PUBLIC LAND FOR PUBLIC GOOD: A CALL FOR A REPARATIVE APPLICATION OF THE PUBLIC TRUST DOCTRINE IN NEW YORK*

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We acknowledge that the land upon which Americans stand was stolen and toiled through the exploitation of Indigenous, Black, and brown people. With that acknowledgement, we also note two indisputable premises about America's foundations. First, American citizens' manifest right to property ownership has always been essential to the nation's identity. Indeed, it was that right that made young America a unique land of opportunity and supposed freedom through private ownership and the control of land. Second, America experienced rapid growth and expansion under a system of slave labor, which secured white dominance and non-white subjugation. While some may view these two premises as completely disconnected, these premises have in fact built off of one another throughout the nation's history. In the Constitution's framers' opinion, the protection of property could only be secured through the wealth generated from and alliances between white people, starting with the violent conquest of Indigenous land and the institution of slavery,[1] both of which have reverberated in destructive ways in the American ethos of property law and management.

*This Article is inspired by the formidable efforts of the New York City Community Land Initiative (NYCCLI) in the last several years to protect and preserve New York City's public land for the common good. NYCCLI is a coalition of social justice and affordable housing organizations committed to developing

Given this history, which we contextualize in Section I, this Article calls for reparative land justice and explores the possibility of expanding one legal mechanism—the public trust doctrine—as a tool to bring our systems into right relationship with shared land and with communities that have been systematically broken and dispossessed from property.

INTRODUCTION

In 1991, the Galesi Group, a for-profit developer acting through Harlem River Yard Ventures, Inc. (Ventures), entered into a ninety-nine year lease agreement with The New York State Department of Transportation (DOT) to develop a cutting-edge transportation hub and industrial park located at the ninety-six acre Harlem River Yard (Yard) in the South Bronx.[2] The park would include an intermodal terminal, allowing cargo to stay on railcars as it moved across the Hudson River instead of stopping in neighboring states for transfer onto trucks.[3] The terminal would not only bring efficiency and modernization to the rail freight system in downstate New York, but it would also alleviate traffic congestion, air pollution, and damage to the region's bridges and streets by taking more trucks off the road.[4] The project was pivotal to New York State's

community land trusts as a tool for (1) combatting the displacement of Black, brown, immigrant, and poor communities; (2) fostering participatory decision-making over neighborhood development; and (3) creating and preserving deeply and permanently affordable housing. NYCCLI members work alongside housing and economic justice allies in the fight against systematic displacement due to speculative investment and destabilizing housing policies. NYCCLI's public land campaign calls on the City to prioritize community-led and nonprofit entities when disposing of public land, to keep land and housing permanently affordable and advance community-led development. *See Take Action!*, NYC CMTY. LAND INITIATIVE, https://nyccli.org/takeaction (last visited May 26, 2022).

[1] *See* Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767 (1988).

[2] *See* DIV. OF MGMT. AUDIT, STATE OF N.Y. OFF. OF THE STATE COMPTROLLER, REPORT 95-D-43, STAFF STUDY: THE VIABILITY OF THE OAK POINT LINK AND HARLEM RIVER YARD PROJECTS 15 (1997).

[3] *See* Affidavit of Benjamin Miller in Support of Verified Petition ¶ 6, S. Bronx Unite! v. N.Y.C. Indus. Dev. Agency, No. 260462-2012, 2013 WL 6840438 (N.Y. Sup. Ct. June 4, 2013).

[4] *See* DIV. OF MGMT. AUDIT, STATE OF N.Y. OFF. OF THE STATE COMPTROLLER, *supra* note 2, at 15.

goals of expanding freight access, mitigating air pollution, and preserving the manufacturing industry.[5]

Today, those goals have yet to be realized. In fact, the only freight being handled at the Yard carries the City's solid waste, shipped by the Bureau of Solid Waste Management, which subleases a portion of the land from Ventures.[6] Ventures also subleased the land to Federal Express (FedEx), 21st Century Fox America, and FreshDirect,[7] none of which serve intermodal freight purposes nor maximize public benefit for the region. To be sure, these are all private, for-profit companies that received a windfall on public land, benefitting from public subsidy and public funds only to serve private purposes.

Former NYC Comptroller Elizabeth Holtzman noted that "[p]ublic costs [were] staggering in relation to public financial benefits under the new plan."[8] The DOT, the Port Authority of New York and New Jersey, and the City invested more than $200 million into the project, while Ventures was only required to pay $1 million per year in rent, which was about $2 million below market value.[9] Under the lease agreement, Ventures also had no obligation to pay the City property taxes or payments in lieu of taxes, which is usually required for private use of publicly owned land.[10] The discounted rental rate coupled with the tax exemptions amounted to a subsidy of more than $40 million over the first ten years.[11] In the years following the developer's signing of the lease agreement, Ventures has done little to earn the incentives it received for this failed public project. Ventures was supposed to develop an intermodal terminal,

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[5] *See* CITY OF NEW YORK OFF. OF THE COMPTROLLER, ON THE WATERFRONT 1–7 (1993).

[6] *See* Affidavit of Benjamin Miller, *supra* note 3, ¶ 12.

[7] *See* EMPIRE STATE DEV., REQUEST FOR EXPRESSIONS OF INTEREST: HARLEM RIVER YARDS 4 (2016).

[8] CITY OF NEW YORK OFF. OF THE COMPTROLLER, *supra* note 5, at ES2.

[9] *See* DIV. OF MGMT. AUDIT, STATE OF NEW YORK OFF. OF THE STATE COMPTROLLER, *supra* note 2, at 1.

[10] *See id.;* Lease Agreement for the Harlem River Yard between the New York State Department of Transportation and Harlem River Yard Ventures 11, 15 (Sept. 18, 1991) (on file with author).

[11] *See* STATE OF NEW YORK OFF. OF THE STATE COMPTROLLER, *supra* note 5, at ES2.

but when it was unable to deliver, its role changed from developer to real estate broker and sublessor.[12]

When Ventures began subleasing the Yard to private companies, the State should have pivoted, consulted with members of the surrounding Mott Haven and Port Morris communities, and reassessed community needs, specifically because this was public land that should have been in service of the people. That land should have been used to maximize the health, safety, and welfare of the surrounding community. Yet, as happens all too often, public land was treated as the government's private asset instead of a public resource, and twenty years after the initial lease had been signed, the City and State continued to enclose and privatize the site. In 2012, "the City and State offered to grant FreshDirect a $130 million taxpayer subsidy to relocate its diesel trucking" food distribution operation to the Yard.[13] The move would bring an additional one thousand truck trips through the community every day.[14]

The State was not only privatizing public land, but it was exacerbating adverse health effects in a community that already suffered a disproportionate pollution burden. FreshDirect has and continues to contribute to poor air quality in the South Bronx,[15] which is home to an asthma epidemic. Asthma hospitalization rates in the Bronx have historically been higher than the national and citywide averages.[16] In 2012, there were more than thirty thousand cases of pediatric asthma, more than one hundred thousand cases of adult asthma, and more than forty thousand cases of chronic bronchitis in the

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[12] *See* DIV. OF MGMT. AUDIT, STATE OF NEW YORK OFF. OF THE STATE COMPTROLLER, *supra* note 2, at 15.

[13] *Campaign Against Fresh Direct*, S. BRONX UNITE, https://www.southbronxunite.org/campaign-against-fresh-direct (last visited Mar. 18, 2022); *see also* Michael Powell, *In Bronx, FreshDirect and Land of Great Promises*, N.Y. TIMES, Feb. 20, 2012.

[14] *See Campaign Against Fresh Direct*, *supra* note 13.

[15] *See* COLUM. UNIV. MAILMAN SCH. OF PUB. HEALTH, *FreshDirect Depot Brings Increased Traffic to South Bronx,* PHYS.ORG (May 12, 2020), https://phys.org/news/2020-05-freshdirect-depot-traffic-south-bronx.html.

[16] *See* Rafael Whu et al., *Risk Factors for Pediatric Asthma in the South Bronx*, 44 J. ASTHMA 855 (2007); INST. FOR CIV. INFRASTRUCTURE SYS., SOUTH BRONX ENVIRONMENTAL HEALTH AND POLICY STUDY: PUBLIC HEALTH AND ENVIRONMENTAL POLICY ANALYSIS 64 (Carlos E. Restrepo & Rae Zimmerman eds., 2007).

Bronx.[17] Moreover, Black and brown communities, like those in the South Bronx, are disproportionally impacted by air pollution that is often generated by white people's consumption of goods and services. A 2018 study published by the National Academy of Sciences revealed that Black Americans are exposed to approximately 56 percent more pollution than is caused by their consumption, and Latinx Americans are 63 percent more exposed.[18] In contrast, non-Latinx whites breathe about 17 percent less air pollution than they generate, earning a "pollution advantage."[19] Unsurprisingly, there was overwhelming community opposition to the project. South Bronx Unite, a coalition of neighborhood residents and community organizations working to improve and protect the social, environmental, and economic future of the Mott Haven and Port Morris neighborhoods of the South Bronx, filed a lawsuit against the City and State for their failure to conduct an adequate environmental review of the site and engaged in direct action to stop the deal.[20] Unfortunately, their lawsuit and appeal were dismissed, and the FreshDirect project moved forward.[21]

What started as a public land initiative meant to serve an environmental public purpose and achieve efficiency within freight transportation turned out to be a privatized, yet government subsidized, project that intensified existing environmental problems. Unfortunately, this dynamic is not unique to the Harlem River Yard project. From the state owned Atlantic Yards in downtown Brooklyn, which became a basketball arena surrounded by mostly luxury housing and retail spaces that displaced people of color and local businesses in the surrounding neighborhoods,[22] to the city owned

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17 *See* AM. LUNG ASS'N, STATE OF THE AIR 2012, at 124 (2012).

18 *See* Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PROC. NAT'L ACAD. SCIENCE 6001, 6001 (2019).

19 *See id*.

20 *See* Verified Petition under Article 78 of CPLR §§ 7801 et seq, S. Bronx Unite! v. N.Y.C. Indus. Dev. Agency, No. 260462-2012, 2013 WL 6840438 (N.Y. Sup. Ct. June 4, 2013).

21 *See* S. Bronx Unite! v. N.Y.C. Indus. Dev. Agency, No. 26046-2012, 2013 WL 6840438 (N.Y. Sup. Ct. June 4, 2013); S. Bronx Unite! v. N.Y.C. Indus. Dev. Agency, 983 N.Y.S.2d 8 (App. Div. 2014).

22 *See* MY BROOKLYN (New Day Films 2012); *Community Groups and Local Residents Reach Historic Accord with New York State and Developers of Brooklyn's Atlantic Yards Project,* TAKEROOT JUST., (June 27, 2014),

Bedford Armory in Crown Heights, Brooklyn, which was ground leased to a for-profit company to develop a mixed-use recreational site that will include a great deal of market-rate housing in a rapidly gentrifying neighborhood,[23] to the New York City Department of Education building in Queens, which the City attempted to designate for Amazon's headquarters without formal community input and approval,[24] examples abound in which low-income Black, brown, and immigrant communities are threatened by exploitative and destabilizing private development on public land. These communities are forced to wage arduous public land fights in their quest to hold the government accountable to using public land in service of the people. They call on their local and state elected officials to follow through on their mandate to protect the health and welfare of constituents and to develop without displacement.[25] They call for truly affordable housing,[26] fully resourced schools and hospitals,

https://takerootjustice.org/2014/06/community-groups-and-local-residents-reach-historic-accord-with-new-york-state-and-developers-of-brooklyns-atlantic-yards-project*; Atlantic Yards*, HUNTER COLL., http://www.hunter.cuny.edu/ccpd/community-planning-zoning/atlantic-yards (last visited Mar. 20, 2022); *see also* EUGENIE BIRCH & AMANDA LLOYD, WILSON CTR. & KOREA HOUS. & URB. GUAR. CORP., COMPARATIVE STUDY OF URBAN REGENERATION IN THE UNITED STATES AND SOUTH KOREA 6 (2020).

[23] *See* Anna Quinn, *Northern Crown Heights Doubled Its White Population in a Decade,* PATCH (Aug. 19, 2021, 9:16 AM), https://patch.com/new-york/prospect-heights/northern-crown-heights-doubled-its-white-population-decade (analyzing and tabulating 2020 Census data for Crown Heights); Devin Gannon, *Affordable Housing Lottery Opens at Bedford Union Armory in Crown Heights, from $367/Month*, 6SQFT (June 24, 2021), https://www.6sqft.com/affordable-housing-lottery-opens-at-bedford-union-armory-in-crown-heights-from-367month.

[24] *See* Max Scott & Veronica Olivotto, *Imagining Collective Ownership: Community Land Trusts Versus Amazon's HQ2*, MEDIUM (Sept. 16, 2021), https://medium.com/resilience/imagining-collective-ownership-community-land-trusts-versus-amazons-hq2-de400ebf5555; *see also* Deyanira Del Rio & Andy Morrison, *CityViews: NYC Needs Equitable Economic Development, Not the Amazon Deal*, CITY LIMITS (Nov. 28, 2018), https://citylimits.org/2018/11/28/cityviews-nyc-needs-equitable-economic-development-not-the-amazon-deal.

[25] *See* Will Doig, *"How Do We Get More Power?"*, OPEN SOC'Y FOUNDS. (May 4, 2020), https://www.opensocietyfoundations.org/voices/how-do-we-get-more-power/episode/fruit-belt.

[26] *See* Molly Greene & Sean McElwee, *Poll: The Bold Policies New York City Voters Want from Their Next Mayor*, APPEAL (June 4, 2021), https://theappeal.org/the-lab/polling-memos/bold-policies-new-york-city-voters-want-from-their-next-mayor.

and open access to recreational and green space.[27] They call for land justice: the creation of land mechanisms and spaces that will deliver and sustain crucial community resources for disenfranchised communities.[28] They have lived through and feel the history of structural racism and government-sponsored disenfranchisement through redlining,[29] slum clearance, benign neglect, and disinvestment,[30] followed by intense speculation and gentrification with the hyper-financialization of housing and deregulation.[31] Yet, they are sounding the alarm in silos and to little avail.

The City and State have no comprehensive directive to ensure that their vacant and underutilized public sites are used to achieve maximum public benefit for frontline communities, which we define as communities most impacted by government neglect and government-sponsored displacement. Ironically, Section 384 of the City's charter actually authorizes the sale of public land for the highest marketable price,[32] which results in a paradigm in which the City essentially incentivizes for-profit development by exploitative companies that prioritize profit over people. With no mandate to maximize community benefit on public sites, the City's constitution

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[27] *See* Kiara Thomas, *Residents Continue Push for New Community Arts Center at Abandoned Rehab Clinic*, MOTT HAVEN HERALD, Nov. 15, 2021, https://motthavenherald.com/2021/11/15/residents-continue-push-for-new-community-arts-center-in-mott-haven; Diana Olick, *Poor Neighborhoods Are Hotter Than Rich Ones—Especially During Heat Waves*, CNBC (Dec. 10, 2021, 7:00 AM), https://www.cnbc.com/2021/12/10/urban-heat-mapping-project-in-nyc-finds-poor-neighborhoods-hotter.html; NYC RACIAL JUST. COMM'N, NYC FOR RACIAL JUSTICE, 15, 97–99, 102–03 (2021).

[28] *See* NYC RACIAL JUST. COMM'N, *supra* note 27, at 102–03; A. Mychal Johnson et al., *Protect NYC Public Land for the Common Good*, N.Y. DAILY NEWS, Nov. 21, 2021, https://www.nydailynews.com/opinion/ny-oped-protect-nyc-public-land-for-the-common-good-20211121-2qe4hkk5gfgfnm4bo-holb4koze-story.html; *see also* Will Spisak, *New York CLTs Unite!*, NEW ECON. PROJECT (May 5, 2021), https://www.neweconomynyc.org/2021/05/ny-clts-unite.

[29] *See Undesign the Redline*, DESIGNING THE WE, http://www.designingthewe.com (last visited Mar. 21, 2022).

[30] *See* BARNARD DIGITAL HUMANITIES CTR., *Undesign the Redline Session #5: Gregory Jost — Undesigning the Extractive Economy*, VIMEO (Feb. 19, 2021), https://vimeo.com/515426196.

[31] *See generally* LANCE FREEMAN, THERE GOES THE 'HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP (2006); Desiree Fields, *Unwilling Subjects of Financialization*, INT'L J. URB. & REG'L RSCH., Sept. 2017, at 1.

[32] *See* N.Y.C., N.Y., CHARTER § 384(b)(1) (2022).

leaves open a gaping hole that allows for-profit development to thrive at the expense of the stability, safety, and flourishing of Black and brown New Yorkers.[33] Meanwhile, the City squanders opportunities to use one of its most valuable assets—land—to repair past harms and advance equitable development.

We cannot afford, as a city and state, to lose vital publicly owned assets to the speculative market. It is time to shift the paradigm: public land must be valued and used as a public resource rather than as a commodity. Frontline communities need a legal remedy that is malleable yet direct enough to protect against this form of land misappropriation. One such remedy, if expanded, is the public trust doctrine, which is upheld as valid New York common law. The State uses the public trust doctrine to protect against alienation of land designated as parkland without legislative approval, recognizing (1) that "the state owes its citizens special duties of care" with respect to common property, such as parkland,[34] and (2) the importance of parks to the health and welfare of the community at large.[35] The underlying assumption upon which these premises rest is that commodification of real estate creates the potential to grossly diminish shared spaces, like parkland, through privatization and enclosure. As such, these premises provide a useful foundation for protecting public land, a particularly valuable common asset in jurisdictions, from being hyper-developed at the expense of Black, brown, and marginalized communities.

This Article advocates for an expansion of the public trust doctrine to protect public land in New York. We define public land as land that is owned or controlled by city and state agencies. We focus our inquiry specifically on New York. Section I synthesizes the racially discriminatory history and use of American property law and frames the importance of expanding the application of legal property mechanisms like the public trust doctrine in terms of reparative

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[33] *See* Chris Walters, *Plan for People of Color: How Our Planning Priorities Got Us to COVID-19 Disparate Impacts*, ASS'N FOR NEIGHBORHOOD & HOUS. DEV. (June 15, 2020), https://anhd.org/blog/plan-for-people-of-color.

[34] *See* NDIVA KOFELE-KALE, THE INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES 144–45 (2006); *see also* New Yorkers for Parks, HEY, THAT'S MY PARK! UNDERSTANDING NON-PARK USES ON PUBLIC PARKLAND, https://www1.nyc.gov/html/mancb2/downloads/pdf/alienationbrochure.pdf (last visited Mar. 17, 2022).

[35] *See* Williams v. Gallatin, 128 N.E. 121, 122 (N.Y. 1920); *see also* Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1053 (N.Y. 2001).

value. Section II summarizes New York's present-day interpretation and application of the public trust doctrine. Section III advocates for the expansion of the public trust doctrine as a useful mechanism to challenge public land misappropriation and ensure that public land is protected as a public resource for frontline communities instead of a private government asset.

I. THE RACIALLY DISCRIMINATORY HISTORY OF AMERICAN PROPERTY LAW

From the time of this nation's colonization, European settlers and white American citizens have perpetrated a great deal of harm on Indigenous land, and property law—which was doctrinally used to the detriment of racially marginalized communities and to the benefit of whites—protected them. While early European colonizers exploited and wrested control of land from Indigenous tribes, Indigenous land use practices were colored as normatively deficient in the new American ethos, allowing white men to use the legal system to secure so-called rightful ownership of land that had already been occupied by Indigenous tribes.[36] American courts supported this cause of action by adopting European legal theories that reinforced and compounded the system of white supremacy already inherent within American society, such as the duty to claim "underutilized" land as proposed in John Locke's *Second Treatise of Government*.[37] That treatise reinforced tribalism's incompatibility with white civilization by equating tribalism's practice of keeping land in its natural and shared state with waste, while rationalizing Europeans' individualistic form of cultivation as the right way to secure property.[38] While the European form of cultivation granted the right of "true" ownership, tribal stewards were merely allowed occupancy, a right which white cultivators could take away from Indigenous people without due process.[39]

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[36] *See generally* Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

[37] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 25–51 (C.B. MacPherson ed., Hackett Publishing Co. 1980) (1689).

[38] *See id.*

[39] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); *see also* Johnson v. M'Intosh, 21 U.S. 543, 587–88 (1823).

Within the realm of American chattel slavery, Black bodies themselves became property necessary to "work" that stolen land. White supremacy normalized the assumption that the line between free and owned bodies could be drawn along racial distinctions. As we now know, this was not natural nor inherent to biology, but it proved to be an easy classification system—a social construct—that fit into the underlying sense of "racial otherness" that had already been developing between colonizers, Indigenous people, and indentured African servants within the "New World."[40] That classification system, which linked slavery to race, ownership, control, and economic domination, was then legitimized by statute through the slave codes in the late 1600s.[41] From that point on, property became contingent upon race, and race became an indicator of ownership.[42]

In a country that uses property ownership to secure and build wealth and ensure stability, this dynamic has had lasting and far-reaching racially discriminatory implications.[43] According to almost every metric of housing stability, economic advancement, and health, Black and brown communities experience the worst outcomes.[44] These circumstances start at the neighborhood level and are perpetuated through land and housing injustices. The foundations of property law in America were designed to uphold white supremacy. If we are to improve the racist systems that have harmed communities of color, we must accept this history, analyze its impacts through a critical race lens, and place racial and social equity

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[40] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716–17 (1993).

[41] *See id.* at 1718.

[42] *See id.*

[43] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

[44] *See* Dayna Matthew et al., *Time for Justice: Tackling Race Inequalities in Health And Housing*, BROOKINGS (Oct. 19, 2016), https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing; Pedro da Costa, *Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 8, 2019), https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites; Angela Hanks et al., *Systematic Inequality*, CTR. FOR AM. PROGRESS (FEB. 21, 2018), https://www.americanprogress.org/article/systematic-inequality; *Racism and Health*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated Nov. 24, 2021), https://www.cdc.gov/healthequity/racism-disparities/ index.html.

at the forefront by using a reparative framework when applying legal property mechanisms to protect the public interest.

II. NEW YORK'S INTERPRETATION AND APPLICATION OF THE PUBLIC TRUST DOCTRINE

From the standpoint of this racist history and its continuing impacts, we call for a reparative expansion of the public trust doctrine to equitably protect public rights in public land. Despite a strong emphasis on individual property ownership, American property law has also recognized certain shared rights in common property and upheld the public trust doctrine as a valid protection for such rights. Throughout the country, the public trust doctrine holds government responsible for preserving certain natural and cultural resources, including waterways,[45] parks,[46] wildlife habitats,[47] and open space,[48] for public and shared use. The public trust doctrine recognizes that an important role of government is to act as a bulwark against the privatization of key resources that are meant for public use and recreational enjoyment.[49]

The public trust doctrine, as currently applied in American courts, was adopted from English common law principles and based on a principled understanding that there are certain resources that are too fundamental to be individually appropriated and hoarded.[50] However, Indigenous communities have long understood and embodied the basic premise that land and the resources that flow from such land are meant to be carefully stewarded and shared communally.[51] Even though American courts do not use Indigenous land practices to legitimize use of the public trust doctrine, the authors of

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[45] *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892).

[46] *See Friends of Van Cortlandt Park v. City of New York,* 750 N.E.2d 1050, 1055 (N.Y. 2001).

[47] *See* Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984); *In re* Complaint of Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va 1980).

[48] *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

[49] *See* Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future,* 45 U.C. DAVIS L. REV. 665, 667 (2012).

[50] *See* Arnold v. Mundy, 6 N.J.L. 1, 147–51 (1821); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 119 (N.J. 2005).

[51] *See* INTER-AM. COMM'N ON HUM. RTS., INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES §§ 17, 64 (2009).

this Article pay respect and homage to Indigenous traditions of collective land use and common land stewardship in our choice to focus on the public trust doctrine as a tool to protect collective land rights, particularly when proposing solutions for land that was stolen from them.

In New York, the public trust doctrine protects the public's recreational enjoyment of land that has been designated as parkland.[52] Under New York common law, once land has been dedicated as parkland, it cannot be alienated for any other use, temporarily or permanently,[53] without legislative approval.[54] New York upholds the public trust doctrine based on the importance of parks to the health and welfare of the community at large.[55] The public trust doctrine, however, is not without its contradictions and racially disparate foundations.

First, the process by which land comes into the public trust can be fraught. One such example is Seneca Village—a thriving Black community that was destroyed in the 1850s to develop a portion of Central Park. Between 1825 and 1857, Seneca Village was a safe haven for Black, brown, and immigrant New Yorkers who sought refuge from the racial discrimination they faced in other parts of Manhattan.[56] The community provided a path to property ownership and brought Black Americans closer to full citizenship during a time when many were still property themselves.[57] Those protections, however, could not stop the long arm of city government from using its eminent domain power to disenfranchise close to three hundred

[52] N.Y. PARKS, RECREATION AND HISTORIC PRES., HANDBOOK ON THE ALIENATION AND CONVERSION OF MUNICIPAL PARKLAND 3–4 (2017).

[53] *See Friends of Van Cortlandt Park v. City of New York,* 750 N.E.2d 1050, 1055 (N.Y. 2001).

[54] *See* United States v. City of New York, 96 F. Supp. 2d 195, 202 (E.D.N.Y. 2000) (citing Williams v. Gallatin, 128 N.E. 121 (N.Y. 1920)).

[55] *See* Williams v. Gallatin, 128 N.E. 121, 122–23 (N.Y. 1920).

[56] *See Before Central Park: The Story of Seneca Village*, CENT. PARK CONSERVANCY: MAG. (Jan. 18, 2018), https://www.centralparknyc.org/articles/seneca-village.

[57] *See Seneca Village Landscape*, CENT. PARK CONSERVANCY, https://www.centralparknyc.org/locations/seneca-village-site (last visited Mar. 28, 2022).

people by forcing them to leave their homes.[58] Today, that land is a part of Central Park and can no longer be alienated for any other non-park purpose.[59] Indeed, Central Park is protected by the public trust doctrine as a shared recreational resource for all members of the public.[60] Yet, the act of taking land from a disenfranchised Black community, whose primary source of stability came from that land, to serve a larger white majority speaks volumes about the importance of transforming the public trust doctrine from having a narrow protectionist purpose to having a broader reparative purpose that can bring New York closer to achieving true land justice.

It is through that lens that we analyze the second contradiction inherent in New York's application of the public trust doctrine: the preservation and stewardship of parkland in the *public interest* directly correlates with the pecuniary and *private interests* of neighboring property owners.[61] Despite the fact that public parks are monetarily free to enter,[62] people pay a premium to live close to well-manicured open spaces because the speculative market recognizes these spaces as important amenities and, as such, can transmute that value into profit.[63] Therefore, when parkland is stewarded inequitably based on government value judgments about which communities deserve deeper investments in green and open spaces, it creates disparate impacts that reach past the park's boundaries. When a public park is well cared-for, the surrounding private properties' market value increases.[64] On the other hand, when a park is

[58] *See History of the Community*, SENECA VILLAGE PROJECT, http://projects.mcah.columbia.edu/seneca_village/htm/history.htm (last visited Mar. 28, 2022).

[59] *See Williams*, 128 N.E. at 122–23.

[60] *See id*.

[61] *See* John Krinsky & Paula Z. Segal, *Stewarding the City as Commons: Parks Conservancies and Community Land Trusts*, 22 CUNY L. REV. 270, 278 (2019).

[62] Note that New York courts have, however, "upheld the charging of fees for park facilities, provided that overall public access is not unduly constrained." *In re* City Club of N.Y., Inc. v. Hudson River Park Tr., Inc., 37 N.Y.S.3d 123, 126 (App. Div. 2016); *see also*_Comm. to Preserve Brighton Beach & Manhattan Beach, Inc. v. Plan. Comm'n of City of New York, 695 N.Y.S.2d 7, 14 (App. Div. 1999).

[63] *See* THE TR. FOR PUB. LAND, THE ECONOMIC BENEFITS OF PARKS, TRAILS AND CONSERVED OPEN SPACES IN BEAUFORT COUNTY, SOUTH CAROLINA 2 (2018).

[64] *See* Krinsky & Segal, *supra* note 61, at 278.

neglected, it can be viewed as evidence of "blight,"[65] which disproportionately harms Black, brown, immigrant, and poor neighborhoods.[66] Not only are these communities given unequal access to safe and healthy green spaces,[67] but they become subject to unchecked condemnation once blight is found.[68] They are also shut out of the ability to access community wealth even through the contradictory pecuniary functions of the public trust doctrine.[69] This narrow application of the public trust doctrine leads to the inadvertent commodification of parkland and a deepening of racial inequities. For these reasons, New York must redefine and expand its

[65] N.Y. UNCONSOL. LAW § 6253(6)(c) (McKinney 2022). New York state courts have been extraordinarily deferential to agency blight findings, even when they are highly disputed. In one of Columbia University's development plans, for example, the State, working in partnership with Columbia University, used its eminent domain power to condemn properties in the West Harlem neighborhood of Manhattan. *See* Kaur v. N.Y. State Urb. Dev. Corp., 892 N.Y.S.2d 8 (App. Div. 2009). The Appellate Division expressed pretextual concerns about the blight study that the New York State Urban Development Corporation (UDC) used to justify its condemnation, noting that "the record overwhelmingly establishes that the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University, a private elite education institution." *Id.* at 23. Nonetheless, the New York Court of Appeals reversed that lower court's decision, giving a great deal of deference to the disputed blight studies, which cited "dearth of new construction," "long-standing lack of investor interest," "utilization rates," "graffiti," and "building code violations in the area" as evidence of blight and a justified precursor to condemnation for the purpose of redevelopment. Kaur v. N.Y. State Urb. Dev. Corp., 933 N.E.2d 721, 727–28 (N.Y. 2010).

[66] *See* Margery Austin Turner & Solomon Greene, *Causes and Consequences of Separate and Unequal Neighborhoods*, URB. INST., https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/causes-and-consequences-separate-and-unequal-neighborhoods (last visited Mar. 28, 2022).

[67] *See* Winnie Hu & Nate Schweber, *New York City Has 2,300 Parks. but Poor Neighborhoods Lose Out.*, N.Y. TIMES, July 15, 2020, https://www.nytimes.com/2020/07/15/nyregion/nyc-parks-access-governors-island.html.

[68] *See* Berman v. Parker, 348 U.S. 26, 35–36 (1954); Dev. Don't Destroy (Brooklyn) v. Urb. Dev. Corp., 874 N.Y.S.2d 414, 422–24 (App. Div. 2009); W. 41st St. Realty LLC v. N.Y. State Urb. Dev. Corp., 744 N.Y.S.2d 121, 126 (App. Div. 2002). All these cases granted government agencies a great deal of deference for condemnations in areas that were considered "blighted" as long as the condemnation was rationally related to a public purpose (e.g., the revitalization of an urban renewal area).

[69] *See* Krinsky & Segal, *supra* note 61, at 278 n.33.

application of the public trust doctrine to protect against future injustices on public land.

III. AN EXPANSIVE AND REPARATIVE APPLICATION OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a useful mechanism to expand to protect against the kinds of public land misappropriation that occurred with the Harlem River Yard[70] because the doctrine inherently keeps government accountable to holding land in trust for the public in perpetuity.[71] In this trust-trustee relationship, the government is the trustee, and the beneficiaries are current and future citizens. In particular, the doctrine places three broad forms of restrictions on governmental authority:

> "[(1)] the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; [(2)] the property may not be sold, even for a fair cash equivalent; and [(3)] the property must be maintained for particular types of uses."[72]

The doctrine is not about the government's proprietary interests in a property nor the rights of government agents; it is about the protection of the public's rights in certain critical resources.[73] This places a strong check on the power of government, its agencies, and its powerful financial influences, while mitigating exploitation through private property ownership and control.[74]

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[70] *See supra* Introduction.

[71] *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

[72] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970). Sax based these restrictions on

> "broad language which commonly appears in public trust cases. 'This title is held in trust for the people for the purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically, it is trust property and should be devoted to the fulfillment of the purposes of the trust, to wit: the service of the people'. Hayes v. Bowman, 91 S.2d 795, 799 (Fla. 1957)." *Id.* at 477 n.25.

[73] *See* People ex inf. State Bd. of Harbor Comm'rs v. Kerber, 93 P.878, 879 (Cal. 1908).

[74] *See* Mary Christina Wood, *You Can't Negotiate with a Beetle: Environmental Law for a New Ecological Age*, 50 NAT. RES. J. 167, 201 (2010).

Moreover, the public trust doctrine is malleable. Over time, it has been interpreted to protect city streets,[75] municipal water supplies,[76] national parks,[77] and wetlands.[78] Scholars have noted that the public trust doctrine can be an effective tool to bring a broad stewardship ethic into property law.[79] We can and should expand the public trust doctrine to public land in New York that satisfies the following criteria: (1) frontline communities have mobilized and called for community resources on public land within their communities; (2) there is a sizeable and impending risk of privatizing that land for profit; and (3) there is potential to perpetrate harm on frontline communities by diminishing their access to the land. These are the circumstances that necessitate a strong fiduciary responsibility by government agents—who have systemic control over public land assets—on behalf of their constituents.[80] In these instances, they must be held to the highest duty of care as they are holding public land not for the private use of government agents, but for the people of the state. This duty of utmost loyalty and care is a basic tenet of the legal trust-trustee relationship,[81] and those duties should be applied to public land as they would be applied to any other form of trust property. Therefore, once public land satisfies all three of the aforementioned criteria, which we argue should invoke the public trust doctrine, the State must work with the municipal government to ensure that the land is accessible to frontline communities and sustainably developed and stewarded based on their shared needs,

[75] *See, e.g.*, Lohr v. Metro. Elevated R.R., 10 N.E. 528, 532–33 (N.Y. 1887); *see* Story v. N.Y. Elevated R.R., 90 N.Y. 122, 156–57 (1882); *see generally* Drake v. Hudson River R.R., 7 Barb. 508 (N.Y. Gen. Term 1849).

[76] *See* Watuppa Reservoir Co. v. City of Fall River, 18 N.E. 465, 472 (Mass. 1888).

[77] *See* Sierra Club v. Dep't of the Interior, 398 F. Supp. 284, 287 (N.D. Cal. 1975).

[78] *See* Just v. Marinette Cnty., 201 N.W.2d 761, 768 (Wis. 1972).

[79] *See* Timothy Patrick Brady, *"But Most of It Belongs to Those Yet to Be Born": The Public Trust Doctrine, NEPA and the Stewardship Ethic*, 17 B.C. ENV'T. AFFS. L. REV. 621, 633 (1990).

[80] The State's constitution states that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state." N.Y. CONST. art. XVII, § 1; *see also id.* § 3. As such, public resources should be allocated to address these concerns.

[81] *See* City Bank Farmers Tr. Co. v. Cannon, 51 N.E.2d 674, 675 (N.Y. 1943); *see* RESTATEMENT (THIRD) OF TRS. § 78 (AM. L. INST. 2007).

as articulated by members of those communities. Certain jurisdictions, including New York City, already have mechanisms for soliciting such community input in public forums with respect to land use decisions (e.g., through the Uniform Land Use Review Procedure).[82] This novel application of the public trust doctrine would ensure that those demands are binding on subsequent development of public land, and not merely advisory.

This expansive and reparative application of the public trust doctrine is rooted in accountability to the communities that have been historically harmed by state-sponsored development and systemic racism. Throughout New York City's history, Black, brown, immigrant, and poor communities have fought for dignity, stability, and critical community resources in their neighborhoods. In fact, there is a growing community land trust movement in New York City neighborhoods that have long borne the brunt of intersecting economic, housing, and health crises.[83] These communities have turned to the community land trust model as a way of using land to address the conditions created by government neglect, while creating shared economic security for present and future generations.[84] They are engaged in deep community planning and are working diligently and collectively to acquire and steward land as a way to sustainably address community needs, including unaffordable and substandard housing, environmental degradation, and displacement of longtime residents and small businesses.[85] Through the community

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[82] *See* N.Y.C., N.Y., CHARTER § 197-c (2022).

[83] *See NYCCLI Community Land Trust Initiatives*, NEW ECON. PROJECT, https://nyccli.files.wordpress.com/2020/11/clt-initiatives-map.jpg (last visited June 2, 2022); Miriam Axel-Lute, *New York City Becomes a Hotbed of Community Land Trust Innovation*, SHELTERFORCE, https://shelterforce.org/2017/11/07/new-york-city-becomes-hotbed-community-land-trust-innovation (Nov. 7, 2017); John Krinsky & Gregory Jost, *Land, Housing, and Racial Justice*, N.Y.C. CMTY. LAND INITIATIVE (June 29, 2020), https://nyccli.org/2020/06/29/land-housing-and-racial-justice; *see also* Carlina Rivera & Donovan Richards, *Opinion: City Must Invest in Bold Housing Solutions Like Community Land Trusts*, CITY LIMITS (June 10, 2019), https://citylimits.org/2019/06/10/opinion-city-must-invest-in-bold-housing-solutions-like-community-land-trusts (providing quotes from New York City elected officials, CLT organizers, advocates, and community residents regarding their reasons and goals for establishing community land trusts).

[84] *See* Krinsky & Jost, *supra* note 83.

[85] *See* Abigail Savitch-Lew, *The NYC Community Land Trust Movement Wants to Go Big*, CITY LIMITS (JAN. 8, 2018), https://citylimits.org/2018/01/08/the-nyc-community-land-trust-movement-wants-to-go-big;

land trust model, frontline communities are working to be the guardians of their own trusts.

For example, in direct response to the failures of the Harlem River Yard project, the South Bronx community created a Mott Haven-Port Morris Waterfront Plan to help offset the disproportionate environmental and health impacts of the project.[86] It would integrate designated open spaces on currently unoccupied portions of the Harlem River Yard to mitigate climate threats and toxic effects of noxious land uses near the site.[87] Simultaneously, the community established a community land trust, the Mott Haven-Port Morris Community Land Stewards, recognizing a "responsibility to steward the land and to use it in a way that values the lives of the people who live on it."[88] The community realized that "[d]ecisions about the land on which [they] live . . . work . . . and raise [their] children, are being made for [them] by those not invested in the health of the land or the people who call it home."[89] Since its establishment, this community land trust has worked to build resiliency and sustainability from the ground up by organizing a number of community visioning sessions, conducting feasibility studies on publicly owned sites, identifying critical public uses for those sites, and calling on elected officials to activate public land in furtherance of

Elise Goldin, *Public Land in Public Hands: Community Land Trusts Demand Control of City Land*, NEW ECON. PROJECT (Sept. 28, 2021), https://www.neweconomynyc.org/2021/09/cltdayofaction.

[86] *See Mott Haven-Port Morris Waterfront Plan*, S. BRONX UNITE, https://www.southbronxunite.org/mott-havenport-morris-waterfront-plan (last visited May 26, 2022); Nandini Bagchee, *Design & Advocacy in the South Bronx*, URB. OMNIBUS (May 3, 2017), https://urbanomnibus.net/2017/05/hearts-studio.

[87] *See Mott Haven-Port Morris Waterfront Plan, supra* note 86; Ben Kochman, *Community Plan to Unlock South Bronx Waterfront Recognized by State,* N.Y. DAILY NEWS, Oct. 19, 2014, https://www.nydailynews.com/new-york/bronx/plan-unlock-south-bronx-waterfront-recognized-state-article-1.1978191; *see also* CITY OF NEW YORK PARKS AND RECREATION, HARLEM RIVER WATERSHED AND NATURAL RESOURCES MANAGEMENT PLAN FOR THE BRONX 38, 56 (2020).

[88] *Community Land Trust*, S. BRONX UNITE, https://www.southbronxunite.org/community-land-trust (last visited Mar. 14, 2022).

[89] *Id.*

environmental, cultural, economic, and housing justice.[90] Nonetheless, the City has stalled in moving their projects forward.[91]

What would it look like for the City and State to act as trustees and be in true partnership with their people, uplifting and answering the demands of those who have been the most disadvantaged by government neglect, and making land the vehicle that drives reparative resource allocation? The City and State have relied too often on market solutions and private companies to address social ills, in ignorance of the fact that commodification of certain aspects of public life, e.g., land, health, and the environment, do not solve issues of social welfare but exacerbate them. For example, roughly 75 percent of affordable housing projects on city owned land have gone to for-profit developers in recent years,[92] despite the fact that for-profit firms are less likely to develop truly and permanently affordable housing.[93] This has led to upzonings of low-income, Black, and brown neighborhoods, creation of so-called "affordable" housing that is out of reach for most neighborhood residents, rampant speculation, and displacement of longtime, low-income New Yorkers from their communities and networks of support.[94] The manner in which city owned land is transferred, and to whom, has major implications for all, but particularly for communities of color that have been disproportionately harmed by exploitative and destabilizing public and private development.

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[90] *See* MOTT HAVEN-PORT MORRIS CMTY. LAND STEWARDS, HEARTS COMMUNITY CENTER 5–7, 10–11; BAGCHEE ARCHITECTS, H.E.ARTS COMMUNITY CENTER FEASIBILITY REPORT 4, 15, 20 (2018).

[91] A. Mychal Johnson, co-founder of South Bronx Unite, stated that, despite years of support from and community planning with local elected officials for the Waterfront Plan as well as their proposed Health, Education and Arts Center (H.E.Arts Center) in what is now a vacant Department of Health building, the city has not yet released any request for proposals in connection with the H.E.Arts Center. Moreover, the $2.7 million that was allocated for the Waterfront Plan was initially designated to the wrong city agency, stalling its roll-out. Telephone Interview with A. Mychal Johnson, Co-Founder, S. Bronx Unite (July 9, 2021).

[92] *See* STEPHANIE SOSA, MAXIMIZING THE VALUE OF NEW YORK CITY-FINANCED AFFORDABLE HOUSING 6 (2019).

[93] *See* SAMUEL STEIN, CMTY SERV. SOC'Y, ASSESSING DEBLASIO'S HOUSING LEGACY 26 (2020) ("Thirty-five percent of the units produced by nonprofits . . . were geared towards extremely low-income households, whereas just 18 percent of the units developed by for-profit firms were geared toward that same population").

[94] *See id.* at 2, 3, 18.

CONCLUSION

At the root of our proposal is a call to context: a redefinition of an existing legal mechanism. Some will argue that such an approach is inconsistent with America's *stare decisis* system of common law and precedent. However, we should be critical of and work to transform a system that builds off of early jurisprudence rooted in racist beliefs. Early property law cases relied on Lockean and other European theories to justify "its privileges of aggression against Indian people by stressing tribalism's incompatibility with the superior values and norms of white civilization."[95] Today, judges use those same racist theories to determine how certain property is protected and legal rights are doled out.[96] How is that justice?

In further support of a paradigm shift, property law is fundamentally doctrinal. It is within legal bounds to alter such doctrines so that they better suit present-day needs and are made accountable to the American legal goal of equality under the law.[97] Indeed, there was no legal precedent for the public trust doctrine when it first appeared in American case law.[98] Those seminal cases cited English common law as the basis by which navigable waters should be protected by the State.[99] They were also rooted in public policy: navigable waters were public in character and warranted protection by the State against private encroachment to ensure the ongoing public use and enjoyment of those waters.[100] At that time, the public trust doctrine suited the needs of a rapidly growing and interconnected America, but it did so during a period when the laws of America worked cohesively and explicitly to entrench white dominance. A reevaluation and expansion of the public trust doctrine is now needed to better suit the race equity needs of today. Throughout America's legal history, cases have set a new standard of morality and protections, even when there has been resistance from dominant

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95 Williams Jr., *supra* note 36, at 277.

96 *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210–12 (1978).

97 *See* U.S. Const. amend. XIV, § 1.

98 *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892); Arnold v. Mundy, 6 N.J.L. 1 (1821); Martin v. Lessee of Waddell, 41 U.S. 367, 411 (1842)*; see also* Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 727–30 (1986).

99 *See Arnold*, 6 N.J.L. at 71–72; *Martin*, 41 U.S. at 410.

100 *See Ill. Cent. R.R.*, 146 U.S. at 452.

voices.[101] If these standards stay true to the ideal of equality under the law, which requires moving past race neutrality, our legal system can move closer to achieving land and racial justice.

Others will argue that this proposal further encourages discrimination because, in fashioning a legal remedy for impacted communities, it centers the demands of Black and brown people. However, such an argument against the remedy ignores the reality of oppression. Proposals like the one we put forth "recognize that this has always been a nation of dominant and dominated and . . . changing that pattern will require affirmative, non-neutral measures designed to make the least the most and to bring peace, at last, to this land."[102] This Article demonstrates that the dominated are exactly who we have in mind in making this proposal. Members of the South Bronx community *needed* a reparative public trust framework to ensure that their waterfront actually served their environmental and public health needs and did not run counter to them. They needed a framework that amplified their demands, protected their interests in the land as long-time residents and community stewards, and granted them recourse when that land was misappropriated. They needed the law to work for them as it had for white, affluent residents and developers. It is not too late for us to get it right for the Black and brown residents still at risk of displacement, exploitation, and destabilization in neighborhoods with dwindling available public land.

[101] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Roe v. Wade, 410 U.S. 113, 116, 153 (1973).

[102] Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 10 (1989).