Climate Law Leaps

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ABSTRACT: In their recent Article, Climate Change Compliance*, Susan Kuo and Benjamin Means recast corporate compliance as an essential element of climate survival. The Article makes a persuasive case for the far-reaching benefits that internal corporate compliance strategies offer for advancing efforts to combat climate change. Of course, Kuo and Means do not demand an abandonment of the conventional model of corporate governance so much as a re-tooling of corporate governance to illustrate the ways that different business practices might be better suited to climate survival.* Climate Change Compliance *is important work, but it also prompts us to interrogate the limits of incremental change and imagine the possibility of more meaningful change. This Response suggests that while corporate compliance may advance incremental change, the climate emergency we currently face demands more creative reimagining of the law. This Response advances that work. It begins the process of envisioning more transformative leaps in the development of climate law.*

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INTRODUCTION

In their recent Article, *Climate Change Compliance*,[1] Susan Kuo and Benjamin Means engage in a delightful reimagining of corporate compliance—once thought of as the "backwater"[2] of corporate governance—that strives to make corporate compliance an essential element of any climate survival strategy. The Article lays out the comparative strengths of internal compliance strategies as an alternative to environmental, social, and governance ("ESG") initiatives and corporate social responsibility ("CSR").[3] In doing so, the Article focuses on the structural commitments and goals employed in compliance and suggests that compliance is a misunderstood and undervalued tool for navigating the opportunities that corporate governance can offer to developing a set of climate survival strategies.[4]

There is no better time for this work. Really, there is no other time. As the authors say, "climate change has arrived."[5] Previously unimaginable choices are before us, and economic and social transformations are needed to weather this storm. Kuo and Means explain that the conventional corporate governance approaches that focus on risk-management and CSG leave corporate governance mired in benign thinking, at best.[6] Specifically, a risk-management approach assumes that there may be old wine skins to fill with this new wine: "Viewed from a risk-management perspective, climate change is just another external risk to hedge against, no different in principle than the risk that interest rates might rise or that an economic downturn could reduce the demand for a corporation's products or services."[7] The authors' attack on corporate climate incrementalism emphasizes that what is needed is more than pretending we are responding to fluctuations in the market, unpredictable times with market investors, or even differing regulatory requirements that may change with political winds. More is needed, and Kuo and Means make a compelling argument that corporate compliance is a powerful and underappreciated tool in this regard. Compliance, they suggest, "provides a framework capacious enough to handle the challenges of climate change."[8]

1. Susan S. Kuo & Benjamin Means, *Climate Change Compliance*, 107 IOWA L. REV. 2135 (2022).
2. *Id.* at 2138.
3. *Id.* at 2140–46.
4. *See id.* at 2138.
5. *Id.* at 2181.
6. *Id.* at 2152.
7. *Id.* at 2137.
8. *Id.* at 2181.

The rhetorical power of incrementalism—which arguably underlies many, if not most, successes in environmental law[9] and climate law[10]—is appealing. Viewing changes in the law from an incrementalism perspective makes it easier to imagine the changes needed, to imagine progress is possible (and happening), and to attempt to ignore the looming necessity of instigating a sea of change in our approach to climate law. But the time to tinker has passed. "Climate change," to repeat, "has arrived."[11]

Coming from outside of the corporate governance realm and situated deep within the worlds of environmental and climate law, we increasingly view both legal evolution and climate strategies with a very different perspective on what is needed: As J.B. Ruhl notes, we are in a no-analog future.[12] Neither past environmental circumstances, nor past regulatory solutions, will provide sufficient guidance for our climate survival strategies. Hence, this Response tests the implicit assumptions the authors make about the value of incremental change and advocates for more transformative thinking. First, we begin by exploring the question of the scale of legal change necessary to unearth climate survival strategies from the confines of past practices. Next, recognizing that Kuo and Means make a valuable contribution to the climate change literature, this Response urges that proposals for incremental climate solutions be juxtaposed alongside more transformative solutions: solutions that avoid framing climate change as just another obstacle to deal with as a matter of corporate, social governance or, even, as a matter of environmental law. Finally, this Response suggests that climate change demands more from the law. It demands that we imagine the kinds of revolutionary paradigm shifts that make many scholars and policymakers alike uncomfortable. It demands that even as we spin away around the edges of our incrementally advancing web of climate law, we pause to acknowledge that climate change is eroding the core of our web of law and that the "fail[ure] to anticipate and adaptively plan for [our climate] future . . . presents an existential threat to democratic governance"[13] and the rule of law.

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9. DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 6–14 (1999); Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law,* 21 STAN. ENV'T L.J. 225, 227, 277–78 (2002).

10. *See, e.g.*, Cinnamon P. Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U. L. REV. 387, 402, 460 (2019) [hereinafter Carlarne, *U.S. Climate Change Law*] (describing the "incremental legal construction" of climate law, including how "[f]or more than two decades, subnational and non-state actors have steadily increased their climate related activities and incrementally influenced federal and international climate policy"); Cinnamon Carlarne, Commentary, *Notes from a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351, 1360–64, 1381 (2008) [hereinafter Carlarne, *Notes from a Climate Change Pressure-Cooker*].

11. Kuo & Means, *supra* note 1, at 2181.

12. J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. Rev. 1, 13 (2008).

13. J.B. Ruhl & Robin Kundis Craig, *4°C*, 106 MINN. L. REV. 191, 195 (2021).

I. THE PROBLEM WITH MOLECULAR MOTION IN LAW

It is axiomatic that law evolves in response to change—changing times, norms, social, political, economic and, even, planetary systems.[14] But, often, this change is slow. It is incremental. This change tends to be interstitial —"confined from molar to molecular motions"[15]—and focused on "resolving new disputes from within a more comprehensive legal scheme and typically seeking the least destructive resolution."[16]

As one of us has suggested, "incrementalism is not problematic because *incrementalism* is wrong."[17] Incrementalism reflects the reality that law is rarely capable of long strides, and it "insure[s] that law's continual adaptation is managed and that the incidental effects of emerging legal principles are not unintended."[18] Incrementalism is, by and large, the way of life in the rule of law. It is measured, reflective, and reactive.

This pattern of change has held true in the development of climate change law, where, for more than three decades, we have engaged in the "inevitably incremental and fragmented hard work of whittling away at the challenges climate change poses."[19] As Ruhl and Craig suggest, "[t]he emphasis in the United States (and elsewhere) has been on using incremental adaptation to keep human communities mostly intact, in situ, and close to normal, with place-based security for people and property the overarching goal."[20] This incremental development has been pivotal. It has resulted in a body of laws "that vary in form and function" but collectively create an "increasingly thick legal foundation."[21] This incrementally sophisticated web

14. *See, e.g.*, Pierson v. Post, 3 Cai. Cas. 175, 181 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting) ("[W]e have only to say tempora mutantur; and if men themselves change with the times, why should not laws also undergo an alteration?"); *see also* John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737, 744 (2017) ("It is axiomatic that physical conditions, such as geography and climate, influence how law evolves.").

15. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Of course, Justice Holmes was specifically confronting restraint on the judiciary, but the proposition also reflects the ongoing tension between continuity of law and legal change in the face of changing social tides.

16. Keith H. Hirokawa, *Contextualizing the Roots of Environmental Law*, 38 REVS. AM. HIST. 153, 156 (2010) (reviewing KARL BOYD BROOKS, BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW 1945–70 (2009)).

17. *Id.*

18. *Id. But see* Cary Coglianese & Jocelyn D'Ambrosio, Response, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411, 1411 (2008) ("Incremental climate change policies can give rise to predictable and nontrivial problems, such as non-effect, leakage, climate side effects, other side effects, lock-in, and lulling. Such problems not only can undermine the interim policies themselves but also may delay the adoption of a more comprehensive climate change policy.").

19. Cinnamon P. Carlarne, *The Space Between Grand Optimism and Grim Determination: Finding a Pathway Forward in International Climate Change Law*, 16 LOY. U. CHI. INT'L L. REV. 1, 19 (2020).

20. Ruhl & Craig, *supra* note 13, at 239.

21. Cinnamon P. Carlarne, *Climate Creep*, 52 ENV'T L. REP. 10,374, 10,375 (2022).

of law includes federal, state, and local law.[22] It includes public law and private law.[23] It includes legislation, regulation, and case law.[24] It includes hard law, soft law, and extra-legal initiatives.[25] It includes, of course, corporate law; the kind Kuo and Means describe as existing and the kind they call for.[26]

The creep of climate law, by now, is systemwide. Out of these incremental and composite changes has emerged a dense body of law that is sprawling, impactful, and important—but also inconsistent, fragmented, and fatally flawed. Its fatal flaw lies not only in the body of law's details but also in its collective impact. Incremental growth in the legal system has managed to capture some emission reductions, but without curtailing our reliance on fossil fuels.[27] Incremental successes in law have lifted attention to the needs of vulnerable communities, but without addressing the prevalence of deep-seeded institutional inequities and distributional disparities.[28] Incremental thinking has facilitated recognition that coastal communities lie in a destructive path, but has not prevented housing developments in vulnerable coastal areas: In fact, this thinking has succeeded in armoring expectations that, climate disaster after disaster, the government will swoop in with an emergency response.[29]

It may be true that the continued growth of our incremental system of climate law is a prerequisite for at least "keep[ing] us moving forward toward

22. *Id.* at 10,375–76; *see also* Carlarne, *U.S. Climate Change Law*, *supra* note 10, at 390–92; and Hirokawa, *supra* note 16, at 156.

23. *See generally* Carlarne, *U.S. Climate Change Law*, *supra* note 10 (describing the local, national, and private legal regimes governing domestic climate law).

24. *See generally id.* (discussing the various methods by which climate change law has been implemented in the United States).

25. *Id.* at 391–93.

26. *Id.* at 470–72; *see also* Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties*, UTAH L. REV. 313, 372–80 (2022); and J. Kevin Healy & Bryan Keyt, *The Case for Corporate Action on Climate Change*, 48 ENV'T L. REP. 10,381, 10,384–85 (2018).

27. *See, e.g.*, HANS-O. PÖRTNER ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY: SUMMARY FOR POLICYMAKERS ¶ B.5.4 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf [https://perma.cc/3MH4-RJG6] [hereinafter SUMMARY FOR POLICYMAKERS].

28. *See, e.g.*, Keith H. Hirokawa & Cinnamon P. Carlarne, *Climate Dominance*, 34 GEO. ENV'T L. REV. (forthcoming 2023) (manuscript at 2–3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4249025 [https://perma.cc/LH4Y-YD2Z].

29. In an ironic example, note Governor DeSantis' pleas for federal assistance in the wake of Hurricane Ira and the devastation done to Florida (among others). Given that DeSantis opposed assistance after Hurricane Sandy, we might have expected Florida to weather the storm on its own. DeSantis' inconsistency may dash such expectations and call into question the politics behind climate change, but it also confirms that climate change could not be less interested in how political actors woo voters on this issue. Climate change brings death and destruction. *See* Areeba Shah, *DeSantis, Who Opposed Hurricane Sandy Relief, Now Desperate for Biden's Aid as Ian Ravages Florida*, SALON (Sep. 30, 2022, 2:51 PM), https://www.salon.com/2022/09/30/desantis-opposed-hurricane-sandy-relief-now-desperate-for-bidens-aid-as-ian-ravages-florida [https://perma.cc/W97L-MZCJ].

a safer and more equitable climate future."[30] But, in the face of climatic changes, this truth is at best a distraction, and at worst, a lie. And the lie is the promise that incrementalism will get us there eventually; that, law by law, we will construct a web of laws that is thick, complete, and—ultimately—enough to save us by creating a set of climate mitigation and survival strategies.[31] Yet this is the web that the authors of this piece—as well as Kuo and Means—cling onto and seek to thicken and expand. Ultimately, however, we know that this is really just a shimmery web of lies and even as we keep spinning away to save our lives, we must work to reconstruct the web from the inside out. And we must do so with urgency. As Ruhl and Craig suggest, we "must move from incremental to transformative" thinking and we must be prepared to do the hard work of transformative change now—of redesigning the law and the systems it shapes—before it is too late to do so.[32]

We used to have the privilege of advancing incrementalism as a tool for finding the least destructive resolutions to our collective challenges. Now, even as we cling onto incrementalism as our hope for fending off the destructive future that climate change threatens, we face a daunting imperative: We must release our tight and panicked grasp on incrementalism so that we can push harder and think more creatively and courageously about what climate change demands from the rule of law. We need to "harnes[s] the power and possibilities of the rule of law," and to question the outer limits of the work the rule of law can do.[33]

II. CLIMATE CHANGE RESPONSES MUST BEND THE RULES—BE THE REVOLUTIONARY MOMENTS

Revolutionary moments. Paradigm shifts. Rights revolutions. These are not comfort zones for the law, or for society. Sometimes revolutionary moments reconfigure society in ways that expand rights, advance equity, and create greater opportunities for more people to live safely as full citizens.[34] At

30. Cinnamon P. Carlarne, *The Acceleration of Climate Creep: The Court Crashes, Congress Surges*, 52 ENV'T L. REP. 10,778, 10,783 (2022).

31. Moreover, as Coglianese and D'Ambrosio suggest, "incremental policies may lull the public into thinking climate change is being addressed, thus dampening demand for the costly and comprehensive policies that will achieve the most meaningful results." Coglianese & D'Ambrosio, *supra* note 18, at 1425.

32. Ruhl & Craig, *supra* note 13, at 244.

33. Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental Law*, 41 STAN. ENV'T L.J. 125, 132 (2022) [hereinafter Carlarne, *Climate Courage*]; *see also* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 411 (2018) (discussing the "central dilemma of liberal law reform projects, caught between a commitment to the rule of law and status quo arrangements on the one hand, and the desire for substantive justice and social, economic, and political transformation on the other").

34. *See* U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIX; Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000 (2020); National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2020); Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2020); Clean Air Act of 1970, 42 U.S.C. §§ 7401–7671 (2020); and Obergefell v. Hodges, 576 U.S. 644, 651–57 (2015).

other times, these revolutionary moments do the opposite: revoking fundamental rights[35] and reshaping society in ways that consolidate power.[36] Yet the fear of a paradigm shift gone wrong does not dispel the need for a paradigm shift gone right. And that is where we find ourselves—at the precipice of environmental change that demands a far-reaching rethinking of the role of law.[37] And just as climate survival demands far-reaching change, we find ourselves in a space where a paradigmatic shift seems possible. As Akbar, Ashar, and Simonson suggest,

> We are living in a moment of possibility—where the failures of the state to provide for people are plain and grassroots contestation of the status quo is stronger than it has been in decades. As scholars, we have an opportunity to respond to today's crises in ways that move us toward more justice and liberation for more people.[38]

This rings true for scholars of climate law. Within this moment of possibility, "[c]limate change compels us to rethink the role of environmental law in advancing transformative change."[39] This rethinking of law includes environmental law.[40] It also includes corporate law. Rethinking law here means thinking *beyond* incrementalism.

To be clear, we—the authors of this Response—are part of this process. Both of us have argued that incremental changes are not as sinister as they might seem, particularly given the way deliberative practices—such as law—can accommodate change.[41] In fact, we have argued, and continue to argue that without incremental change, we would not now be in a position to advocate for something more, something different, something beyond the range of normal legal evolution. Yet, we now find ourselves rudderless within the confines of incrementalism. We are at a point in the development of climate law, and in our understanding of climate change, that we—hat in hand—say we need something different, something beyond what we can accomplish through even the most persistent and hard-fought forms of incrementalism. We are at a point in our collective understanding of climate change where we know—when we choose not to look away—that the changes that are needed appear to defy the capacity of our conventional legal system

35. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

36. *See, e.g.*, Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651, 652–53, 663–64.

37. Importantly, climate change is increasingly approached as an intersectional issue that intersects with other social movements—civil rights, labor rights, disability rights, gender equality, LGBTQ+ rights, reproductive rights—demanding systemic change. *See, e.g.*, Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 170–74 (2022); Carlarne, *Climate Courage, supra* note 33, at 127–32.

38. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 830 (2021).

39. Carlarne, *Climate Courage, supra* note 33, at 126.

40. Hirokawa, *supra* note 9, at 226–28.

41. Carlarne, *Notes from a Climate Change Pressure-Cooker*, *supra* note 10, at 1353–54, 1381–82.

and what we think of as normal legal change. Any legal system that is capable of sufficiently managing climate change is not likely to fall within the range of "normal" changes in law achieved through incremental processes. In large part, something more substantial, far-reaching—even surprising—has become necessary in the face of climate change for at least one simple reason: Normal law falls among the primary culprits of climate change.

To be clear, while climate change is exceptional, it is not a threat to be viewed in isolation. Rather, climate change is exceptional and, at the same time, a rule of law threat multiplier[42] that intersects with and exacerbates the many-fronted precipice of disaster at which we find ourselves.[43] The moment—this moment—in which we finally find ourselves facing head-on the climate challenge is also a moment when, as a society, we find ourselves facing a series of cascading challenges demanding revolutionary change: radicalism on the right;[44] extreme political polarization;[45] deadly systemic racism;[46] deepening fights to advance non-reformist reforms for racial, social, and income equality;[47] the global Covid-19 pandemic;[48] devastating

42. *See* Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1576 (2009).

43. Cinnamon P. Carlarne, *From Covid-19 to Climate Change: Disaster and Inequality at the Crossroads*, *in* THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY: RISK, RECOVERY, AND REDEVELOPMENT 511, 511–12 (John Travis Marshall, Ryan Rowberry & Susan S. Kuo, eds., 2022).

44. *See, e.g.*, *Press Release: Former Leader of Proud Boys Pleads Guilty to Seditious Conspiracy for Efforts to Stop Transfer of Power Following 2020 Presidential Election*, U.S. DEP'T OF JUST. (Oct. 6, 2022), https://www.justice.gov/opa/pr/former-leader-proud-boys-pleads-guilty-seditious-conspiracy-efforts-stop-transfer-power [https://perma.cc/7XH3-59ZN]; Zack Stanton, *The Problem Isn't Just One Insurrection. It's Mass Radicalization.*, POLITICO MAG. (Feb. 11, 2021, 6:06 PM), https://www.politico.com/news/magazine/2021/02/11/mass-radicalization-trump-insurrection-468746 [https://perma.cc/46AU-Z7WM]; Hannah Allam, *Right-Wing Embrace of Conspiracy Is 'Mass Radicalization,' Experts Warn*, NPR (Dec. 15, 2020, 12:17 PM), https://www.npr.org/2020/12/15/946381523/right-wing-embrace-of-conspiracy-is-mass-radicalization-experts-warn [https://perma.cc/B473-3XK8]; *see also*, Khiara M. Bridges, *Language on the Move: "Cancel Culture," "Critical Race Theory," and the Digital Public Sphere*, 131 YALE L.J.F. 767, 795–96 (2022); and Vida B. Johnson, *White Supremacy's Police Siege on the United States Capitol*, 87 BROOK. L. REV. 557, 560–62 (2022).

45. *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 87, 118, 122, 169, 173 (2020) (discussing increased polarization in American politics and its effect on presidential elections); Cinnamon P. Carlarne & Mohamed S. Helal, *A Conversation About Climate Change Law and the 'International Community'*, 8 CLIMATE L. 229, 234–36 (2018).

46. *See, e.g.*, Keith H. Hirokawa, *Race, Space, and Place: Interrogating Whiteness Through a Critical Approach to Place*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. (forthcoming 2023) (manuscript at 33–37) (on file with author).

47. *See, e.g.*, Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1546–47 (2022); Akbar, *supra* note 33, at 408; and Hirokawa, *supra* note 46, at 54–73.

48. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., https://covid19.who.int [https://perma.cc/CPN4-M8F2]; UNITED NATIONS, COVID-19 AND HUMAN RIGHTS: WE ARE ALL IN THIS TOGETHER 2 (2020), https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf [https://perma.cc/4P8W-GLQP].

environmental degradation in the form of mass species extinction;[49] acidification and plastic pollution in our oceans;[50] and chemicals in our water.[51] Our political and physical bodies are under siege entirely because these actions were not prevented by law—and oftentimes has been enabled by it. Our legal system, in this sense, is a maladaptation that directs our demise.

This is the moment that we are living in. This is the "here" that defines the context within which climate change swells from above, below, and all around us to compound our already vulnerable sense of physical, political, and cultural stability. In this already fragile world, the inevitability and brutality of climate change appears all the more ruthless and in need of a non-incremental response.

Here, we share two ideas—one procedural and the other substantive —that we believe help illustrate the types of thinking that is required to face climate change with any hope of survival.

A. THE CLIMATE MORATORIUM[52]

Moratoria are not (in their currently used iteration) novel legal tools. In fact, the moratorium is "an essential tool of successful development"[53] that assists governments who face complex challenges—such as climate change —seeking time to think through how to adequately address these challenges as they make planning decisions. As a brief reminder, a land use moratorium is a temporary suspension on the issuance of building and other development permits.[54] The suspension—essentially making space to engage in planning —is designed to give local governments time to study and make considered decisions with respect to adopting or amending comprehensive land use plans, zoning ordinances, or other land-use regulations.[55] Moreover, as will inevitably become relevant in the climate context, moratoria can also be used

49. *See* Rodolfo Dirzo, Gerardo Ceballos & Paul R. Ehrlich, *Circling the Drain: The Extinction Crisis and the Future of Humanity*, 377 PHIL. TRANSACTIONS ROYAL SOC'Y B, Aug. 15, 2022, at 2; Gerardo Ceballos, Paul R. Ehrlich & Peter H. Raven, *Vertebrates on the Brink as Indicators of Biological Annihilation and the Sixth Mass Extinction*, 117 PNAS 13596, 13596 (2020); and Gerardo Ceballos et al., *Accelerated Modern Human–Induced Species Losses: Entering the Sixth Mass Extinction*, 1 SCI. ADVANCES, June 2015, at 1.

50. *See, e.g.*, Bronte Tilbrook et al., *An Enhanced Ocean Acidification Observing Network: From People to Technology to Data Synthesis and Information Exchange*, 6 FRONTIERS MARINE SCI., June 19, 2019, at 2; Marcus Haward, *Plastic Pollution of the World's Seas and Oceans as a Contemporary Challenge in Ocean Governance*, 9 NATURE COMMS., Feb. 14, 2018, at 1.

51. Annie Sneed, *Forever Chemicals Are Widespread in U.S. Drinking Water*, SCI. AM. (Jan. 22, 2021), https://www.scientificamerican.com/article/forever-chemicals-are-widespread-in-u-s-drinking-water [https://perma.cc/QA4G-HMM5]; ROBERT BILOTT, EXPOSURE: POISONED WATER, CORPORATE GREED, AND ONE LAWYER'S TWENTY-YEAR BATTLE AGAINST DUPONT 3–6 (2019).

52. This section is derived from Cinnamon P. Carlarne & Keith H. Hirokawa, *The Climate Moratorium* (work in progress) (on file with author).

53. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 331 (2002).

54. *See, e.g.*, Downham v. City Council of Alexandria, 58 F.2d 784, 788 (1932).

55. *Id.*

where local governments lack the infrastructure or facilities needed to serve new development; in such cases, "[t]he purpose of the moratorium is to allow the local government to plan, finance, and construct the necessary infrastructure so that both new and existing development receive adequate levels of public services."[56]

Thus, by adopting a moratorium, an agency can preserve the status quo by suspending development and construction proposals for a limited period of time to address a public welfare need through planning. Moratoria have been used to engage in comprehensive land use planning,[57] address increasing congestion,[58] address infrastructure inadequacies (particularly in the face of new development),[59] understand and mitigate threats to water quality,[60] plan for energy facility development,[61] consider land acquisition for park purposes,[62] and address water scarcity.[63] Courts uphold moratoria that are limited to a reasonable period of time,[64] are reasonably formulated to advance the stated public interest,[65] and that results in actual planning.[66] So, to be clear, moratoria are tried and true mainstays of our legal system. Yet, the outer edges of the use of the moratoria have yet to be discovered. We suggest—in the context of climate change—that the climate moratorium provides an opportunity for something beyond incremental progress.

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56. AM. PLAN. ASS'N, GROWING SMART LEGIS. GUIDEBOOK 8-179–80 (Stuart Meck ed., 2002); *see also* JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 2.4 (2d ed. 2022) (surveying state statutory authority and case law on moratoria authority).

57. *See, e.g.*, Nolen v. Newtown Twp., 854 A.2d 705, 706–07 (Pa. Commw. Ct. 2004) (moratorium to create a comprehensive plan); Droste v. Bd. of Cnty. Comm'rs, 159 P.3d 601, 603 (Colo. 2007) (same).

58. *See, e.g.*, WCI Cmtys., Inc. v. City of Coral Springs, 885 So.2d 912, 915 (Fla. Dist. Ct. App. 2004) ("To enable the city to undertake a thorough analysis of the Comprehensive Plan and the residential development regulations for RC & RM zoning districts including, but not limited to the impact of said development on parks, recreation and open space, the availability of infrastructure and accessibility of emergency and public service vehicular traffic and public safety and public facilities.").

59. *See, e.g.*, First Peoples Bank of N.J. v. Twp. of Medford, 599 A.2d 1248, 1249–50 (N.J. 1991) (sewer capacity); Belle Harbor Realty Corp. v. Kerr, 323 N.E.2d 697, 697 (N.Y. 1974) (same).

60. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 306 (2002) (pollution in Lake Tahoe).

61. *See, e.g.*, Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149, 152–53 (W.D.N.Y. 2006) (wind energy development).

62. *See, e.g.*, Davis v. City of Bandon, 805 P.2d 709, 710 (Or. Ct. App. 1991) (potential park acquisition).

63. *See, e.g.,* Marin Mun. Water Dist. v. KG Land Cal. Corp., 235 Cal. App. 3d 1652, 1657 (1991) (water shortage).

64. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 341–42 ("[A]ny moratorium that lasts for more than one year should be viewed with special skepticism.").

65. *See, e.g.*, *Ecogen*, 438 F. Supp. 2d at 157 (refusing to enjoin a moratorium on wind energy development that was applied to substations, even though the substations had minimal impacts on the aesthetic purpose of the moratorium).

66. *See, e.g.*, Mitchell v. Kemp, 575 N.Y.S.2d 337, 338–39 (App. Div. 1991) (five-year moratorium was unreasonable in the absence of justified delay).

Climate change presents obvious challenges and opportunities for planning. A moratorium appears justified to facilitate such planning. To be blunt, we are unprepared to survive the brutal, existential threats of climate change. Beginning with an obvious example, our coastal cities are unprepared for the rising seas that lap at their edges. The global mean sea level has risen faster since 1900 than during any other century in at least 3,000 years.[67] Between 1901 and 2018, the global mean sea level rose by 0.2 meters.[68] Sea levels will continue to rise over the twenty-first century, with estimates ranging from 0.28 to two meters.[69] As a result, our coastal cities face flooding, erosion, land submergence, destruction of coastal ecosystems, saltwater incursion, and poor drainage.[70] And that is just a start. This all, of course, demands a very different kind of planning than in the past. But it is not just our coastal cities that sit precariously on the edge of existence. Across the country, (especially in the West), we have allocated vast amounts of water and established complex systems of water rights to protect these allocations. As a result, individual water users with settled water rights have little incentive to burden themselves with everyone else's water needs during times of scarcity.[71] We have allowed incineration and land disposal of industrial byproducts with impunity, resulting in the now normalized and frequent discovery of cancer clusters, ocean acidification, and the realization that exposure to "forever chemicals" such as per- and polyfluoroalkyl substances ("PFAS") and perfluorooctanoic acid ("PFOA") is now widespread and unavoidable.[72] We allow unimpeded manufactured packaging for our beloved consumer products, despite the fact

67. *See* Robert E. Kopp et al., *Temperature-Driven Global Sea-Level Variability in the Common Era*, 113 PNAS 1434, 1434 (2016); Bob Kopp, *Global Sea-Level Change Over the Common Era*, BOB KOPP (Feb. 22, 2016), https://www.bobkopp.net/160222-pnas-commonera [https://perma.cc/W84C-4H5W].

68. RICHARD P. ALLAN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS: SUMMARY FOR POLICYMAKERS ¶ A.1.7 (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [https://perma.cc/UW5T-WMSY].

69. *See, e.g.*, WILLIAM V. SWEET ET AL., NAT'L OCEANIC & ATMOSPHERIC ADMIN., GLOBAL AND REGIONAL SEA LEVEL RISE SCENARIOS FOR THE UNITED STATES: UPDATED MEAN PROJECTIONS AND EXTREME WATER LEVEL PROBABILITIES ALONG U.S. COASTLINES 20 (2022), https://oceanservice.noaa.gov/hazards/sealevelrise/noaa-nos-techrpt01-global-regional-SLR-scenarios-US.pdf [https://perma.cc/AS4W-YPNL].

70. *See* Kees Nederhoff et al., *Drivers of Extreme Water Levels in a Large, Urban, High-Energy Coastal Estuary—A Case Study of the San Francisco Bay*, 170 COASTAL ENG'G 103,984, 103,984–85 (2021).

71. *See* A. Park Williams et al., *Large Contribution From Anthropogenic Warming to an Emerging North American Megadrought*, 368 SCI. 314, 314 (2020); *see also* Greg Shirah & Cheng Zhang, *Megadroughts in U.S. West Projected to Be Worst of the Millennium*, NASA SCI. VISUALIZATION STUDIO (Feb. 12, 2015), https://svs.gsfc.nasa.gov/cgi-bin/details.cgi?aid=4270 [https://perma.cc/45DQ-MNM2].

72. *See* Heather Goodall, *Garbage: 'Reclamations' and Casualties*, *in* GEORGES RIVER BLUES: SWAMPS, MANGROVES AND RESIDENT ACTION, 1945–80 135, 136 (2022). *See generally* Ilene Munk & Kacy Manahan, *Private-Party Actions Are Establishing PFOS and PFOA Liability*, 32 NAT. RES. & ENV'T 29 (2017) (discussing the danger of exposure and lack of regulatory determination).

that most packaging is useless, judged by the velocity in which packaging goes from the store shelf to the garbage dump (largely unrecycled and unrecyclable).[73] We continue to build large resource intensive single-family homes in extremely vulnerable areas.[74] We allow historic practices of segregation to determine which residents and communities face the highest levels of exposure to pollution and hazardous materials, and some states have even made it unlawful to discuss the role that racial oppression continues to play in shaping the lived experiences of different communities.[75] As a whole, we have done very little to understand our vulnerabilities, adapt laws to human needs in a climate change era, or redesign communities to survive and thrive in future environments. As a result, we find ourselves physically, emotionally, and psychologically unprepared, yet facing a growing awareness of the scale of planning that needs to be done. And the planning needs to be done quickly to prevent more maladaptation, but not so quickly that it is poorly thought out: hence, the climate moratorium.

Given the foregoing, the climate moratorium provides a novel and potentially powerful tool for stimulating new and increasingly effective systems of climate change governance. The climate moratorium can be used to slow down maladapted development proposals—such as coastal development that fails to take into account sea level rise or zoning that allows building in high-risk fire zones—to facilitate community vulnerability assessments, rethink community resiliency as determined by a local zoning code, address operational capacities and condition of infrastructure elements, address a community's capacity to limit climate-induced migration or to receive climate migrants, and to assess the relative resiliency of our most vulnerable communities. The climate moratorium might result in something that resembles the Climate Justice Plan adopted in Providence, Rhode Island,[76] the Climate Equity Plan in Austin, Texas,[77] or the Climate Action Plan in Kingston, New York,[78] or it could be something uniquely adapted to a

73. Goodall, *supra* note 72, at 137.

74. *See* Edward H. Ziegler, Jr., *The Twilight of Single-Family Zoning*, 3 UCLA J. ENV'T L. & POL'Y 161, 167–70 (1983); William J. Stull, *Community Environment, Zoning, and the Market Value of Single-Family Homes*, 19 J.L. & ECON. 535, 553 (1975).

75. Rashawn Ray & Alexandra Gibbons, *Why are States Banning Critical Race Theory?*, BROOKINGS (Nov. 21, 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory [https://perma.cc/PCK6-FKFN].

76. *See generally* CITY OF PROVIDENCE, THE CITY OF PROVIDENCE'S CLIMATE JUSTICE PLAN (2019), https://www.providenceri.gov/wp-content/uploads/2019/10/Climate-Justice-Plan-Report-FINAL-English-1.pdf [https://perma.cc/PG6M-CSCR] (laying out the City of Providence's plan to address climate change).

77. *See generally* CITY OF AUSTIN, AUSTIN CLIMATE EQUITY PLAN (2020), https://www.austintexas.gov/sites/default/files/files/Sustainability/Climate%20Equity%20Plan/Climate%20Plan%20Full%20Document__FINAL.pdf [https://perma.cc/9TFL-8JYV] (discussing the City of Austin's plan to address climate change).

78. *See generally* CITY OF KINGSTON, KINGSTON CLIMATE ACTION PLAN 2030 (2021), https://engagekingston.com/climate-action-plan [https://perma.cc/6PEB-MS58] (describing the City of Kingston's ten-year climate action plan).

particular region. The climate moratorium is a key—but not yet utilized—tool to facilitate such planning.

B. CIVIL SOCIETY WITHOUT PROPERTY RIGHTS[79]

A second illustration of our call for non-incremental responses is more substantive. It is a proposal that truly fits within the previously described category of revolutionary paradigm shifts that make many scholars and policymakers alike uncomfortable. It is a proposal that asks us to imagine the idea of a society untethered from our existing system of property rights.

This proposal centers on acknowledging the profound, yet persistent, ways that property shapes our collective ability to survive in a climate changed world. It recognizes the manner in which the rights of property operate to deny society the ability to govern effectively, especially—or at least —considering the challenges presented by climate change. Property rights have prevented the state of South Carolina from regulating private construction projects to avoid the destruction of sand dune ecosystems,[80] prohibited the state of California from guaranteeing access by labor unions to the lands of agricultural employers,[81] undermined local governments' abilities to limit developments in high-risk fire zones,[82] and protected private interests in water consumption where the federal government attempted to use water to protect endangered species of fish.[83] In many ways, and regardless of any virtues they may have, property rights prevent effective governance.

Among other things, property doctrines have served as effective determinants of power.[84] With property, law has accommodated a variety of claims to power resulting in exclusion, oppression, alienation, segregation, and poverty.[85] Sinister employment of property rights has justified the ownership of people based on race,[86] zoning for purposes of segregation,[87]

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79. This section is derived from Keith H. Hirokawa, *Without Property* (work in progress) (on file with the author).

80. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–30 (1992).

81. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072–74 (2021).

82. *See, e.g.*, Caroline Mimbs Nyce, *One Developer's Case for Building in a High-Risk Fires Zone*, THE ATL. (July 20, 2022), https://www.theatlantic.com/ideas/archive/2022/07/california-wildfire-development-fire-zone/670572 [https://perma.cc/TQ4F-MEX5]; Michael Phillis & Suman Naishadham, *Wildfire Threat Becomes Tool to Fight Home Builders*, AP NEWS (July 14, 2022), https://apnews.com/article/wildfires-science-california-san-diego-sierra-club-28d5eb4c7a49500d35066fe70ccd35d2 [https://perma.cc/U9BR-EQXE].

83. *See, e.g.*, Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319–20 (2001); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

84. *See, e.g.*, K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field,* 131 YALE L.J. 1062, 1067–69 (2022).

85. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA viii (2017).

86. *See* Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1849–51 (2022).

87. *See* Richard F. Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. ILL. L.F. 186, 189–92.

ownership of people based on gender (coverture),[88] custodial decisions,[89] racially restrictive covenants,[90] displacement and possession through partition,[91] and redlining[92] to prevent lateral and vertical mobility of Black families. In the meantime, the rhetoric behind property doctrines has been used to mask causal connections between how land is used and the environmental impacts of land use, hamstringing efforts to imagine—much less achieve—equitable and effective systems of environmental governance.[93] Such uses of property have had an enduring legacy, creating inequities throughout entire cities, individual neighborhoods, education, employment, policing policy, banking policy, the character of government, and the marketplace.[94]

Of course, this proposal should not be read as a condemnation of property so much as a thought exercise that might help us get to the root of obstacles to climate change preparedness. This thought exercise portends a significant shift because law has been busy making use of property rights for some time. Property pervades almost every conceptualization of rights and legal processes, is responsible for disparate allocations of social, environmental, and economic benefits, and has (in some individual circumstances) become co-existent with identity. More importantly, the rhetorical force of property, together with the antisocial incident of the right to exclude, elevates individualism at the expense of our collective needs and values. And, in the context of climate change, this form of individualism could prove disastrous.

Imagining law without property might not guarantee a perfectly integrated society, justly distributed wealth, an equitable education system, climate preparedness, or a sustained and inclusive system of governance. Folks committed to creating hierarchy that elevates individualism would find a way to use the system in other ways. Yet without the shackles of property, such an effort certainly would be different: A world without property might be closer to a world without a structural demand for competition, without the inherent tension between community and the individual, and without the inevitability of class-based poverty. Within a dialectical framework, a proposal

88. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2154 (2019).

89. *See* Gayle Pollack, Note, *The Role of Race in Child Custody Decisions Between Natural Parents over Biracial Children*, 23 N.Y.U. REV. L. & SOC. CHANGE 603, 604 (1997).

90. *See* Lauren A. Schaffer, Note, *A Statutory Analysis on Racially Restrictive Covenants*, 53 U. TOL. L. REV. 351, 351 (2022).

91. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 508 (2001).

92. Kim E. Baptiste, Note, *Attacking the Urban Redlining Problem*, 56 B.U. L. REV. 989, 989 (1976).

93. *See* Kyla N. George, Note, *Black Spaces Matter: An Analysis of Environmental Racism, Siting, and Litigation in America*, 16 S. J. POL'Y & JUST. 69, 69–71 (2022).

94. ROTHSTEIN, *supra* note 85, at viii.

for society without property results in a shift of presumptions from individual needs to community ones.

Importantly, a society unchained to the rights of property would likely move with more flexibility to act in the face of existential threats, more voices to capture differences across the spectrum of our collectivity, and more sensitivity to the needs of the disadvantaged. That is, without property, law can focus on protecting people instead of on abstract rights to things. And it is in this liberation that problems such as socio-ecological traps[95] do not appear intractable if they even appear as traps at all. Notably, for our purposes, even imagining a society unfettered by the rights of property creates immediate and productive space for reimagining more equitable and effective responses to climate change.

CONCLUSION

In the end, *Climate Change Compliance* is work we need. Of course, Kuo and Means do not propose replacing the corporate governance scheme. Yet they propose re-tooling corporate governance with far-reaching changes that might result in fundamentally different business practices that are better suited to climate survival.[96] Hence, in a world of incremental policymaking, compliance may be another incremental tool, but it is a better one. It is work that gets corporate lawyers—and others—thinking more about climate change. It is work that mainstreams the reality that "we are all climate lawyers now."[97] It is work that reaffirms how far behind we are and how far we have to go. It is work that we—the authors of this Response—argue must be read alongside bolder and more creative reimaginings of the law.

95. *See* Adam Herron, *Climate Change and the Water Trap: Considering Western Water Policy Through Socio-Ecological Trap Theory*, 85 ALB. L. REV. 497, 498–99 (2022); *see also* R. S. Steneck et al., *Creation of a Gilded Trap by the High Economic Value of the Maine Lobster Fishery*, 25 CONSERVATION BIOLOGY 904, 905–06 (2011) (discussing the "gilded trap" scenario, where "the perceived lucrative value of a natural resource drives stakeholders and managers to overlook risks of its unexpected decline and the associated negative social and ecological consequences").

96. Kuo & Means, *supra* note 1, at 2138–39.

97. *See, e.g.*, Lisa Benjamin & Sara Seck, *The Escalating Risks of Climate Litigation for Corporations*, 18 A.B.A. SCITECH L. 11, 14 (2021) (citing Hana Vizcarra, *Climate Change is Changing the Practice of Law*, ENV'T & ENERGY L. PROG. (July 30, 2020), https://eelp.law.harvard.edu/2020/07/climate-change-is-changing-the-practice-of-law-beyond-environmental-law [https://perma.cc/B4KD-439A]).