CTR., <https://perma.cc/4WQF-AKQT>.

sary, we go to court to stop environmental abuses or to set far-reaching precedents”³¹⁹ In the fight against the ACP, however, the SELC credited the work of a broad coalition for the cancellation of the pipeline,³²⁰ and represented two organizations in a case that successfully sought to force the Virginia Air Pollution Control Board (“the Board”) to take seriously and implement state law requiring analysis of disproportionate health impacts on a predominantly African American community.³²¹

In particular, the SELC represented Friends of Buckingham, a group of Buckingham County, Virginia, residents committed to protecting their health and environment, as well as the Chesapeake Bay Foundation, a conservation group dedicated to saving the Chesapeake Bay,³²² on a challenge to a permit for the construction of a compressor station to be located on a plot of land in Union Hill, a historic Black community settled during Reconstruction.³²³ The ACP permit application itself stated that the compressor station would burn gas twenty-four hours a day, every day, and emit particulate matter as well as toxic substances such as formaldehyde and hexane.³²⁴ The petition filed by the SELC argued that state law governing the powers and duties of the Board required it to consider “[t]he character and degree of injury to, or interference with, safety, health, or the reasonable use of property” and “[t]he suitability of the activity to the area in which it is located,” among other things.³²⁵ Moreover, this analysis included consideration of “the potential for disproportionate impacts to minority and low income communities” under both the law governing the powers and duties of the Board and the Commonwealth Energy Policy.³²⁶ The Fourth Circuit found that the Board failed to make findings required to assess the likelihood of disproportionate harm, in violation of law.³²⁷ The court went further, though, rejecting the Board’s reliance on environmental air quality standards to determine whether there were cognizable adverse impacts on the community living in proximity to the compressor station, stating, “environmental justice is not merely a box to be checked, and the Board’s failure to consider the disproportionate impact on those closest to the Compressor Sta-

319. *Id.*

320. *Thank You for Fighting the Atlantic Coast Pipeline with Us*, S. ENV’T L. CTR. (July 30, 2020), <https://perma.cc/6QGT-CEDM>; *SELC’s Pipeline Team Reflects on the Path to Victory*, *supra* note 316 (while not identifying building community power as the theory of change, the SELC staff recognize the importance of deepening relationships with communities affected by issues in order to “take on the toughest challenges and win”).

321. *See* *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020).

322. *About Us*, FRIENDS OF BUCKINGHAM, <https://perma.cc/TF7Q-KTH7>; *Our Mission*, CHESAPEAKE BAY FOUND., <https://perma.cc/DC8X-CKE5>.

323. *Friends of Buckingham*, 947 F.3d at 85.

324. *Id.*

325. *Id.* at 86 (citing VA. CODE ANN. § 10.1-1307(E) (2020)).

326. *Id.* at 87.

327. *Id.*

tion resulted in a flawed analysis.”³²⁸ Based on its finding that the Board violated its statutory duty to determine the character and degree of injury to the health of residents and the suitability of the placement of the Compressor Station to the area, the Fourth Circuit vacated the permit and remanded back to the Board for further consideration.³²⁹

Although much of the legal action was happening in Virginia, communities in North Carolina were also raising concerns and working in coalitions to build momentum. In 2018, environmental attorney John D. Runkle filed a civil rights complaint under Title VI of the Civil Rights Act of 1964 against the North Carolina Department of Environmental Quality (“DEQ”) on behalf of a number of environmental justice groups, for example.³³⁰ The complaint alleged that agencies reviewing the ACP “failed to assess the impacts on families and communities along the route, the environmental and health impacts from the construction and operation of the pipeline, and its cumulative impacts, including the worsening of the climate crisis,”³³¹ and that ultimately “members in communities of color would bear a disproportionate impact.”³³² The Environmental Protection Agency’s (“EPA”) External Civil Rights Compliance Office rejected the complaint on ripeness grounds, because work on the ACP had been suspended while permits were pending.³³³ Then, in 2019, activists Donna Chavis, at Friends of the Earth, and Reverend Mac Legerton, at the North Carolina Climate Solutions Network, filed a petition to the DEQ to revoke the section 401 certification under the Clean Water Act, arguing that the ACP imposes an unfair burden on the indigenous residents of Robeson County.³³⁴ Then, in February 2020, the Environmental Justice Clinic at Vermont Law School filed a new civil rights complaint against the DEQ, asserting that the DEQ’s failure to revoke the section 401 certification would have an unjustified disproportionate impact on the basis of race and national origin against Native

328. *Id.* at 92.

329. *Id.* at 93.

330. Letter from John D. Runkle & Kristin Wills to EPA, *supra* note 188 (complainants included WARN, Clean Water for NC, Blue Ridge Environmental Defense League and its chapters, Concerned Stewards of Halifax County, Nash Stop the Pipeline, Wilson County No Pipeline, No Pipeline Johnston County, Cumberland County Caring Voices, EcoRobeson, Concerned Citizens of Tillery, Concerned Citizens of Northampton County, Friends of the Earth, and the NC Environmental Justice Network).

331. *Id.* at 4.

332. *Id.* at 5.

333. Letter from Dale Rhines, Deputy Director, External Civ. Rts. Compliance Office, EPA, to John Runkle, EPA, File No. 02R-18-R4 (Aug. 24, 2018) (on file with authors).

334. Letter from Donna Chavis, Senior Fossil Fuels Campaigner, Friends of the Earth, & Mac Legerton, Interim Executive Director, NC Climate Solutions Network, to Michael S. Regan, Secretary, N.C. Department of Environmental Quality, & Linda Culpepper, Director, Division of Water Resources (Aug. 13, 2019) (on file with authors) (Atlantic Coast Pipeline – Petition for Revocation of 401 Water Quality Certification).

Americans and African Americans in violation of Title VI of the Civil Rights Act of 1964.³³⁵ These efforts supported concerns community members were raising about the disproportionate impacts of the ACP on BIPOC communities, and though none dealt a fatal blow, they were additional thorns in the side of the project.

C. *Portland Montreal Pipeline*

1. *Overview*

Unlike the other case studies, the Portland Montreal Pipeline (“PMPL”) case study involves efforts to address impacts from reversing an existing pipeline.³³⁶ The PMPL’s owner constructed the original pipeline in 1941 and added two more pipelines over several decades.³³⁷ The PMPL system extends from its owner’s pier in South Portland, Maine, through parts of New Hampshire and Vermont, to refineries in Montreal, Quebec.³³⁸ At its peak capacity, the pipeline system can carry roughly 602,000 barrels per day of crude oil.³³⁹

Oil tankers historically docked in South Portland and offloaded crude oil for northbound delivery on the PMPL.³⁴⁰ But with the rise of tar sands oil production in western Canada, and corresponding pipeline constraints, industry considered reversing existing pipeline infrastructure within Canada for eastward transport of tar sands oil to Montreal and then down the Portland Montreal pipeline where it could be loaded onto marine tankers for delivery to refineries along the U.S. Gulf Coast.³⁴¹ Thus, in 2007, the PMPL’s owners initiated a plan to reverse flow. The reversal project lost steam in 2008 due to the worldwide financial crisis, but Portland Pipe Line Corporation (“PPLC”) continued seeking permits for the project while waiting for markets to rebound.³⁴²

335. Letter from Marianne Engelman Lado et al. to Lilian Dorka, *supra* note 188.

336. The PMPL case study is not focused on a BIPOC or low-income community but bears on the role of lawyers in supporting community-led action against local environmental impacts from pipeline projects.

337. *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 322, 331–34 (D. Me. 2017). The original pipeline has not been in service for several decades.

338. *Id.* at 334.

339. *Id.* at 333.

340. *Id.* at 334.

341. See Dayna Nadine Scott, *The Networked Infrastructure of Fossil Capitalism: Implications of the New Pipeline Debates for Environmental Justice in Canada*, 43 REVUE GÉNÉRALE DE DROIT 11, 39 n.107 (2013).

342. *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 342; see also Tom Bell, *Pipeline Set to Lose Major Customer*, PORTLAND PRESS HERALD (Jan. 14, 2010), 2010 WLNR 770358.

The reversal project initially garnered little attention. The first report of opposition appears in a short 2010 news report of a protest in Quebec.³⁴³ Attention grew in 2011–2012 when PPLC began soliciting interest in the project from shippers.³⁴⁴ Having learned PPLC was restarting the project, national environmental groups took notice³⁴⁵ followed by regional environmental groups and South Portland residents.³⁴⁶ Led by South Portland residents who later formed the core of a group called Protect South Portland, the community supported an initiative and referendum called the Waterfront Protection Ordinance (“WPO”),³⁴⁷ which redefined land uses along the waterfront to exclude uses related to loading crude oil onto marine tankers and prohibited enlargement or expansion of petroleum storage or handling facilities in the same area.³⁴⁸ Sensing a threat, the PPLC spent \$650,000 opposing the measure³⁴⁹ and published an open letter stating there was “no such [reversal] project proposed, pending or imminent.”³⁵⁰

343. *Around Canada: Protesters Oppose Pipeline*, WINNIPEG FREE PRESS (Aug. 16, 2010), 2010 WLNR 16296229.

344. *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 351.

345. *See Peaceful Protest Takes a Violent Turn in Burlington*, BURLINGTON FREE PRESS (Sept. 25, 2012), <https://perma.cc/79ME-M28C> (describing protest to reversal project by environmental groups, including 350.org, the Natural Resources Defense Council, the Sierra Club, and the National Wildlife Federation); Seth Koenig, *Environmental Advocates Caution Mainers About Potential for Tar Sands Oil to Go Through State Pipeline*, BANGOR DAILY NEWS (Oct. 10, 2012), <https://perma.cc/9WVV-YPHD> (describing public meeting organized by Natural Resources Defense Council, Environment Maine, the Sierra Club, and Natural Resources Council of Maine); Tony Iallorardo, *Exxon's Stealth Moves to Run Tar Sands into New England*, NAT'L WILDLIFE FED'N BLOG (Oct. 9, 2012), <https://perma.cc/YN63-QKTK>; NAT. RES. DEF. COUNCIL ET AL., *GOING IN REVERSE: THE TAR SANDS OIL THREAT TO CENTRAL CANADA AND NEW ENGLAND* (2012), <https://perma.cc/B2EB-8M72>; *Stop the New England Tar Sands Oil Pipeline*, FRIENDS OF THE EARTH CLIMATE & ENERGY BLOG, <https://perma.cc/QV24-8JH4>. National groups have continued to follow the case and recognize its significance. *See* Sabrina Shankman, *South Portland's Tar Sands Ban Upheld in a 'David vs. Goliath' Pipeline Battle*, INSIDE CLIMATE NEWS (Aug. 28, 2018), <https://perma.cc/XW24-NM35> (statements of Josh Axelrod, Natural Resources Defense Council).

346. *See* Leslie Bridgers, *Tar Sands Oil Fight Moves to Maine Towns*, PORTLAND PRESS HERALD (Feb. 18, 2013), <https://perma.cc/A6Z4-Z23L>.

347. Seth Koenig, *supra* note 345.

348. South Portland, Me., Proposed Ordinance No. 1-13/14, Waterfront Protection Ordinance (Aug. 19, 2013), <https://perma.cc/F45Q-F7SA>.

349. *See* Mike Tipping, *Manipulative Message Won Ballots but May Have Lost Tar Sands Battle*, PORTLAND PRESS HERALD (Nov. 12, 2013), <https://perma.cc/6E5R-TM2U> (documenting pipeline company's expenditure of more than \$650,000 on campaign to defeat anti-pipeline land use initiative in South Portland, Maine).

350. *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 322, 356 (D. Me. 2017).

Ultimately, the initiative failed,³⁵¹ arguably over concern that it was overly broad in its application.³⁵² Nevertheless, the City Council enacted a moratorium on loading tar sands onto marine tankers in South Portland, which gave the City time to study and assess its options.³⁵³ The City then established a “Draft Ordinance Committee” (“DOC”) to study the legal issues and make recommendations to the City Council.³⁵⁴ The DOC held several public hearings, heard testimony from members of the community, members of the nascent Protect South Portland, local attorneys, Maine-based environmental organizations, and others. The pipeline company chose not to participate.³⁵⁵

The DOC ultimately recommended an ordinance, called the Clear Skies Ordinance (“CSO”), that it believed would achieve three important goals: (1) protect the City of South Portland from local impacts, (2) leave existing uses along the waterfront in place, and (3) likely survive an inevitable legal challenge. Driven by community engagement, the DOC focused on impacts from the reversal project that appeared within the scope of local authority and less vulnerable to preemption and dormant commerce clause challenges.

The community’s concerns over air pollution impacts were central to the DOC’s recommendation. In 2009, PPLC obtained an air pollution permit from state authorities to build and operate two seventy-foot tall smokestacks to burn off fumes displaced from the marine tanker hulls during the loading process.³⁵⁶ The permit application indicated that these smokestacks would still add considerable amounts of volatile organic compounds (“VOCs”), hazardous air pollutants (“HAP”), sulfur dioxide, and nitrogen oxides to the South Portland airshed.³⁵⁷ To prevent these, and other local impacts, the CSO prohibited bulk loading of crude oil onto marine tankers.

351. The City Council opposed the WPO by a vote of 5–1 and residents voted against the ordinance 4453 to 4261. *Id.* at 356.

352. Editorial, *Waterfront Vote Affects More than Tar Sands*, PORTLAND PRESS HERALD (Oct. 17, 2013), <https://perma.cc/K2KW-8JGS> (describing concerns over the potential breadth of the WPO); *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 380 (quoting statement of South Portland City Councilor Linda Cohen, “I felt that [the WPO] was too broad.”).

353. *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 359.

354. *Id.* at 359–60.

355. *See id.* at 360.

356. *Id.* at 344–46. Loading crude oil displaces air containing petroleum vapors from marine tank vessel hulls. Unloading does not. *See* 40 C.F.R. § 63.562 (2020) (National Emissions Standards for Marine Tank Vessel Loading Operations).

357. *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 345–46, 393. The license authorized the PPLC to emit 21.0 tons per year of sulfur dioxide, 18.7 tons per year of nitrogen oxides, and 39.0 tons per year VOCs. VOCs in crude oil contain hazardous air pollutants such as benzene, toluene, and ethylbenzene. *Id.* at 393–94. The court found that “[h]igher concentration of HAP emissions would cause increases in City residents’ risk of cancer and other serious effects.” *Id.* at 394. The court found other significant adverse effects from air pollution would result and that these effects would be felt most acutely by children, low-income, and elderly residents. *Id.* at 395.

Protect South Portland and others then rallied the community in support of the CSO, urging the City Council to pass the measure. At the final meeting of the City Council, residents donning sky blue t-shirts in support of the CSO packed a high school gymnasium where the vote would be held.³⁵⁸ City councilors heard testimony from a broad swath of people that shared a number of concerns over the reversal project: parents, children, elderly residents, school-teachers, real estate developers, and health professionals, including a representative of the Maine Chapter of the American Lung Association. Following hours of testimony, the City Council passed the ordinance on a six-to-one vote.³⁵⁹

On February 6, 2015, the PPLC and the American Waterways Operators (“AWO”) filed a nine-count complaint in federal court against the City.³⁶⁰ Despite a string of procedural losses, the City ultimately prevailed before Judge John A. Woodcock, Jr., a George H.W. Bush appointee.³⁶¹ Judge Woodcock held, among other things, that the Pipeline Safety Act does not preempt the CSO,³⁶² nor does the ordinance run afoul of the dormant Commerce Clause.³⁶³ The PPLC and the AWO appealed these rulings to the First Circuit on November 13, 2018.³⁶⁴ After briefing and oral argument, the court certified a question of state law preemption to the Maine Supreme Judicial Court,³⁶⁵ which ruled in favor of the City and sent the case back to the First Circuit.³⁶⁶ On February 12, 2021, the First Circuit invited the U.S. government to file an amicus brief by May 2021, which suggests a decision is unlikely before the latter half of the year.

2. *Observations and Role of Lawyers*

The PMPL case study bears several hallmarks of the “from the ground up” theory of change. Though national environmental groups perhaps sparked the community’s interest in fighting the project, the CSO and the City’s defense of the ordinance were achieved through community action, assisted by community-driven lawyers and regional environmental groups. Individuals within the

358. Sabrina Shankman, *This Coastal Town Banned Tar Sands and Sparked a War with the Oil Industry*, INSIDE CLIMATE NEWS (Nov. 21, 2017), <https://perma.cc/V4E2-M2JV>.

359. *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 382.

360. Complaint, *Portland Pipe Line Corp. v. City of S. Portland*, No. 15-cv-00054 (D. Me. Feb. 6, 2015), ECF No. 1.

361. *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264 (D. Me. 2018).

362. *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 428–34.

363. *Portland Pipe Line Corp.*, 332 F. Supp. 3d at 299–313.

364. Notice of Appeal, *Portland Pipe Line Corp. v. City of S. Portland*, 947 F.3d 11 (1st Cir. 2020) (No. 18-2118).

365. *Portland Pipe Line Corp. v. City of S. Portland*, 947 F.3d 11 (1st Cir. 2020).

366. *Portland Pipe Line Corp. v. City of S. Portland*, 240 A.3d 364 (Me. 2020).

community transformed from “being a bystander to being a participant in a struggle,”³⁶⁷ and remain active in fighting pollution issues.³⁶⁸

The movement exerted considerable influence on the City’s legislative process, despite facing a formidable adversary in the PPLC—one of the City’s largest taxpayers, one of its oldest businesses, and a recipient of support from powerful trade organizations like the American Petroleum Institute.³⁶⁹ The City could not have passed the CSO, spent \$2.7 million to defend it,³⁷⁰ and risked paying the PPLC’s attorney fees without strong political support. But the community maintained the pressure and, notably, donated or solicited approximately \$174,000 to offset some of the legal costs,³⁷¹ which was both significant in terms of the amount and symbolism.

None of this is to suggest that lawyers’ roles were insignificant. Rather, they did not adopt an impact litigation model in the pipeline fight.³⁷² The news reports referenced above show national groups were actively opposing the PMPL reversal project, but they never fought the reversal in court. It may be difficult to see the role lawyers who worked for the community played because that work is shrouded by attorney-client privilege. However, as Judge Woodcock’s decisions highlight, the CSO implicated weighty issues of constitutional law, statutory interpretation, and land use law that helped “craft[] an ordinance capable of surviving judicial scrutiny”³⁷³ including a factual record to support it rather than manufacturing “pretextual, illegitimate, or illusory” claims.³⁷⁴ As Judge Woodcock explained: “The public comments and official legislative history demonstrate that air quality, aesthetics, and waterfront redevelopment goals pervaded the public and official considerations They were not merely

367. COLE & FOSTER, *supra* note 6, at 151.

368. See Sabrina Shankman, *Air Monitoring Reveals Troubling Benzene Spikes Officials Don’t Fully Understand*, INSIDE CLIMATE NEWS (Aug. 23, 2019), <https://perma.cc/RV47-98L4> (reporting Protect South Portland’s continuing environmental protection efforts); Sabrina Shankman, *Parents Become Activists in the Fight over South Portland’s Petroleum Tanks*, INSIDE CLIMATE NEWS (Feb. 17, 2020), <https://perma.cc/S5D7-UZEC>.

369. See Sabrina Shankman, *supra* note 358.

370. Megan Gray, *Court Sides with South Portland in Pipeline Feud*, PORTLAND PRESS HERALD (Oct. 29, 2020), <https://perma.cc/29B4-WE46>.

371. Kelley Bouchard, *Is South Portland the ‘Greenest’ City in Maine? It’s a Leader, for Sure*, PORTLAND PRESS HERALD (Apr. 22, 2019), <https://perma.cc/9NXA-JRAJ>.

372. Perhaps no such avenue was possible. Unlike other pipeline challenges, the PMPL was already in the ground and did not implicate any permitting decision or action from a federal agency. See *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 322, 343–49, 352–54 (D. Me. 2017). Some question remains whether the PPLC’s reversal project would have required a new or amended presidential permit from the U.S. Department of State. See *id.* If so, it would likely trigger NEPA. But the State Department initially indicated that no further authorization for the reversal project would be necessary. *Id.* at 343–44.

373. *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 306 n.6 (D. Me. 2018).

374. *Id.* at 310.

tacked-on justifications after savvy attorneys instructed the City Council to ‘bulletproof’ the Ordinance, as the PPLC insists.”³⁷⁵ At the risk of stating the obvious, it also took superb lawyering to defend the CSO in court.

3. *Lessons Learned*

The ground-up approach in the PMPL case study has been an effective strategy to date. The reversal project opponents were able to mount a successful grassroots campaign and navigate potential legal pitfalls. But many stars also seemed to align for the reversal project opponents in South Portland. For one, the community was able to obtain timely legal advice from attorneys with sufficient expertise and experience on the specific legal issues presented in the case. Those stars do not always align for various reasons including geography, time, and money.

One also cannot rule out the impact declining oil markets may have had on the campaign. Even without the CSO in place, the reversal project seems unlikely given poor market conditions that have existed for some time. There may be little need to run tar sands oil through the PMPL. Even if the PPLC were to prevail at the First Circuit, the pipeline reversal project may never materialize. We cannot speculate how the market affected the pipeline fight, except that it may have been more challenging politically if the project received strong economic support. While these factors may have helped the community’s success, they do not undermine an effective ground up strategy that has so far yielded the desired results.

IV. ANALYSIS AND CONCLUSIONS

In a column in 2020, New York Times climate reporters Hiroko Tabuchi and Brad Plumer asked whether defeats in the DAPL and Keystone XL Oil Pipeline, together with the cancellation of the ACP signaled “the End of New Pipelines.”³⁷⁶ Tabuchi and Plumer noted, “Pipeline projects like these are being challenged as never before as protests spread, economics shift, environmentalists mount increasingly sophisticated legal attacks and more states seek to reduce their use of fossil fuels to address climate change.”³⁷⁷ Yes, legal rulings played key roles, but ultimately “growing opposition” represented “a break from

375. *Id.* Judge Woodcock also explained “there is nothing nefarious about crafting an ordinance capable of surviving judicial scrutiny.” *Id.* at 306 n.6.

376. Hiroko Tabuchi & Brad Plumer, *Is This the End of New Pipelines*, N.Y. TIMES (Jan. 18, 2021), <https://perma.cc/DYD3-7PAN>; see also Tom diChristopher, *Avangrid’s NY Utilities Commit to Measures to Prevent Growth in Natural Gas*, S&P GLOB. MKT. INTEL. (July 1, 2020), <https://perma.cc/JMY5-BR8P> (reporting on settlement in a pending rate case between state regulators and utilities that included a commitment to consider non-pipeline-based solutions to meeting energy needs).

377. Tabuchi & Plumer, *supra* note 376.

the past decade, when energy companies laid down tens of thousands of miles of new pipelines” and the economic context for the projects shifted.³⁷⁸ As the reporters wrote: “Strong grass roots coalitions, including many Indigenous groups, that understand both the legal landscape and the intricacies of the pipeline projects have led the pushback.”³⁷⁹

Our case studies offer a helpful glimpse into how anti-pipeline movements, supported by lawyers, helped get to a point when the New York Times printed a story with a headline questioning the future of new pipeline construction. Although we are primarily focused on exploring lessons learned about lawyering and our relationship to community movements, it’s also timely to shed light on what may be a significant shift in momentum around pipeline infrastructure resulting, at least in part, from community-led movements. The opening days of the Biden Administration, with the release of an executive order revoking the March 2019 permit for the Keystone XL Pipeline,³⁸⁰ is further evidence of this shift.

A. Defining Change

Since we want to explore what these case studies tell us about the “from the ground up” theory of change and role of lawyering it seems the first step is to understand what kind of change is sought in the three case studies. Common to each case study is a community’s desire to halt a pipeline project that would place the community at greater risk of environmental and economic harm. In the DAPL case, lands and waters of great importance to the tribal plaintiffs are at risk from a pipeline that will transport oil for many generations. The ACP both threatened to entrench natural gas infrastructure and, also, raised concerns about intensely local impacts on residents in Robeson County, North Carolina, which is disproportionately Lumbee,³⁸¹ and Union Hill, a historic Black community.³⁸² And in South Portland, the community identified several local impacts the PMPL reversal project would bring.³⁸³

Beyond these immediate concerns lie broader and sometimes overlapping systemic concerns about climate change and notions of justice. We will focus on four here: decarbonization of energy systems, distributive justice, procedural justice, and social justice.³⁸⁴ Pipelines are the main arteries of carbon-based energy systems. They feed growth, investment, and continued reliance on fossil fuel resources. But they also render fossil fuel production vulnerable to bottle-

378. *Id.*

379. *Id.*

380. Exec. Order No. 13,390, 86 Fed. Reg. 7037 (Jan. 20, 2021).

381. See Letter from Marianne Engelman Lado et al. to Lilian Dorka, *supra* note 188, at 2.

382. See *Friends of Buckingham v. State Air Pollution Bd.*, 947 F.3d 68, 71 (4th Cir. 2020).

383. *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 310 (D. Me. 2018).

384. Professor Kuehn offers a helpful discussion on the kinds of “justice” embodied in the concept of environmental justice. See Kuehn, *supra* note 55.

necks and capacity constraints, particularly for unconventional oil and fracked-gas operations located far from refineries. Successful pipeline challenges may attenuate growth in fossil fuel development while stimulating growth in low- or no-carbon alternatives.

Each case study also embodies community concerns over distributive justice.³⁸⁵ This is important because it is another intersecting concern: not exacerbating existing inequalities in health and general welfare. Communities may become energized not only because of the new insult or risk, but also because they feel they cannot afford to take yet another insult. The DAPL case study offers a clear example. As former Chairman of the Standing Rock Sioux Tribe Dave Archambault II stated: “This pipeline was rerouted towards our tribal nations when other citizens of North Dakota rightfully rejected it in the interests of protecting their communities and water. We seek the same considerations as those citizens.”³⁸⁶ In the ACP case study, community members challenged the disproportionate impact of infrastructure on residents of Union Hill in Virginia³⁸⁷ and, also, on members of the Lumbee Tribe in Robeson County, North Carolina.³⁸⁸ And in South Portland, the community raised similar concerns as others along pipeline routes arguing, “[t]ar sands is all risk and no reward for the people and environment of South Portland and Maine.”³⁸⁹

The case studies highlight issues of procedural justice as well.³⁹⁰ Some obvious examples arise in the DAPL case study, which involved both tribal consultation and NEPA claims. Recall that NEPA is a procedural statute that creates the space for consideration of environmental justice in the decision-

385. As Professor Kuehn notes, “[d]istributive justice has been defined as ‘the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given.’” Kuehn, *supra* note 55, at 10,683 (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273 (1977)).

In an environmental context, distributive justice involves the equitable distribution of the burdens resulting from environmentally threatening activities or of the environmental benefits of government and private-sector programs. More specifically, in an environmental justice context, distributive justice most commonly involves addressing the disproportionate public health and environmental risks borne by people of color and lower incomes.

Id. at 10,684 (citing Kaswan, *supra* note 33, at 230–33).

386. Catherine Thorbecke, *Why a Previously Proposed Route for the Dakota Access Pipeline Was Rejected*, ABC NEWS (Nov. 3, 2016), <https://perma.cc/NP3Q-SRJ9>.

387. *See Friends of Buckingham*, 947 F.3d at 71.

388. *See* Letter from Marianne Engelman Lado et al. to Lilian Dorka, *supra* note 188, at 2.

389. Duke Harrington, *Tar Sands Moratorium Enacted*, PORTLAND PRESS HERALD (MAR. 11, 2016) <https://perma.cc/RD2S-8EWE> (quoting Taryn Hallweaver, then campaign director for the organization Environment Maine).

390. Procedural justice “involves justice as a function of the manner in which a decision is made, and it requires a focus on the fairness of the decision-making process, rather than on its outcome.” Kuehn, *supra* note 55, at 10,688.

making process. The Standing Rock Sioux raised concerns over the Corps's failure to consider environmental justice and potential impacts from the pipeline treaty rights issues before granting permission to Dakota Access, LLC to construct the Lake Oahe pipeline segment. Procedural issues were also raised by communities opposing the ACP. As the Reverend Mac Legerton, co-director of the Southeast North Carolina Climate, Disaster, and Justice Ministry stated: "It is hard to find any other racially diverse, rural community in the U.S. that is facing such new, massive, dangerous, polluting fossil fuel industry expansion with such little prior information, discussion, and consent."³⁹¹ In contrast, the PMPL case study embodies positive outcomes of procedural justice. Protect South Portland and other reversal project opponents successfully navigated the legal process to obtain their desired result, first in the WPO citizens' initiative and referendum, and then in the process of obtaining the passage and continued defense of the CSO.

The theory of social justice requires, among other things, that "privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages."³⁹² In the context of environmental justice, social justice aims to address "the role of sociological factors (race, ethnicity, class, culture, lifestyles, political power, and so forth) in environmental decisionmaking."³⁹³ It is perhaps the social justice concerns that drew national and international interest in the Standing Rock Sioux's opposition to DAPL. As Chairman Archambault II stated on PBS NewsHour:

[I]t's unfortunate that this nation continues to treat our tribe and tribal nations around this country in this manner. We have every right to protest this pipeline. We have indigenous lands, we have ancestral lands, we have treaty lands. The pipeline is 500 feet from our reservation. And history will show that the federal government, the state government has always built the economy, has secured energy independence and has secured national security off the backs of our nations.³⁹⁴

391. Mac Legerton, Opinion, *No Public Need for Atlantic Coast Pipeline Projects*, FAYETTEVILLE OBSERVER (June 3, 2019), <https://perma.cc/47HG-JKEA>; see also Letter from John D. Runkle & Kristen Wills, *supra* note 188, at 4–5 (stating that many of the concerns of environmental justice groups had not been taken into consideration by the federal and state agencies that granted approvals for the ACP and that approval procedures "were not fair and impartial").

392. Kuehn, *supra* note 55, at 10,698 (quoting Robert E. Rodes Jr., *Social Justice and Liberation*, 71 NOTRE DAME L. REV. 619, 620 (1996)).

393. *Id.* at 10,699 (quoting Robert D. Bullard, *Unequal Environmental Protection: Incorporating Environmental Justice in Decisionmaking*, in *WORST THINGS FIRST?* 237, 258 (Adam M. Finkel & Dominic Golding eds., 1994).

394. *Despite Impending Deadline, Standing Rock Protestors Vow to Stay*, PBS NEWSHOUR (Dec. 2, 2016), <https://perma.cc/KES4-77DC>.

The Chairman's statements highlight the inequitable treatment of native communities on the basis of sociological factors imbued within the pipeline fight.

As the claims alleged in both *Friends of Buckingham* and the civil rights complaints filed by residents of Robeson County suggest, social justice issues were at the core of the fight over the ACP as well. The civil rights complaint filed with EPA alleged, particularly, that the DEQ's approval of the permit for the ACP "would have a significant and adverse impact on the health and well-being of the members of Environmental Justice Groups, and on their families, the use and enjoyment of their property, the value of their property, and other economic interests."³⁹⁵ Indeed, "members of communities of color would bear a disproportionate impact" because in North Carolina, the pipeline's route cut across counties with significantly higher percentage BIPOC communities than the counties in the rest of the state.³⁹⁶

Unlike the other case studies, the PMPL case study did not implicate social justice issues, at least directly. The anti-tar sands movement, however, reflects solidarity with social justice concerns raised by communities beyond South Portland. But concepts of social justice concerns arguably were subordinate to environmental and economic issues.

At the risk of overgeneralizing, national environmental groups may be primarily motivated to change the trajectory on climate change and decarbonizing energy systems. On the other hand, there is little doubt that their motivations are not purely environmental, that is, these groups are also motivated by the toll climate change will have on human welfare. Not only are community groups lifting up issues of distributional, procedural, and social justice, but community-centered activism, particularly in the environmental justice context, is premised on the fundamental idea of community agency and power. As Cole and Foster argue, social transformation and institutional change are consequences of movement building rather than a successful argument by a lawyer in court.³⁹⁷

B. *Measures of Success in Achieving Systemic Change*

The second step in our inquiry is to define success. It would be difficult to evaluate the impacts of a "from the ground up" theory of change without at least some qualitative description of success. Since our focus is on systemic change, it seems best to define success in terms beyond the immediate pipeline battle at issue in each of the case studies.

Success in the context of climate change and decarbonization is probably best viewed as halting the construction or operation of energy infrastructure, preventing fossil fuel development, shifting incentives toward more sustainable

395. Letter from John D. Runkle & Kristen Wills, *supra* note 188, at 5.

396. *See id.* at 5–8.

397. *See generally* COLE & FOSTER, *supra* note 6.

sources of energy or mechanisms for reducing energy consumption, avoiding concrete harms associated with the construction and operation of a pipeline, or some combination of these.³⁹⁸ But even small victories and delay should be viewed in the broader context of decarbonization. U.S. courts have been resistant to impact litigation from private litigants seeking sweeping remedies from the judiciary.³⁹⁹ As Michael Gerrard has noted, “There is no silver litigation bullet for climate change.”⁴⁰⁰ Without a silver bullet, success on an individual pipeline level should be viewed in the context of “death by a thousand cuts” or the collective impact of individualized efforts. Those efforts may not provide a silver bullet, but may be replicable or shift legal, economic, and social norms towards a renewable energy economy.

Success in the context of distributional and procedural justice may be viewed here as a shift in “social relations through systems of localized environmental decisionmaking.”⁴⁰¹ An equitable approach to decarbonization starts with an understanding that “the perpetuation of systemic inequalities . . . have left communities of color, tribal communities, and low-income communities exposed to the highest levels of toxic pollution and the most burdened and affected by climate change.”⁴⁰² Permitting decisions—and more broadly, questions regarding the future of energy policy—can be evaluated in terms of whether they address the disproportionately high environmental and public health risks and reduce pollution in already environmentally overburdened BI-POC and low-income communities.⁴⁰³ Fundamentally, we might ask whether an action addresses rather than exacerbates inequality. In addition, as a recent report of an equity working group of a state climate action council emphasized, “[e]quitable approaches to policy planning and implementation recognize that communities should have a role in creating plans that affect their well-being.

398. Quantitative measures of success were beyond the scope of this Article and the authors’ expertise but warrant further investigation by experts in other fields.

399. As one author has written, “legal efforts have accomplished little in terms of actually reducing greenhouse gas emissions or setting major laws, precedents, or principles that encourage a shift away from our fossil-fuel economy and the legal licenses and assumptions that support it.” Hamilton, *supra* note 166, at 224.

400. Giuliana Viglione, *Climate Lawsuits Are Breaking New Legal Ground to Protect the Planet*, NATURE (Feb. 28, 2020), <https://perma.cc/AAT5-PM9U> (describing several successful international climate change decisions).

401. COLE & FOSTER, *supra* note 6, at 13.

402. EQUITABLE AND JUST NATIONAL CLIMATE PLATFORM 2 (2020), <https://perma.cc/M98T-JQYW>.

403. *Id.* at 3 (“The national climate policy agenda must address . . . environmental injustice head-on by prioritizing climate solutions and other policies that also reduce pollution in . . . legacy communities at the scale needed to significantly improve their public health and quality of life.”).

Equity values community perspectives and viewpoints.”⁴⁰⁴ This involves not only incorporating local voices into the administration of environmental laws,⁴⁰⁵ but also building power so that those voices can influence and direct decision-making. These three measures of success are not mutually exclusive and, indeed, success involves progress as to all three criteria.⁴⁰⁶

C. *Successful Outcomes?*

The DAPL fight led to several important successes, largely due to the movement rather than the courts. The Obama Administration’s decision to review the DAPL decision came after the Tribes lost a court battle. The Obama Administration responded to the movement’s unprecedented level of organization. The victory was short-lived, however, and then legal efforts helped to breathe life back into the effort. After the Trump Administration reversed course, Judge Boasberg vindicated the Tribes’ complaint that the Corps violated NEPA by failing to take a hard look at environmental justice issues, pipeline safety issues, and potential impacts from the pipeline on treaty rights. And while the courts have not permanently shut down DAPL, that outcome remains a possibility. Ultimately, the long-term impact of judicially enforced requirements for further NEPA analysis may be of limited value in creating systemic change without continued pressure from the movement and external factors that affect the viability of the pipeline.⁴⁰⁷

Assuming the courts do not permanently enjoin operation of DAPL, the litigation still has achieved at least one important objective. It helped to keep the issue alive for another administration. What action the Biden Administra-

404. LEE CRUZ ET AL., EQUITY & ENVIRONMENTAL JUSTICE WORKING GROUP REPORT: PREPARED FOR THE GOVERNOR’S COUNCIL ON CLIMATE CHANGE 15 (2020), <https://perma.cc/2LU8-3CJ6>.

405. Bullard & Johnson, *supra* note 56, at 558 (defining environmental justice as the “meaningful involvement of all people . . . with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”).

406. Related measures of success include the effect on building community institutions, replicability, virality, permanence, normative changes, impact on ultimate decisions, and other indicators of empowerment. *But see* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 486–87 (2001) (discussing critique of localism, and calling for future research on explicating links between local movements and larger institutional reform).

407. Purely procedural cases such as those arising under NEPA cases also are undermined by the federal judiciary’s unwillingness to enjoin projects based on procedural violations. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008) (finding that lower court abused its discretion in enjoining government action based on failure to complete EIS); *Order, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, Nos. 20-5197, 20-5201, 2020 WL 4548123, at *1 (D.C. Cir. Aug. 5, 2020) (per curiam) (staying injunction based on failure to file environmental impact statement, because lower court “did not make the findings necessary for injunctive relief”).

tion takes is likely to be more a product of the movement's effectiveness, as it was under the Obama Administration.

Perhaps most importantly, however, the litigation worked in tandem with strong community-led organizing and complemented the growth of the movement and the leadership of the Tribes. Moreover, by focusing on the failure of the Corps to take a hard look at environmental justice issues and, then, its errors in assessing risks associated with oil spills, the litigation shined a spotlight precisely on the impacts of the pipeline on resources held sacred by the Tribes, reinforcing their public messaging.

In a similar vein, though the Supreme Court rejected claims in what was probably the most visible litigation to challenge the ACP, the legal work by the SELC and others can also be credited with a number of indicia of success. Delays caused by litigation affected the economic feasibility of the pipeline, and shifts in the market for gas over time further amplified these effects. To be clear, also, the SELC's multi-year, leave-no-stone-unturned approach also scored legal successes in court. But as the organization's own assessment suggested, the ACP was an example "of a major natural gas pipeline abandoned due to legal defeats *and* overwhelming community opposition."⁴⁰⁸ Legal victories were only "one piece of the puzzle," according to the SELC's narrative: "Getting to victory required a complex network of policy, outreach, and strategic approaches, working alongside a huge coalition of advocates and 15 client organizations."⁴⁰⁹

To the end, the SELC's communication emphasized issues of environmental justice, including both the disproportionate impacts of pipeline infrastructure on historic Union Hill, for example, and also the importance of the right to be heard.⁴¹⁰ *Friends of Buckingham* put environmental justice front and center before the court, reinforcing public messages and supporting community concerns. The SELC successfully argued that the state was required to consider "the potential for disproportionate impacts to minority and low income communities" and the Fourth Circuit agreed.⁴¹¹ The language of the Fourth Circuit's decision, stating that environmental justice is "not merely a box to be checked" rang out as a long-awaited clarion call, taking decision-makers to task for neglecting environmental justice.⁴¹²

The PMPL efforts can be viewed as a success in terms of halting the pipeline reversal project. Even if the First Circuit rules against the City of South Portland, the markets may not support the pipeline reversal project. A favorable decision from the First Circuit would amplify the success in South Portland

408. *SELC's Pipeline Team Reflects on the Path to Victory*, *supra* note 320 (emphasis added).

409. *Id.*

410. *See id.*

411. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020).

412. *Id.* at 92.

through binding legal precedent in the First Circuit and serve as persuasive authority elsewhere. Though many legal and factual circumstances raised in the litigation are unique to the case study, others are applicable elsewhere, particularly in the area of crude oil infrastructure.

Should Judge Woodcock's decision stand, it would shift decision-making authority over new oil infrastructure projects to the communities most at risk. Legal issues would still remain, including whether the future project falls within the scope of federal or state preemption and whether the local government possesses sufficient legal authority to act. But the blueprint for a successful grassroots movement will have been laid and will help shift the power dynamics in favor of the local community.

D. *Lessons for the Future*

These case studies show the value of community-driven systemic change and offer lessons for how lawyers can play supportive roles in ways that align with their organizational missions. One of the most important lessons from each case study is that the courts alone are likely unable to drive systemic change. In the DAPL case, success has largely come from the community-driven social movement, which compelled the Obama Administration to reevaluate the Army Corps's actions under NEPA. During the pendency of Judge Boasberg's 2020 decision requiring the Army Corps to issue an EIS, shifts in economic and political circumstances may also have influenced the future of the pipeline. As before, future successes for the Standing Rock Sioux may come from a receptive Biden Administration,⁴¹³ made possible by a complementary community movement-building and litigation.

The defeat of the ACP is a victory for community opposition and the lawyers who brought multiple cases on procedural and substantive grounds in tandem with community activism. Notably, claims that decision-makers failed to analyze the disproportionate adverse impacts of the pipelines were successful in both the DAPL litigation and *Friends of Buckingham*. These court rulings are taking place in a moment of national reckoning on issues of racial inequality, more than twenty-five years after President Clinton signed EO 12,898 and more than fifty-five years after Congress passed Title VI of the Civil Rights Act of 1964, which, together with NEPA, provided President Clinton with authority to issue EO 12,898.⁴¹⁴ Finally these courts are demonstrating a will-

413. See, e.g., Rebecca Elliott & Vipal Monga, *Biden Presidency Imperils Key Oil Pipelines*, WALL ST. J. (Nov. 11, 2020), <https://perma.cc/9AJD-RLGE> (noting President Biden signaled he would revoke the Keystone XL presidential permit but remained silent on DAPL).

414. Memorandum on Environmental Justice, 1 PUB. PAPERS 241 (Feb. 11, 1994) (directing all departments and agency heads to ensure that programs or activities receiving federal funds don't discriminate, in accordance with Title VI).

ingness to enforce federal and state requirements that decision-makers analyze and consider environmental justice.

Lessons learned from the PMPL case study are that community-driven actions can significantly impact fossil fuel infrastructure development. Communities must have a legally defensible position to validate as a starting point. But rather than look to the courts as the principal agents of change, community-driven lawyers can also support community-based action with the goal of building the capacity of community movements to influence policy and transform institutions.⁴¹⁵

CONCLUSION

Since 2016, when thousands of protesters and supporters of the Standing Rock Sioux and other Tribes flocked to North Dakota, economic, political, and cultural winds affecting the development of pipeline infrastructure have shifted. Dominion and Duke Energy cancelled the ACP and significant questions have put the future of DAPL and the South Portland projects in doubt. The price of and demand for fossil fuels plummeted, and issues of racial inequality became front page news in response to the killings of Michael Brown, Breonna Taylor, and so many other Black Americans at the hands of police. Disproportionate incidence of illness and death on the basis of race and national origin during the pandemic reinforced the urgency of action to address racial inequality. All of these developments inform the central questions animating this paper: What are the roles of lawyers in creating structural change? How do these roles relate to theories of change—including traditional models, centering the power of litigation versus base-building alternatives, whereby lawyers provide technical assistance to build the capacity of communities, who are the primary agents of change? And what do recent struggles over pipelines, which involved significant community activism as well as legal efforts, reveal about the effectiveness or success of legal action?

The Article suggests a community-driven model of public interest lawyering, whereby lawyers serve as technical advisors to communities and community movements. Legal organizations should acknowledge that their own missions may constrain their activities and drive case selection, but legal work is intended to complement community-based strategies and build capacity rather than prioritize a national strategy for law reform. Unlike the traditional public interest model, cases are largely community generated and intended to support base building. Underlying issues need not be susceptible to remedy by litigation—one that is necessarily replicable or otherwise of precedential weight. This

415. See Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 385–86 (2018). Cummings refers to this as “movement liberalism” and is viewed as a response to conservative backlash to the so-called activist courts of the civil rights era.

model is consistent with the theory of change grounded in the agency of community members who, when working together, can lead community transformation and, ultimately, influence law and policy.

Three case studies shed light on the roles of legal groups in fights over pipelines. Legal work in all three cases largely complemented movement-building and other community-based activities. Litigation in both the DAPL and ACP cases had some success, but were contributing factors rather than the direct cause of key victories. In DAPL, the tremendous gathering of protesters camping near the site in 2016 had an impact on the Obama Administration's decision to halt construction pending further study. In fact, the Administration issued its decision soon after the district court ruled against the Tribe, though more recent litigation has had a more direct impact on prospects for the pipeline. The cancellation of the ACP was also announced soon after a challenge to the pipeline lost in the Supreme Court, though by then the no-holds-barred approach taken by the community groups and lawyers, who brought multiple cases over six years, had delayed the project and scored some victories. Most notably, litigators in both the DAPL and ACP cases successfully raised environmental justice claims, breathing life into requirements that assessments under federal and state law include whether the projects would have disproportionate adverse impacts on the basis of race or income. Finally, the case studies, particularly the PMPL, reflect the range of tools used to support communities. Lawyers assisted pipeline opponents to navigate the process to obtain their desired legal results, first in the citizens' initiative and referendum, and then in the process of obtaining the passage and continued defense of the CSO.

With high profile, expansive, and costly pipeline projects at a standstill, this moment provides an opportunity to reflect and explore the roles played by lawyers and what strategies and skills have been most successful. These questions are critical for both legal strategy and clinical education. Though the stories of the DAPL and South Portland projects are still unfolding and will provide additional material for further analysis, this initial exploration reinforces the value of conceptualizing the role of lawyer as a technical assistance provider to communities, providing high quality, ethical, legal advice and representation in a range of forums, in support of the community's pursuit of its own vision for the future. Community activism made a difference in these struggles and, ultimately, the credit for slowing and stopping thousands of miles of pipeline goes to members of the communities who acted.