

**FROM CONSULTATION TO CONSENT:
COMMUNITY APPROVAL AS A PREREQUISITE TO
ENVIRONMENTALLY SIGNIFICANT PROJECTS**

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ABSTRACT

Since the United States enacted the National Environmental Policy Act (NEPA) in 1969, nations all around the world have adopted similar statutes. What started as a unique response to the American environmental movement grew to become a nearly global standard. Although the details of the regimes vary from country to country, there are two constants: (1) the regimes force the government to consider environmental impacts before conducting or authorizing projects, and (2) they allow some degree of public participation. This Article focuses on the latter of these two features.

Public participation in NEPA-style regimes generally means public consultation: Information is disseminated and civil society is allowed to comment. Depending on a range of factors—some political and some legal—

comments may influence the circumstances under which a project takes place or whether it occurs at all. Though the public's influence is often limited in practice, the mere fact of public participation at the project level—as opposed to participation at the candidate level through elections or at the issue level through referenda—is exceptional. In the United States and many other countries, NEPA and its counterparts represent a break from the normal rule of executive decision-making by encouraging public involvement and deliberative, participatory democracy.

Despite the progress, critics have accused these regimes of falling short. In practice, public consultation under NEPA-style frameworks is severely limited in terms of who participates, how many participate, and the extent to which this participation impacts the decision-making process. This is not surprising. By its very nature, consultation implies limited influence.

In this Article, I argue that policy-makers, both domestic and foreign, should replace consultation with consent as the public-participation requirement in certain cases. Although the concerns leading to the inclusion of public consultation in NEPA and its foreign counterparts were many, one of the more important ideas was that those persons affected by environmentally significant projects should have a say in the matter. Unfortunately, the consultation approach has proven increasingly ineffective. If the goal is to match influence with stake, consultation is the wrong mechanism.

Requiring consent, even in a limited number of cases, may seem like an extreme remedy. Not so. It is an attractive way to respond to a situation inherent in many major public works (especially infrastructure and energy projects) and in large-scale private endeavors on public land (especially extractive projects). While the benefits of these projects are often spread around an entire nation or large region, the environmental costs are frequently concentrated within a small, local community (the site community). Requiring the consent of the local site community insures that its interest is adequately accounted for in the decision-making process.

I. INTRODUCTION

When the National Environmental Policy Act (NEPA) was enacted in 1969,¹ it was hailed as a victory for both conservation and democracy.² Although NEPA did not introduce any specific conservation standards, it required the government to analyze the environmental impact of a proposed project, consider other options, and present its analysis to the public for comment and

¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2012).

² Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 483, 484 (2009) (“Early reactions to the Act suggested that it would become the environmental Magna Carta.”).

debate.³ By forcing the government to consider the environmental factor—and to do so transparently—NEPA would have the effect of screening out unsound projects.⁴ Even if the public's consent were not required *per se*, governmental agencies would be unlikely to push forward with a project that met overwhelming resistance.⁵ Public consultation would introduce an element of deliberative, participatory democracy; the government would make better decisions, and the public would be more likely to support those decisions. Even if some people disagreed with the ultimate outcome, they would be more likely to accept it having participated in the decision-making process.⁶

Since its enactment over forty years ago, the NEPA model of public consultation has spread to become a nearly global standard.⁷ Despite its popularity among governments, however, critics complain that it neither leads to environmentally sound choices nor promotes deliberative, participatory democracy.⁸ In this Article, I argue for a new model: one of consent rather than consultation.

There are many reasons why consent should be favored over consultation, but before summarizing those reasons, let me be clear about what I envision. First, I do not propose that every government project should be subjected to a national vote. The consent I envision is community consent: Only the community or communities most affected by the project should have the right to vote. The broader population should maintain the right to consultation, but its consent should not be a prerequisite to the project's implementation.

Second, not every government project should be subject to consent. Only those projects having a "significant" impact on the local environment could even *potentially* trigger the government's obligation to obtain community approval. Because "significant" is already well-defined under NEPA law—and exists as a criterion, in some form or another, in NEPA's foreign counterparts—debates over its meaning would not spiral out of control.⁹ To put it dif-

³ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989).

⁴ Cf. Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99, 112 (1994) (suggesting that state "mini-NEPAs" have been more effective at screening out faulty projects in the first instance).

⁵ See, e.g., Jeff Juel, *Idaho Panhandle National Forest Abandons ORV Expansion Project*, WILDLANDS CPR (Nov. 21, 2012), <http://www.wildlandscpr.org/blog/idaho-panhandle-national-forest-abandons-orv-expansion-project>.

⁶ See Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 677 (2005).

⁷ See Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1520 (2012).

⁸ See, e.g., Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 342 (2004); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 85–92 (1996).

⁹ See *infra* Part IV.B.1.a.

ferently, only those projects that currently require preparation of an Environmental Impact Statement (EIS) under NEPA could possibly trigger the requirement of community consent.¹⁰ What other condition must pertain? As elaborated in more detail below, the consent requirement would ultimately turn on the presence of a profound disconnect between those who benefit from the project and those who suffer its environmental costs. This would limit the consent component to major projects that display an acutely lopsided distribution of costs and benefits—projects that dramatically affect the local environment but fail to confer even marginally commensurate benefits on the local community—while at the same time preserving, to the extent possible, the regulatory structure already in place.

Third, the consent regime would not require absolute approval. The community would express its consent through a majority vote; minority views would still be considered by the responsible agency, but they could not block a finding of community consent.

Finally, and related to the previous point, is the idea that consent would not equal authorization. The government would not have the green light to go forward with the project simply because it obtained community consent. Community consent would be a necessary but not sufficient condition. Regardless, the responsible agency would still conduct (or, rather, have conducted) the regular analysis to determine whether the project should in fact be executed. Recognizing that local communities may sometimes misjudge environmental impact—or grant approval due to ancillary factors such as perceived economic benefits—community consent should not be dispositive.

To make the case for consent rather than consultation, I begin by discussing the role of public participation in the law of environmental impact assessment (EIA). Because public input is also central to another emerging body of law—indigenous rights associated with free, prior, and informed consent (FPIC)—I take care to distinguish the role of public participation within these two doctrinal contexts. Having made this distinction, I devote the rest of Part II to describing the NEPA consultation model and how it has spread to become a global standard. Tracing its history and theoretical underpinnings, we see that the consultation model was at least partially intended to address the complaint that public projects were being designed and executed without adequately considering local concerns. For instance, even if the construction of a dam makes sense from a regional or national perspective—its economic benefits outweighing the environmental harms in the aggregate—it may be a tragedy from a local perspective. To at least some degree, the consultation model was supposed to ensure that the local perspective was taken into account and given due weight.

With this in mind, I use Part III to discuss the pros and cons of this model and to evaluate the extent to which NEPA and its foreign counterparts

¹⁰ 42 U.S.C. § 4332(c) (2012).

actually pay respect to local interests. I focus in particular on how public participation under this model is at once too limited and too broad. It is too limited in the sense that consultation fails to account for the fact that the most serious environmental impacts of many projects are often concentrated in relatively small areas. Because these small communities have to live with the consequences of environmentally significant projects, their say-so should be required. At the same time, the consultation model is overbroad. By inviting all to opine on a project without differentiating between local and outside stakeholders, the concerns of locals are diluted. While non-locals should be free to comment, giving community residents the right to vote would better match the weight of the relative interests.

In Part IV, I outline a model of community consent that would enhance protection for local interests without upsetting the basic regulatory scheme. Incorporating the limitations I mention above, the community consent requirement would be narrowly tailored to achieve its principal objective: Governmental decision-making that takes proper account of the reality that the benefits of environmentally-impactful projects are often relatively diffuse, while the negative impacts tend to be focused within a small, regional community.¹¹

In Part V, I address several possible objections to my proposal. These include the contentions that consent would derail sustainable development; that consent would enable a minority to stymie the legitimate desires of the majority; and that consent for non-indigenous peoples would dilute emerging rights associated with indigenous peoples.

I conclude by urging policy-makers, both foreign and domestic, to consider amending their decision-making regimes so as to incorporate elements of consent. As I demonstrate in this Article, a policy shift towards consent would make sense normatively, ecologically, and—perhaps surprisingly—even economically.

¹¹ Throughout this paper I discuss the demographical disconnect between those who receive the benefits and those who feel the harms of large public works, especially infrastructure and extractive projects. This phenomenon has been observed in various contexts, including freeways, *see, e.g.*, Roger Nober, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 237 (1990), dams, *see, e.g.*, FRED PEARCE, WHEN THE RIVERS RUN DRY 104 (2006), mines and other extractive projects, *see, e.g.*, Marcia Langton & Odette Mazel, *Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom*, 26 J. ENERGY & NAT. RESOURCES L. 31, 36 (2008), and energy production, *see, e.g.*, Kirk Herbertson & David Hunter, *Emerging Standards for Sustainable Finance of the Energy Sector*, 7 SUSTAINABLE DEV. L. & POL'Y 4, 4 (2007). *But see* Todd J. Zywicki, *Baptists?: The Political Economy of Environmental Interest Groups*, 53 CASE W. RES. L. REV. 315, 348 (2002) (arguing that environmental regulations in the energy context tend to harm low-income peoples disproportionately by raising the cost of energy).

II. NEPA AND THE CONSULTATION PROCESS: THE DOMINANT GLOBAL MODEL FOR ASSESSING GOVERNMENT PROJECTS

In this Part, I describe the basic contours of NEPA and EIA law, taking care to illustrate the role and theoretical roots of public participation in environmental decision-making, as well as the related but distinct role of consent in emerging norms of indigenous rights. I draw out this distinction—between the indigenous-rights approach to consent and the EIA approach to public participation—in order to establish the primary normative foundation of my argument: the democratic rationale. I then discuss the way in which the NEPA public-consultation model has grown over the last few decades to become a nearly global standard, informing national and international EIA law around the world. Finally, I discuss one of the main advantages of public participation in environmental decision-making: its ability to give voice to local concerns that decision-makers might otherwise ignore or fail to recognize.

A. *Democracy, Consent, and the Law of Environmental Impact Assessment*

Before discussing NEPA and EIA in general, I should first explain the selection of this body of law as the analytical starting point. If one wanted to argue that consent should be required for certain environmentally-disruptive projects, EIA law would be only one of two prime candidates. The other would come from emerging norms of indigenous law. Through the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the international community has recognized that states should not sponsor certain projects in indigenous territory unless the people within that territory have given their “free, prior, and informed consent” (FPIC).¹² UNDRIP is not legally binding, the range of projects to which FPIC extends is unclear, and whether FPIC implies a veto right is hotly contested.¹³ Still, there is a growing consensus that consultation alone is insufficient when indigenous peoples are involved.¹⁴

So, one might wonder, wouldn't it make more sense to ground my argument in indigenous law rather than EIA law? In other words, shouldn't I be arguing for the expansion of FPIC to non-indigenous communities rather than for the modification of EIA regimes from consultation to consent? The intuitive

¹² Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

¹³ See Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 572, 591 (2009); Siegfried Wiessner, *Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime*, 15 UCLA J. INT'L L. & FOREIGN AFF. 239, 281 (2010).

¹⁴ See Anne Perrault, Kirk Herbertson & Owen J. Lynch, *Partnerships for Success in Protected Areas: The Public Interest and Local Community and Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 475, 489–94 (2007).

appeal of indigenous law notwithstanding, EIA is the better starting point because the rationale behind the public-consultation component of EIA applies more convincingly to my proposal than does the rationale behind FPIC for indigenous communities.

FPIC for indigenous peoples is a corollary of the right to self-determination, or the right of indigenous peoples to shape their own destinies.¹⁵ In UNDRIP, the foundational right to self-determination expresses itself in the more specific rights of FPIC, the right to develop and maintain juridical institutions, the right to maintain languages, the right to develop educational systems, and so forth.¹⁶ But to say that FPIC grows out of the broader right to self-determination is hardly sufficient to explain why FPIC has been associated most strongly with indigenous peoples. To do that, one must probe the relationship between *self-determination* and indigenous peoples. A full account of this relationship is beyond the scope of this paper, but it bears noting the key characteristics of this relationship; by so doing, we see that FPIC, informed as it is by self-determination, fails to offer the democratic rationale that underlies much of NEPA and other EIA regimes.¹⁷ It is this democratic rationale that forms the thrust of my argument.

To return to the key characteristics of self-determination, then, we see that this right is associated with indigenous peoples for the related reasons of (1) property, (2) sovereignty, (3) decolonization, and (4) cultural integrity.¹⁸ The property justification is essentially this: Indigenous peoples are—or should

¹⁵ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, ¶ 41, Human Rights Council, U.N. Doc. A/HRC/12/34 (July 15, 2009) (by James Anaya); Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 ARIZ. L. REV. 1301, 1323–24 (2011).

¹⁶ UNDRIP, *supra* note 12.

¹⁷ See Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 594 (1992) (“EIA facilitates democratic decisionmaking and consensus building regarding new development.”).

¹⁸ See KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 78–79 (2010) (describing the drafting history of UNDRIP); Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENVTL. L.J. 225, 257 (2012) [hereinafter “*Human Rights and Environmental Regulation*”] (stating that UNDRIP “emphasizes prior informed consent as an aspect of the right to property, the right to culture and the right to indigenous people’s sovereignty”); Kinnison, *supra* note 15, at 1323–27; McGee, *supra* note 13, at 571 (“The concept of free, prior and informed consent is based on the rights of participation and consultation, self-determination, and indigenous property rights.”); *id.* at 582 (“Exploitation without consent represents the greatest threat to the ability of these minority populations to protect their cultural traditions, social structures, means of livelihood, and way of life from myriad forms of destruction.”); *id.* at 579 (“The right to property and land ownership is another foundation of FPIC.”).

be—the owners of their traditional lands.¹⁹ Just as any citizen in the United States has control over her land, and can refuse government takings of her land absent eminent domain,²⁰ so too should indigenous peoples be able to block activities on their traditional lands.²¹ Starting at least with the Universal Declaration of Human Rights in 1948, there has been an increasing movement to recognize property rights in communal or other lands traditionally possessed by indigenous peoples.²² If indigenous peoples have a property claim in their lands, the theory goes, they should also have the right to self-determination (and thus FPIC) with respect to those lands.²³

This property justification ties into (but does not fully account for) the notion of sovereignty. Indigenous peoples are thought to be sovereign or quasi-sovereign populations not simply because they own or possess lands, but because they possess all or some of the attributes of sovereign peoples.²⁴ In addition to land, the classic criteria include a form of government, a population, and the capacity to enter into relations with other sovereigns.²⁵ Although these cri-

¹⁹ See Sarah S. Matari, *Mediation to Resolve the Bedouin-Israeli Government Dispute for the Negev Desert*, 34 *FORDHAM INT'L L.J.* 1089, 1101 (2011) (“Persistent international efforts to promote the customary land rights of indigenous persons culminated in [UNDRIP].”).

²⁰ *United States v. Miller*, 317 U.S. 369, 373 (1944).

²¹ See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) (recognizing the property rights of the Awas Tingni community and concluding that Nicaragua had violated those rights by initiating logging on traditional lands without community consent). Note, however, the interaction between this property rationale and the sovereignty rationale: If indigenous peoples are fully sovereign, then their property rights should not be subject to eminent domain. See Lawrence B. Landman, *International Protection for American Indian Land Rights?*, 5 *B.U. INT'L L.J.* 59, 85–86 (1987).

²² See Rebecca M. Bratspies, *Human Rights and Arctic Resources*, 15 *SW. J. INT'L LAW* 251, 269 (2009).

²³ See *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. ¶ 131 (2002) (imploping national governments to recognize communal property rights of indigenous peoples and to ensure that these rights are not relinquished in the absence of FPIC).

²⁴ See Glenn T. Morris, *International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 55, 78 (M. Annette Jaimes ed., 1992) (“Most indigenous peoples argue that because their territories have been invaded and incorporated into states without indigenous consent, self-determination does not constitute secession, but merely the exercise of inherent sovereign powers that have never been relinquished.”); cf. Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 *U. PA. J. CONST. L.* 357, 357 (2003) (“Universally recognized as being the ‘first’ inhabitants of subsequently colonized lands, indigenous peoples across the globe have an ambiguous status—alternatively considered by their encompassing nation-states to be ‘quasi-sovereign nations,’ ‘tribes,’ or ‘ethnic minorities.’”).

²⁵ See *Montevideo Convention on Rights and Duties of States* art. 1, Dec. 26, 1933, 49 *Stat* 3097, 165 *L.N.T.S.* 19; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 31–

teria are difficult to square with contemporary global conditions, indigenous peoples can often engage with these criteria more successfully than others.²⁶

The decolonization and cultural integrity rationales pick up where sovereignty leaves off. If indigenous peoples around the world find it difficult to satisfy the traditional criteria of sovereignty, it is due to the lingering effects of colonization, the overwhelming influence of globalization, and the difficulty of maintaining a distinct culture in the face of these forces.²⁷ Accordingly, self-determination at once grows out of historical conditions supporting recognition of sovereignty and responds to the pressures assaulting these conditions in the colonial and contemporary eras.²⁸

Thus understood, the theoretical justifications supporting FPIC for indigenous peoples do not readily lend themselves to the extension of this right to non-indigenous peoples. Should the right to grant or withhold consent only exist when people can claim a property right? Should it only occur when an affected community can describe itself as sovereign or quasi-sovereign? Should consent only pertain when the people of the site community have been “colonized” or otherwise historically oppressed? These are all good reasons to insist upon consent, but they are not the *only* reasons to insist upon this right. And so I place FPIC for indigenous peoples to the side, and pursue EIA law—and the participatory principle upon which it is built—as the foundation for my argument.²⁹

34 (1979); NII LANTE WALLACE-BRUCE, *CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* 51 (1994).

²⁶ To say that indigenous peoples can engage with the classic criteria of sovereignty is not to say that they can, as a legal matter, make the argument with absolute success. See Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 202 (2008) (“[I]ndigenous peoples as international legal actors do not occupy the same international legal plane as sovereign States.”). Rather, it is simply to recognize the “growing acceptance of indigenous peoples’ collective identity and distinct rights in international law and practice.” Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 35 (1994).

²⁷ See Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 129 (2011).

²⁸ See *id.*

²⁹ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that preparation of an EIS “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”); 40 C.F.R. § 1500.2(d) (2013) (“Federal agencies shall to the fullest extent possible . . . facilitate public involvement in decisions which affect the quality of the human environment.”); Albert C. Lin, *Clinton’s National Monuments: A Democrat’s Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 732 (2002) (“The public notice and participation requirements of NEPA have a strong democratic element in their emphasis on direct citizen participation.”); cf. Madeline June Kass, *A NEPA Climate Paradox: Taking Greenhouse Gases into Account in Threshold Significance Determinations*, 42 IND. L. REV. 47, 50–51 (2009) (“The NEPA review process ideally serves an informational role by encouraging informed federal decisionmaking and promoting

B. NEPA Basics

The stated purpose of NEPA is to require the federal government to “use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony”³⁰ Although this sounds like it contains both procedural and substantive components, NEPA is famous for not mandating any particular results or outcomes.³¹ Declarative purpose aside, it is largely a procedural statute.³²

Under NEPA, all federal agencies must incorporate environmental considerations in the analysis of “major” projects.³³ The depth of the analysis depends on the likely impact to the environment. The three basic levels of analysis are (1) a categorical exclusion, (2) an environmental assessment (EA), and (3) an environmental impact statement (EIS).³⁴

As the name suggests, a categorical exclusion operates to preclude any substantial analysis.³⁵ If the project in question is one that, as a category, has been found to result in no significant environmental impact, the agency may proceed with the project right away.³⁶ Projects that are categorically excluded from the NEPA analysis are often straight-forward, routine, and well-understood.³⁷ In the transportation context, for instance, categorically excluded projects include constructing bike paths and rest areas, resurfacing highways,

public awareness. Secondary benefits include fostering collaborative government and participatory democracy.”).

³⁰ 42 U.S.C. § 4331(a) (2012).

³¹ See *Robertson*, 490 U.S. at 351; *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (“Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a ‘hard look’ at the environmental consequences before taking a major action.”).

³² See *Balt. Gas & Elec.*, 462 U.S. at 97 (describing NEPA’s “twin aims”); see also RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 68 (2004) (“By the end of the 1970s, . . . the U.S. Supreme Court had rejected any such substantive dimension to NEPA, ruling instead that NEPA’s mandate was ‘essentially procedural.’”); cf. William Murray Tabb, *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 175, 211 (1997) (stating that NEPA’s “requirements, although not directed to achieve a particular outcome, are intended to ensure the integrity of the process and hopefully achieve better decisionmaking”).

³³ 42 U.S.C. § 4332(C) (2012). The Council on Environmental Quality has defined “major [f]ederal actions” as “actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18 (2013).

³⁴ Ted Boling, *Making the Connection: NEPA Processes for National Environmental Policy*, 32 WASH. U. J.L. & POL’Y 313, 318–19 (2010).

³⁵ Arnold W. Reitze, Jr., *The Role of NEPA in Fossil Fuel Resource Development and Use in the Western United States*, 39 B.C. ENVTL. AFF. L. REV. 283, 300 (2012).

³⁶ See, e.g., *Colo. Wild v. U. S. Forest Serv.*, 435 F.3d 1204, 1209 (10th Cir. 2006).

³⁷ See Boling, *supra* note 34, at 319.

and landscaping.³⁸ As one might imagine, requiring analysis of these sorts of projects would consume far too many agency hours, rendering them prohibitively expensive.³⁹ Given the known and relatively minimal environmental impact of these projects, the benefits of detailed analysis are outweighed by the costs.⁴⁰

Assuming a project does not fit within one of the categorical exclusions—and likewise assuming the project does not fall within a category that typically requires an EIS—the sponsoring agency must prepare an EA.⁴¹ An EA is a concise analysis that gauges the likely impact of the proposed project and possible alternatives.⁴² Practically, its main purpose is to determine whether the agency should conduct the more detailed analysis accompanying an EIS.⁴³ An EA generally describes the need for the project, available alternatives, the environmental impacts of the proposed action and alternatives, and the agencies and persons consulted in preparing the document.⁴⁴ If in the course

³⁸ 23 C.F.R. § 771.117(c)–(d) (2013).

³⁹ See Boling, *supra* note 34, at 319 (explaining that categorical exclusions “were designed to avoid repetitive analysis of actions that normally do not involve significant impacts”). Many complain that NEPA compliance is already too costly. See COUNCIL ON ENVIRONMENTAL QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1997) [hereinafter, CEQ STUDY] (observing that NEPA compliance often requires too much in the way of money and time); Irma S. Russell, *Streamlining NEPA to Combat Global Climate Change: Heresy or Necessity?*, 39 ENVTL. L. 1049 (2009) (arguing that NEPA should be streamlined in the context of clean energy projects to encourage development in this direction).

⁴⁰ See Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312, 2322 (2004) (“The public need not participate in minor decisions, and requiring them to do so would only distract them from environmentally significant decisions and unnecessarily burden agencies. Categorical exclusions thus promote agency efficiency and avoid masses of paper that might otherwise divert attention away from federal actions with real environmental effects.”).

⁴¹ Mark A. Chertok et al., *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, http://www.sprlaw.com/pdf/spr_nepa_eli_05.pdf (last visited Sept. 5, 2013).

⁴² *NEPA Documents*, U.S. DEP’T OF ENERGY, <http://energy.gov/nepa/nepa-documents> (last visited Sept. 5, 2013).

⁴³ See, e.g., *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996).

⁴⁴ *National Environmental Policy Act: Basic Information*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/basics/nepa.html> (last updated June 25, 2012). Under NEPA, “significance” is measured in terms of both “context” and “intensity.” 40 C.F.R. § 1508.27 (2013). The consideration of “context” requires agencies to judge “the significance of an action . . . in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” *Id.* § 1508.27(a). The “intensity” analysis bears more directly on the question of impact and requires agencies to consider (1) “both beneficial and adverse” impacts, (2) the effect on public health and safety, (3) “unique characteristics of the geographic area,” (4) the extent to which the impacts on the “human environment are likely to be highly controversial,” (5) the extent to which the risks to the human environment are unknown or uncertain,

of preparing the EA the agency determines that the project will have no significant impact on the environment, it issues a Finding of No Significant Impact (FONSI). Assuming the FONSI is not challenged in court, the agency may then break ground or issue the permit.⁴⁵

The law on public participation in EAs is somewhat muddled.⁴⁶ Although, according to the Council of Environmental Quality itself, CEQ regulations “do not require agencies to prepare a draft EA or circulate a draft or final EA for public review or comment,”⁴⁷ they do direct agencies to generally inform and engage the public throughout the decision-making process.⁴⁸ On this basis, some courts have inferred a duty to solicit public comment on draft EAs.⁴⁹ Other courts have held the opposite.⁵⁰ Whether out of an abundance of caution or a genuine sense of duty, most agencies have taken it upon themselves to make draft EAs available to the public and to receive input before issuing a FONSI, at least in controversial cases.⁵¹

(6) the extent to which the project decision could establish a precedent or signal a decision in principle about a future action, (7) “whether the action is related to other actions with individually insignificant but cumulatively significant impacts,” (8) the extent to which the action may negatively affect sites of historic, scientific, or cultural importance, (9) whether the action will negatively impact a species (or its critical habitat) listed as endangered or threatened under the Endangered Species Act, and (10) whether the action will threaten violation of federal, state, or local requirements designed to protect the environment. *Id.* § 1508.27(b).

⁴⁵ *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 599 (9th Cir. 2010).

⁴⁶ *See Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004) (“NEPA’s public involvement requirements are not as well defined when an agency prepares only an EA and not an EIS.”).

⁴⁷ Nancy H. Sutley, *Memorandum for Heads of Federal Departments and Agencies: Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*, COUNCIL ON ENVTL. QUALITY 11–12, http://www.whitehouse.gov/sites/default/files/microsites/ceq/nepa_improving_efficiency_draft_guidance.pdf (last visited Sept. 5, 2013).

⁴⁸ 40 C.F.R. §§ 1500.1(b), 1506.6(a) (2013).

⁴⁹ *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 970–71 (9th Cir. 2003); *see Ohio Valley Env’tl. Coal. v. U.S. Army Corps of Eng’rs*, 674 F. Supp. 2d 783 (S.D. W. Va. 2009).

⁵⁰ *Montrose Parkway Alts. Coal. v. U.S. Army Corps of Eng’rs*, 405 F. Supp. 2d 587, 596 (D. Md. 2005); *see Natural Res. Def. Council, Inc. v. Forest Service*, 634 F. Supp. 2d 1045 (E.D. Cal. 2007); *Natural Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115 (D.D.C. 2007).

⁵¹ *See, e.g., Bureau of Land Management, BLM Seeks Comments on EA for Wind River/Bighorn Basin District Portion of August 2013 Oil and Gas Lease Parcels*, U.S. DEP’T OF THE INTERIOR (Jan. 25, 2013), http://www.blm.gov/wy/st/en/info/news_room/2013/january/25wrbbd-leasesale.html (seeking public comment on EA in connection with proposal to grant oil-and-gas leases on up to 98,000+ acres in Wyoming’s Wind River Range); *NEPA Documentation*, U.S. DEP’T OF TRANSP., <http://www.environment.fhwa.dot.gov/projdev/docuea.asp> (last visited Sept. 5, 2013) (stating agency policy that “EAs do not need to be circulated but they must be made

If the agency determines that the project will result in significant impact, it must prepare a full-blown EIS.⁵² An EIS typically has four main sections: (1) an introduction that sets forth the purpose and need of the project; (2) a description of the environment at issue; (3) the various alternatives to the project, one of which must be a “no action” alternative; and (4) an analysis of the expected environmental impact of each alternative, including the impact on endangered species, air, water, historical and cultural sites, the local economy, and the public fisc.⁵³ If the project is expected to have a particularly profound impact on the environment, the EIS will also normally include an environmental mitigation plan (EMP).⁵⁴ An EMP is a set of design and operational measures that aim to prevent or mitigate adverse impacts.⁵⁵

The EIS process is characterized by stricter participation requirements. If an agency decides to prepare an EIS, the public has an opportunity to get in on the ground floor through involvement in scoping.⁵⁶ Scoping is the step during which the agency identifies the issues to be considered in the EIS.⁵⁷ Federal regulations require agencies to actively seek input from the public and other agencies on scoping determinations.⁵⁸ Following scoping, the agency prepares a draft EIS and makes it available for public comment.⁵⁹ The agency must give the public a minimum of forty-five days to respond.⁶⁰ Although the agency retains discretion over whether to hold a public hearing, the agency must do so when there is “[s]ubstantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.”⁶¹ After receiving comments from the public and other agencies—whether written or submitted at a hearing—the agency must then prepare a final EIS addressing the “responsi-

available to the public through notices of availability in local, state, or regional clearinghouses, newspapers and other means”).

⁵² Again, the efficient use of limited agency resources is key. “The EIS process reflects a prioritization of agency resources to focus on those environmental effects deemed ‘significant.’” Tabb, *supra* note 32, at 206.

⁵³ 40 C.F.R. §§ 1502.13–1502.16 (2013).

⁵⁴ Even if the agency does not include a full mitigation plan, mitigation should be discussed in the EIS. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

⁵⁵ See, e.g., DEP’T OF ENERGY, BELIZE SOLID WASTE MANAGEMENT PROJECT ENVIRONMENTAL IMPACT ASSESSMENT REVISED 25–26 (2008), available at <http://www.doe.gov.bz/documents/EIA/Solid%20Waste/003%20SW%20Rev%20EIA%20Exec%20Summary.pdf>.

⁵⁶ 40 C.F.R. § 1501.7 (2013).

⁵⁷ *Id.* § 1501.7(a)(2)–(3).

⁵⁸ *Id.*

⁵⁹ *Id.* § 1502.19.

⁶⁰ *Id.* § 1506.10(c).

⁶¹ *Id.* § 1506.6(c).

ble” concerns raised with respect to the draft.⁶² Thirty days after distributing the final EIS, the agency may render its ultimate decision.⁶³

Judicial review of agency decisions under NEPA is deferential.⁶⁴ “The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.”⁶⁵ Whether the agency analysis resulted in a FONSI or a decision approving the project with modifications following an EIS, the court will only reverse the decision if the agency failed to take the requisite “hard look” at the potential environmental impacts.⁶⁶ Generally speaking, this is not a difficult showing for the agency to make.⁶⁷

C. *The NEPA Framework Goes Global*

So how did the basic consultation framework of NEPA expand beyond U.S. borders to become a nearly global standard?⁶⁸ For one thing, the environmental movement of the 1960s and 70s⁶⁹ was not limited to the United States.⁷⁰

⁶² *Id.* § 1502.9(b).

⁶³ *Id.* §§ 1505.2, 1506.10(b)(2).

⁶⁴ Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 371 (1989).

⁶⁵ *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97–98 (1983).

⁶⁶ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989); *Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 68 (D.D.C. 2000). Note, however, that if a plaintiff challenges the agency's decision to forgo an EIS on the basis of a FONSI, the plaintiff must only show “substantial questions” as to the issue of “significant impact.” *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988).

⁶⁷ See Dorothy W. Bisbee, *NEPA Review of Offshore Wind Farms: Ensuring Emission Reduction Benefits Outweigh Visual Impacts*, 31 B.C. ENVTL. AFF. L. REV. 349, 351 (2004) (“[I]t is settled that courts apply a highly deferential standard of review to NEPA decisions.”).

⁶⁸ See Ann Hironaka, *The Globalization of Environmental Protection: The Case of Environmental Impact Assessment*, 43 INT'L J. OF COMP. SOC. 65, 66 (2002) (“Environmental Impact Assessments were first developed in the United States in 1969, but have diffused rapidly to many other countries in the following decades.”); Nicholas Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 404 (2003) (“NEPA has served as a model for counterpart laws within the United States . . . and in other nations.”). I use the term “global standard” to describe the increasingly harmonious evolution of both national laws within various countries and international laws among such countries. In this sense, my use of the term is similar to Yang and Percival's description of “global environmental law.” See Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615 (2009).

⁶⁹ Though the environmental movement exploded onto the political scene during this time period, it would be a mistake to think that the movement was somehow spontaneous or without historical build-up. LAZARUS, *supra* note 32, at 44.

⁷⁰ See DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 140 (4th ed. 2011) (“A similar transformation was occurring throughout the industrialized world as many

Activists staged protests and gained political ground in Europe,⁷¹ Asia,⁷² Australia,⁷³ Latin America,⁷⁴ and Africa,⁷⁵ raising concerns over water pollution, air contamination, species loss, and more.⁷⁶

In terms of legal reform, the biggest event was the Stockholm Conference and Declaration of 1972.⁷⁷ Creating the first UN body exclusively devoted

countries passed national environmental laws and established environmental institutions in the late 1960s and early 1970s.”).

⁷¹ See, e.g., Christopher Rootes, *The Transformation of Environmental Activism: An Introduction*, in ENVIRONMENTAL PROTEST IN WESTERN EUROPE 1, 9–11 (Oxford Univ. Press 2003) (discussing the history of Germany’s Green Party); Do-Wan Ku, *The Structural Change of the Korean Environmental Movement*, 25 KOR. J. OF POPULATION & DEV. 155, 156 (1996) (describing protests in the 1960s and the emerging environmental movement in Korea); see also HILARY F. FRENCH, GREEN REVOLUTIONS: ENVIRONMENTAL RECONSTRUCTION IN EASTERN EUROPE AND THE SOVIET UNION 30 (1990) (identifying the Chernobyl crisis as the pivotal moment for the environmental movement in the Soviet Union); cf. Douglas Lind, *The Crane, the Swamp, and the Melancholy: Nature and Nihilism in Soviet Environmental Literature and Law*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 381, 386 (2009) (“Not until the 1960s did the Soviet Union begin anew to enact laws protective in any meaningful way of the environment and natural resources.”). But see Srini Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT’L ENVTL. L. & POL’Y 267, 280–81 (2007) (“China was at least two decades behind the United States and Western Europe in introducing domestic environmental laws . . .”).

⁷² See, e.g., JEFF HAYNES, POLITICS IN THE DEVELOPING WORLD: A CONCISE INTRODUCTION 229–30 (2002) (describing the history of the “Chipko Movement,” or the practice of individuals wrapping themselves around trees to prevent them from being felled, which started in northern India in the 1970s).

⁷³ See generally GREG BUCKMAN, TASMANIA’S WILDERNESS BATTLES: A HISTORY (2008).

⁷⁴ In Brazil, for instance, the mid-1970s saw the initiation of a campaign by rubber-tappers to halt the destruction of rainforest by encroaching ranchers. Although the campaign managed to save 1.2 million acres of rainforest, its leader, Francisco “Chico” Mendes, was brutally murdered in 1988. Anthony L. Hall, *Land Tenure and Land Reform in Brazil*, in AGRARIAN REFORM AND GRASSROOTS DEVELOPMENT: TEN CASE STUDIES 205, 213 (Roy L. Posterman et al. eds., 1990).

⁷⁵ In South Africa, for instance, concerns of environmental justice—particularly the fair distribution of water—took center stage during the transition from apartheid to democracy in the early 1990s. See Rose Francis, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power*, 18 GEO. INT’L ENVTL. L. REV. 149, 156–57 (2005).

⁷⁶ Although protests and corresponding legal reforms occurred in all these areas, however, the environmental movement did seem to pick up more steam in the developed world—at least in the 1960s and 1970s. There are at least two reasons for this: (1) with many of the worst environmental problems stemming directly from industrialization, developing nations did not experience the full force of these problems; and (2) developing nations had more urgent challenges, like widespread poverty and hunger and the formation of new governments in the post-colonial era. See HUNTER ET AL., *supra* note 70, at 140–41. By the late 1980s, environmental protection had become a policy priority in developing countries as well. See generally Daniel Bodansky, *The United Nations Framework on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 526 n.455 (1993).

to environmental issues—the United Nations Environment Programme—the Stockholm Conference also generated movement towards establishing EIAs and public comment as a global standard.⁷⁸ Five of the recommendations coming out of the conference encouraged nations to assess potential environmental impacts before breaking ground on public projects.⁷⁹ As it now stands, over 70% of nations require EIAs in at least certain types of public works.⁸⁰ And even if a few nations still do not require EIAs, they may eventually find themselves legally bound to do so under evolving standards of customary law.⁸¹

That being said, there is still a great amount of diversity among regional and national approaches to environmental decision-making.⁸² In the Europe-

⁷⁷ United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf.48/14 (June 16, 1972) [hereinafter Stockholm Declaration].

⁷⁸ See Joan R. Goldfarb, *Extraterritorial Compliance with NEPA amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543, 583 (1991).

⁷⁹ Stockholm Declaration, *supra* note 77. Although EIAs vary from country to country, the basics remain largely the same. Professor Hironaka describes the global standard as follows:

Environmental Impact Assessments (EIAs) are reports of predicted environmental consequences that are typically a prerequisite to development projects such as roads or buildings. Ideally, an EIA fulfills three tasks. First, the EIA describes the proposed project and the predicted environmental effects of the project in the immediate and long-term future. Second, the EIA lays out the alternatives for the decision-maker and calculates the costs and benefits of each alternative. Third, the public and relevant interest groups are informed about the contents of the EIA and are allowed to negotiate over the details of the plan.

Hironaka, *supra* note 68, at 66 (internal citations omitted).

⁸⁰ Kevin R. Gray, *International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 83, 89 (2000); see also Caleb W. Christopher, *Success by a Thousand Cuts: The Use of Environmental Impact Assessment in Addressing Climate Change*, 9 VT. J. ENVTL. L. 549, 553 (2008) (“The NEPA model was adopted in varying forms by over 100 nations within their domestic law.”).

⁸¹ See HUNTER, ET AL., *supra* note 70, at 309 (“Frequently mentioned candidates for customary status include . . . the principle that State actions should be undertaken only after conducting an environmental impact assessment.”). *But see id.* at 310 (“Although [this and other principles] frequent reiteration in international documents of every kind provides evidence of possible *opinio juris*, State practice may be too new and insufficiently uniform to satisfy the consistent State practice requirement.”). Even where an EIA is not statutorily required, some states have recognized it as the usual and proper practice. See, e.g., *Save Guana Cay Reef Association Ltd. v. The Queen & Ors* [2009] UKPC 44, [12] (Bahamas) (“The preparation of the EIA in this case, and its submission to The Bahamas Environment, Science and Technology Commission (BEST Commission) was in accordance with what has become the usual practice, but it is not a practice required by statute.”).

⁸² See Mark Squillace, *An American Perspective on Environmental Impact Assessment in Australia*, 20 COLUM. J. ENVTL. L. 43, 45 (1995) (“Although EIA legislation has become commonplace throughout the world, marked contrasts exist in the manner in which EIA has developed and been implemented.”); ENVIRONMENTAL LAW ALLIANCE WORLDWIDE, *GUIDEBOOK FOR EVALUATING MINING PROJECT EIAs* 87 (2010) (“Public participation requirements and imple-

an Union, for instance, the process is similar to NEPA at the surface level, but significant deviations appear once we dive into the details. One point of distinction lies in the identity of the entity charged with preparing the impact statement.⁸³ Whereas NEPA places this duty with the agency,⁸⁴ in the EU the statement is “prepared by or on behalf of the developer, not a neutral party, and so is likely to give a distorted picture of the true environmental impact.”⁸⁵ While this difference is somewhat technical in nature—being the product of specific legislation—other differences between the American approach and its foreign counterparts arise from more fundamental rules. In Australia, for instance, citizen suits challenging agency action are impeded by the “English rule” of cost and fee assessment (requiring the losing party to pay the winning party’s reasonable costs and attorney’s fees).⁸⁶ Despite these differences, the commonality is far more striking: Nations around the world have adopted laws that (1) require government to consider the environmental impacts of a project prior to approval and (2) allow some measure of public input.⁸⁷

mentation vary widely, depending on the particular EIA system. Some laws require extensive public involvement as part of the EIA process, while others make it discretionary, or are silent on the matter.”).

⁸³ Louis L. Bono, *The Implementation of the EC Directive on Environmental Impact Assessment with the English Planning System: A Refinement of the NEPA Process*, 9 PACE ENVTL. L. REV. 155, 174 (1991). Another distinction is the way in which projects are singled out for EIAs. Whereas NEPA vaguely requires EISs for actions “significantly affecting the quality of the human environment,” 42 U.S.C. § 4332(C) (2012), the EU directive specifically identifies the projects for which an EIA *must* be prepared, Council Directive 97/11, 1997 O.J. (L 73) 5, Annex I (EC).

⁸⁴ Bono, *supra* note 83, at 174.

⁸⁵ DAVID WILKENSON, ENVIRONMENT AND LAW 118 (2002); *see also* DONALD M. GOLDBERG, CTR. FOR INT’L ENVTL. LAW, A COMPARISON OF SIX ENVIRONMENTAL IMPACT ASSESSMENT REGIMES: THE UNITED STATES, THE CZECH REPUBLIC, SLOVAKIA, THE EUROPEAN COMMUNITY, THE WORLD BANK, THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT 9–10 (1993), available at <http://www.ciel.org/Publications/AComparisonof6EnvReg.pdf> (outlining difference between NEPA and EU law as it concerns responsibility for statement preparation). This is also the case in Taiwan. *See* Dennis Te-Chung Tang, *New Developments in Environmental Law and Policy in Taiwan*, 6 PAC. RIM L. & POL’Y J. 245, 258–59 (1997).

⁸⁶ Squillace, *supra* note 82, at 56; Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 329 (2013).

⁸⁷ *See* Gray, *supra* note 80, at 90; Yuhong Zhao, *Public Participation in China’s EIA Regime: Rhetoric or Reality?*, 22 OXFORD J. OF ENVTL. L. 8990 (2010) [hereinafter *Public Participation in China*] (“Public participation forms an essential part of any efforts to tackle environmental problems. It is treated as the cornerstone of Environmental Impact Assessment (EIA) in the West, which has critical value in informing decision-makers of the potential environmental harms of a proposed project or action.”). Whether these laws are enforced is another matter altogether. Particularly in the developing world, EIA laws that impress as written are often paper tigers. *See, e.g.*, Yuhong Zhao, *Assessing the Environmental Impact of Projects: A Critique of the EIA Legal Regime in China*, 49 NAT. RESOURCES J. 485, 500 (2009) (“The 2005 ‘storm of environmental protection’ has revealed the common practice of many project proponents . . . to start

Underlying this movement is the ascendancy of a political outlook that sees citizen input as fundamental to government decision-making regarding the environment. As expressed in 1992's Rio Declaration:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁸⁸

In addition, citizen input now plays an important, though less significant, role in international environmental law (as opposed to national law in place throughout the world's countries).⁸⁹ In Europe, for instance, environmental non-governmental organizations (NGOs) have been recognized as "legitimate bearers of procedural rights on behalf of affected publics."⁹⁰ Rather than just observing the design of international conventions and treaties, NGOs are beginning to actively participate in the process.⁹¹

construction first and then, if caught by the enforcement authority, submit an EIA document and continue with construction.").

⁸⁸ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), available at http://search.yahoo.com/r/_ylt=A0oG7nq4f1dSpXIAb4FXNy0A;_ylu=X3oDMTEzNGtpY3AyBHNIYwNzcgRwb3MDMgRjb2xvA2FjMgR2dGlkA1ZJUDI4NF8x/SIG=12nqn7si2/EXP=1381494840/**http%3a//sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

⁸⁹ See Michael Mason, *Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law*, 12 GLOBAL GOVERNANCE 283, 284 (2006) ("There is an emerging body of international law that, although state centered in its formulation and implementation, is attuned both to safeguarding collective ecological interests and to allowing at least some input from public actors in administering its constituent environmental obligations."); Peter H. Sand, *The Evolution of International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 29, 41 (Daniel Bodansky et al. eds., 2007) (describing the "participatory revolution" that occurred at Rio in 1992).

⁹⁰ Mason, *supra* note 89, at 283.

⁹¹ *Id.* That being said, we should be careful not to exaggerate the growing influence of civil society and NGOs vis-à-vis the environmental decision-making process. From a normative standpoint, we might wish to reach a place where civil society and governmental agencies stand on an equal footing, but that does not make it so as a matter of fact. See Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 247–48 (2006) ("Some commentators . . . present

To cite one recent example of citizen input in the design of international environmental law,⁹² consider the process behind the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (“Land Tenure Guidelines”), adopted in 2012 by the UN Committee on World Food Security.⁹³ Three years in the mak-

a very rosy picture of the nature and extent of NGO influence on international law, though often with little empirical evidence to substantiate their claims.”). As it now stands, the notion of genuine parity between state and non-state actors seems more myth than accurate description of reality. Still, there are signs of progress. See Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 13 (1997).

⁹² The Land Tenure Guidelines and the Rio Declaration are but two examples of soft-law instruments that emphasize the importance of public participation in environmental lawmaking. Other examples include United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, Agenda 21, ch. 23, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), available at http://search.yahoo.com/r/_ylt=A0oG7nq4f1dSpXIAb4FXNy0A;_ylu=X3oDMTEzNGtpY3AyBHNIwNzcgRwb3MDMgRjb2xvA2FjMgR2dGIkA1ZJUDI4NF8x/SIG=12nqn7si2/EXP=1381494840/**http%3a//sustainabledevelopment.un.org/content/documents/Agenda21.pdf; International Conference on Water and the Environment, Jan. 26–31, 1992, *The Dublin Statement on Water and Sustainable Development*, princ. 2 (Jan. 31, 1992), available at <http://www.un-documents.net/h2o-dub.htm>; and the World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, princs. 4, 26, 138, 141, 164, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002). Among binding legal instruments, the following treaties or conventions require some level of public consultation: Agreement on Cooperation for the Protection and the Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins, Port.-Spain, art. 6, Nov. 30, 1998, 2099 U.N.T.S. 275; Aarhus Convention, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention], available at <http://www.uncece.org/env/pp/documents/cep43e.pdf>; Helsinki Convention, Convention on the Protection and Use of Transboundary Watercourses and International Lakes (“Helsinki Convention”), arts. 11(3), 16(1)–(2), Mar. 17, 1992, 1936 U.N.T.S. 269; Ramsar Convention, Convention on Wetlands of International Importance Especially as Waterfowl Habitat, art. 3(a), Feb. 2, 1971, 996 U.N.T.S. 245; Association of South East Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources, art. 16(2), July 9, 1985, available at <http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE000820.txt>; Canada-Mexico-United States North American Agreement on Environmental Cooperation, art. 1(h), Sept. 14, 1993, 32 I.L.M. 1480; Framework Convention on the Protection and Sustainable Development of the Carpathians, art. 13(1), May 22, 2003, available at <http://www.carpathianconvention.org/text-of-the-convention.html>; Revised African Convention on the Conservation of Nature and Natural Resources arts. XVI, XX, July 11, 2003, available at <http://www.au.int/en/content/african-convention-conservation-nature-and-natural-resources-revised-version>; Tripartite Interim Agreement Between the Republic of Mozambique and the Republic of South Africa and the Kingdom of Swaziland for Co-Operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses, Mozam.-S. Afr.-Swaz., art. 12, Aug. 29, 2002, available at <http://www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/En/TR001811.doc>.

⁹³ COMM. ON WORLD FOOD SEC., VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY

ing, the Land Tenure Guidelines were the result of broad-based consultation, including ten regional, one private sector, and four civil society meetings. Attended by nearly 1,000 people from over 130 countries, “[t]he participants represented government institutions, civil society, private sector, academia and UN agencies.”⁹⁴

In keeping with the trend, the Land Tenure Guidelines identified “consultation and participation” as one of the key implementation principles.⁹⁵ According to the Guidelines, governments seeking to implement new land policies should “engag[e] with and seek[] the support of those who . . . could be affected by decisions[] prior to decisions being taken.”⁹⁶ In a victory for marginalized peoples, the Committee on World Food Security further advised governments to take “into consideration existing power imbalances between different parties” while “ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.”⁹⁷

In addition to building upon the Rio Declaration, instruments like the Land Tenure Guidelines expand upon the principles announced in the regional Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (better known as the “Aarhus Convention”).⁹⁸ The 1998 Aarhus Convention stands out as an international agreement exclusively aimed at ensuring public participation and the right to know in the context of environmentally sensitive projects. Although limited by its regional scope—its signatories are countries in Europe and Central Asia—the Aarhus Convention distinguishes itself as the most progressive binding international legal document speaking to the issue of public participation in environmental decision-making.⁹⁹

As it now stands, then, national and international law-making institutions have largely embraced the idea of citizen consultation as a key component

(2012) [hereinafter Land Tenure Guidelines], available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

⁹⁴ FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, *About the Voluntary Guidelines on the Responsible Governance of Tenure*, <http://www.fao.org/nr/tenure/voluntary-guidelines/en/> (last visited Sept. 6, 2013).

⁹⁵ Land Tenure Guidelines, *supra* note 93, at 6.

⁹⁶ *Id.* at 5.

⁹⁷ *Id.*

⁹⁸ Aarhus Convention, *supra* note 92.

⁹⁹ See U.N. ECON. COMM’N OF EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at v, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000), available at <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf> (“Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens’ participation in environmental issues and for access to information on the environment held by public authorities.”).

in environmental decision-making.¹⁰⁰ What's more, if the Land Tenure Guidelines and other like documents are any evidence, they are beginning to recognize that public consultation processes should take into account the power imbalance that exists within civil society. The thought is that more weight should be given to the interests of local, marginalized communities (i.e., the people most likely to suffer the severest consequences) than to the interests of other parties.

D. Local Concerns as a Driver for the Adoption of NEPA-Style Regimes

One of the main reasons the United States and other nations have adopted NEPA-style regimes is to address the perceived failure of government agencies to give due weight to local concerns.¹⁰¹ The perception was one of agencies executing the whim of political and economic interests, many of which were only loosely tied to the site community.¹⁰² Thus, although NEPA and its foreign counterparts were certainly pushed forward by a general sentiment that public projects were being designed and executed without adequate environmental analysis, there was also the feeling that local communities had no say in the matter.¹⁰³

To give an example, imagine that the Department of Energy (DOE) is contemplating where to locate a nuclear-waste facility. Even if the DOE were required to analyze the potential environmental impacts and consider alternatives, the absence of a public-consultation requirement would undermine the ability of the local community (i.e., the community surrounding the site) to ex-

¹⁰⁰ The trend of citizen input is not limited to environmental law. Across all areas, "participation in the global constitutive process of authoritative decision has been greatly democratized" in recent decades. LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE* 23 (2d ed. 2001).

¹⁰¹ See Paul J. Culhane, *NEPA's Impacts on Federal Agencies, Anticipated & Unanticipated*, 20 ENVTL. L. 681, 691-92 (1990); see also Roger Nober, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 269 (1990) ("The public hearing provisions of the EIS process require that local concerns and considerations be heard, considered, and integrated into the project's design.").

¹⁰² As arms of the Executive Branch, federal agencies in the pre-NEPA days would often speak with a united voice, following the lead of the White House in lock-step. See, e.g., William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 489-90 (1990) (describing this phenomenon in the context of the supersonic airplane project under the Nixon administration); see also *id.* at 490 ("Twenty years later, after the experience of a generation with NEPA, we would be surprised to see the major agencies of the federal government address a controversial environmental issue (for example, oil development in the Arctic National Wildlife Refuge) with a single voice.").

¹⁰³ See Ryan M. Seidemann & James G. Wilkins, *Blanco v. Burton: What Did We Learn from Louisiana's Recent OCS Challenge?*, 25 PACE ENVTL. L. REV. 393, 400 (2008) ("The general idea is that the decision makers in Washington may not be aware of the local environmental impacts of their decisions that are made thousands of miles away.").

press unique concerns. At a minimum, the community would be prevented from giving voice to: (1) non-obvious environmental factors, (2) non-obvious economic factors, and (3) socio-cultural considerations. Of course, if the local community were unable to present these concerns, the agency charged with making the decision would be less likely to consider them in its analysis. The inclusion of a public-comment requirement was a direct response to this.¹⁰⁴

It was not just that agencies operating in a pre-NEPA world were failing to consider local interests; it was that they were failing to consider *some* local interests more than others.¹⁰⁵ If a local organization or business stood to gain or lose in an obvious and immediate (read: economic) way, the agency would likely consider such interests.¹⁰⁶ But if the local interests were more generalized—the interests we all have in the environmental quality of our surrounding ecosystems—they would receive short shrift.¹⁰⁷ It was this asymmetrical consideration of local interests that public participation aimed to remedy. Understood in this manner, public participation in agency decisions seems a rather appropriate response to the limited space afforded to prospective litigants under modern standing doctrine.¹⁰⁸ Public participation under NEPA calls standing's bluff: *Of course we should all have a say, it affirms, because these decisions affect everyone.*

Yet, even so, our embrace of public participation implicitly recognizes the need for a *different* type of asymmetry. All members of the public have a right to participate, but the concerns raised by some members of the public—locals, and especially locals without an investment stake—should be given more credit than others.¹⁰⁹ Whether we think of this as a counterweight (to the

¹⁰⁴ The idea of a public-comment requirement was one of the most important concepts to arise from 1969's landmark Conference on Law and the Environment. See LAZARUS, *supra* note 32, at 48. Led by policy advocates such as Ralph Nader and legal academics such as Professor David Currie—who would later author the 1970 Illinois Environmental Protection Act—the Conference concluded that the country needed “an early warning system about major environmental modifications and proposals, permitting public comment and criticism before the event.” Philip H. Hoff and Rep. Paul N. McCloskey Jr., *Conclusion*, in LAW AND THE ENVIRONMENT 368, 372–74 (Malcolm F. Baldwin and James K. Page, Jr. eds., 1970). This “early warning system” for the broader public is exactly what we have in NEPA. LAZARUS, *supra* note 32, at 48.

¹⁰⁵ See Culhane, *supra* note 101, at 687 (“Citizen participation had been the centerpiece of attempts to democratize urban programs in the late 1960s, and carried the ‘power to the people’ flavor of 1960s radicalism. Public interest groups saw the NEPA process as a mechanism for participation in agency decision processes from which they felt systematically excluded, *although economic interests with a contractual stake in the decision were naturally included in decision negotiations.*” (emphasis added)).

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130, 134 (2010).

¹⁰⁹ This is not to suggest that NEPA has been implemented in a way that grants heightened importance to local interests. Indeed, as I argue below, the reality has been quite the opposite.

heavy emphasis granted to pro-development business interests) or a protective measure (to prevent the people's voice from being drowned out), the basic idea remains the same: Public participation was intended, at least in part, to bring us closer to a world where influence is commensurate with interest, with interest defined broadly.

III. PUBLIC INVOLVEMENT IN ENVIRONMENTAL DECISION-MAKING: THE BENEFITS AND SHORTCOMINGS OF THE CONSULTATION MODEL

In this Part, I discuss the pros and cons of the consultation model, both in the United States under NEPA and in other nations under their respective EIA regimes. I begin by acknowledging the ground-breaking nature of NEPA's public-participation scheme, highlighting in particular the shift this has worked towards heightened transparency of agency decision-making and the impact it has had on government initiatives that affect the environment. I then gauge the breadth and depth of public participation under NEPA specifically and EIA generally, concluding that, despite the hype, consultation has failed to give a meaningful voice to the public. I elaborate on this theme by mapping consultation's failure to encourage deliberative democracy, its tendency to cater to the well-educated and well-off, its inadequacy as a lever for local site communities, and its inability to consistently secure legitimacy and public acceptance for the projects and initiatives to which it applies. I end by returning to the specific provisions of NEPA, examining one way in which the statute appears—but ultimately fails—to accommodate the opposition that might be mounted by a disproportionately affected site community.

A. *Credit Where It's Due*

Although NEPA and its foreign counterparts fail to involve the public to a sufficient degree, this sort of legislation has not been a complete flop in terms of democratizing agency decision-making. As Jonathan Poisner explains, NEPA represents “a grand experiment in democracy.”¹¹⁰ Through it, “[t]he administrative agencies . . . have opened their decision-making processes to un-

Recognizing this problem, the Task Force on Improving NEPA advised CEQ in 2005 “to prepare regulations giving weight to localized comments.” TASK FORCE ON IMPROVING THE NAT'L ENVTL POLICY ACT AND TASK FORCE ON UPDATING THE NAT'L ENVTL POLICY ACT, INITIAL FINDINGS AND DRAFT RECOMMENDATIONS 26 (2005), *available at* http://ncfp.files.wordpress.com/2013/07/nepataskforcenepareport_finaldraft122105-1.pdf. The logic was quite simple: Influence in the decisional process should be commensurate with stake. *See id.* (“When evaluating the environmental impacts of a particular major federal action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.”).

¹¹⁰ Poisner, *supra* note 8, at 53.

paralleled levels of citizen input and scrutiny.”¹¹¹ To contend that NEPA has not gone far enough with respect to citizen input is not to deny the progress that it has achieved.¹¹²

Prior to NEPA, decision-making by executive agencies was much more opaque.¹¹³ The public learned of the results, but not much else.¹¹⁴ Regular citizens were usually not privy to the analysis leading up to the decision, let alone invited to participate in that analysis.¹¹⁵ By inviting public comment, executive agencies in the post-NEPA era have been more likely to modify projects in light of expressed concerns and to consider alternatives proposed by interested citizens.¹¹⁶

In addition to what we might call the “value-added” benefit of public involvement—helpful modifications to projects and initiatives that are teased out through public scrutiny and feedback—the transparency demanded by NEPA has acted as a powerful screen. As Robert Dreher puts it, “NEPA’s most significant effect has been to deter federal agencies from bringing forward pro-

¹¹¹ *Id.*

¹¹² See Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. 703, 703 (1990) (observing that NEPA “accelerated and stimulated” positive changes in the Forest Service); Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 NAT. RESOURCES J. 931, 931 (2003); Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205, 207 (1998) (concluding that NEPA has “improved the quality of public planning and decisionmaking”); Culhane, *supra* note 101, at 681–93 (identifying the following benefits vis-à-vis agency decision-making: (1) the consideration of environmental impacts, (2) the transformation of agency staffs away from homogeneity, and (3) some degree of public participation); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 906 (2002) (“NEPA transformed the institutional landscape in its revolutionary youth, bringing important and lasting changes to the way government does business.”).

¹¹³ See Mathew P. Reinhart, *The National Environmental Policy Act: What Constitutes an Adequate Cumulative Environmental Impacts Analysis and Should It Require an Evaluation of Greenhouse Gas Emissions?*, 17 U. BALT. J. ENVTL. L. 145, 148 (2010) (“Before NEPA was enacted federal agencies could plan and construct large facilities such as highways, bridges and dams without having to provide Congress, other governmental agencies or the public with any advanced notice of a proposed facility and its likely adverse environmental impacts, or without having to solicit public input about the proposed facility and its environmental impacts.”). *But cf.* Culhane, *supra* note 101, at 691–92 (noting that several federal agencies sought public input prior to NEPA’s enactment).

¹¹⁴ See Reinhart, *supra* note 113, at 148.

¹¹⁵ See *id.* *But see* Culhane, *supra* note 101, at 691–92 (noting exceptions).

¹¹⁶ Today, almost every significant federal environmental law incorporates elements of public participation. See, e.g., Clean Water Act, 33 U.S.C. §§ 1251–1287 (2012); Clean Air Act, 42 U.S.C. §§ 7401–7671 (2012); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6987, 6974(b) (2012); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 117, 42 U.S.C. §§ 9601–9628 (2012); 42 U.S.C. § 9617 (2012).

posed projects that could not withstand public examination and debate.”¹¹⁷ In other words, while public involvement improves some projects—taking them from marginal to reasonable—the specter of public involvement screens out truly bad ideas from ever being proposed in the first place.¹¹⁸

B. Gauging the Breadth and Depth of Public Participation

Despite their achievements, NEPA and EIA have failed to deliver in several ways. Among the more notable of these failures is the lack of meaningful public participation. Giving a voice to the public is not the same as *listening* to the public.¹¹⁹ In the United States and around the world, EIA has created the largely false impression that government is responsive to the environmental concerns of civil society.¹²⁰ Given the gravity of this failure, we might want to check our applause for the proliferation of NEPA-like regimes. Though it would be exaggerating to call the spread of EIA a negative development, there is legitimate concern that EIA acts as a deceptive veneer, allowing us to feel better about projects that are rotten at the core.¹²¹ If NEPA and other consultation regimes fail to engender—and, more importantly, prompt government to act upon—public input, then what is the point?¹²²

All around the world, nations have adopted EIA laws that envision public notice and comment. Yet, in many of these nations, citizen participation in the decision-making process is extremely limited or of little consequence.¹²³ In China, for instance, EIA law discriminates between government projects and private projects.¹²⁴ Unlike NEPA, which applies to “major [f]ederal actions,”¹²⁵

¹¹⁷ Robert G. Dreher, *NEPA Under Siege: The Political Assault on the National Environmental Policy Act*, 2005, GEO. ENVTL. L. & POL’Y INST., at 6, available at <http://www.arcticgas.gov/sites/default/files/documents/2005-nepaundersiege.pdf>.

¹¹⁸ The “screening” effect of NEPA is not simply the product of the public-consultation requirement. Another structural adjustment that contributes to screening is NEPA’s command that the agency with decision-making authority circulate its opinion to other interested agencies. Rodgers, *supra* note 102, at 489.

¹¹⁹ See Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENVTL. L. REV. 151, 165 (2009) (“I contend that the benefits of public participation accrue generally where the participation has effect. Such effective participation alters the course of the subject process, by material change, or the substantial potential for material change to either the substantive outcome or to the underlying process.”).

¹²⁰ David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1, 8 (1998).

¹²¹ *Id.* at 8.

¹²² See Mihaly, *supra* note 119, at 165.

¹²³ See, e.g., *Public Participation in China*, *supra* note 87, at 99–100.

¹²⁴ Julie A. Lemmer, *Cleaning Up Development: EIA in Two of the World’s Largest and Most Rapidly Developing Countries*, 19 GEO. INT’L ENVTL. L. REV. 275, 290 (2007).

the Chinese regime primarily targets private endeavors.¹²⁶ With only a few exceptions, government works are off the table.¹²⁷ And while the Chinese law technically applies to a broad range of private projects, the proponent need only solicit comments from the public with respect to one category of projects—so-called “Special Projects” for the development of industry, agriculture, animal husbandry, forestry, energy, water conservation, communications, construction, tourism, and natural resources¹²⁸—and even then only when the project is expected to directly harm the “environmental rights and interests of the public.”¹²⁹ This opportunity, limited as it is, can be lifted for “cases in which secrecy is required.”¹³⁰ Coupled with the Chinese public’s understandable reluctance to criticize the government,¹³¹ it comes as no surprise that the first public hearing held by China under its EIA law did not occur until 2005,¹³² some three years after the EIA law was promulgated.¹³³ Even so, the hearing was riddled with procedural problems (including viewpoint discrimination, a scheduled time of only three-and-a-half hours, and no access to key information prior to the day of the hearing) that muffled the public’s voice.¹³⁴ And this was in the context of a high-profile project on the grounds of the Imperial Summer Palace in Beijing.¹³⁵ In the run of cases, “the overwhelming practice of engaging the public in the EIA process still remains at the preliminary stage of nonparticipation or tokenism.”¹³⁶

¹²⁵ 42 U.S.C. § 4332(C) (2012).

¹²⁶ Ruoying Chen, *Information Mechanisms and the Future of Chinese Pollution Regulation*, 7 CHI. J. INT’L L. 51, 55 (2006).

¹²⁷ *Id.*

¹²⁸ Huanjing Yingxiang Pinggu Fa (环境影响评价法) [Environmental Impact Assessment Law] (promulgated by the Standing Comm. Nat’l People’s cong., Oct. 28, 2002, effective Sept. 1, 2003) 2002 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 77, art. 7 (China) [hereinafter EIA Law 2002], available at http://english.gov.cn/laws/2005-10/09/content_75327.htm.

¹²⁹ *Id.* at art. 11.

¹³⁰ *Id.* All told, only “3 to 5 percent of all construction projects subject to the EIA requirement” are required to solicit public comment. Yuhong Zhao, *Assessing the Environmental Impact of Projects: A Critique of the EIA Legal Regime in China*, 49 NAT. RESOURCES J. 485, 498 (2009); see also *Public Participation in China*, *supra* note 87, at 91.

¹³¹ See *Li Wu Lin v. INS*, 238 F.3d 239, 245 (3d Cir. 2001) (noting “the Chinese government has frequently used force and coercion to suppress political dissent”); see also *Public Participation in China*, *supra* note 87, at 91 (explaining that “it has not been the tradition in China to involve the public in the government decision-making process, which is usually shrouded in secrecy”).

¹³² *Public Participation in China*, *supra* note 87, at 99–100.

¹³³ EIA Law 2002, *supra* note 128; *id.* at art. 21 (public-hearing mechanism).

¹³⁴ *Public Participation in China*, *supra* note 87, at 100–01.

¹³⁵ *Id.* at 97.

¹³⁶ *Id.* at 107.

Variations on this theme can be seen in Peru (where, as of 2009, only one major mining project had ever been halted at the EIA stage due to public opposition),¹³⁷ India (where officials declared a public consultation for a 1,200 MW power plant satisfactory even though public participation was limited to one 20-minute hearing held over 35 kilometers away from the site village, effectively precluding local input),¹³⁸ Nigeria (where public participation is not yet required by statute),¹³⁹ and countless other countries around the world.¹⁴⁰ Assessing the situation in three African nations, three Asian nations, nine European nations, and ten Latin American nations, the World Resources Initiative found that, as of 2008, “public participation has not been mainstreamed at the project level in about half of the countries assessed.”¹⁴¹ Even where the law envisions an open participatory process, hurdles on the ground include insufficient lead time, unavailable project documents, or consultations that are held too late in the project cycle to make a real difference.¹⁴²

In the United States, the birthplace of EIA, the perception of public participation is mixed. On the one hand, the broader population—comprised mostly of people who have never submitted a comment or attended a hearing—has a generally positive impression of participation.¹⁴³ The opportunity for participation creates the impression that environmental decision-making is subject to influence through direct democracy. On the other hand, this vague, uninformed impression is conspicuously absent among many experienced parties.¹⁴⁴

¹³⁷ Fabiana Li, *Documenting Accountability: Environmental Impact Assessment in a Peruvian Mining Project*, 32 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 218, 220 (2009).

¹³⁸ Kanchi Kohli, *Myth of a Public Hearing*, CIVIL SOC'Y (July 2010), <http://civilsocietyonline.com/Archive/jul10/jul1012.asp>; Menju Menon, *The Sites of New Knowledge: Citizens' Participation in Environmental Decisionmaking*, RITIMO (Aug. 1, 2011), available at <http://www.ritimo.org/article948.html>.

¹³⁹ Nerry Echefu & E. Akpofure, *Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework*, in STUDIES OF EIA PRACTICE IN DEVELOPING COUNTRIES 63, 72 (Mary McCabe & Barry Sadler eds., 2003).

¹⁴⁰ See generally ECON AND TRADE BRANCH, UNITED NATIONS ENV'T PROGRAM, STUDIES OF EIA PRACTICE IN DEVELOPING COUNTRIES (Mary McCabe & Barry Sadler eds., 2003).

¹⁴¹ JOSEPH FOTI ET AL., WORLD RES. INST., VOICE AND CHOICE: OPENING THE DOOR TO ENVIRONMENTAL DEMOCRACY xiii (2008), available at http://www.accessinitiative.org/sites/default/files/voice_and_choice.pdf.

¹⁴² *Id.*

¹⁴³ CEQ STUDY, *supra* note 39, at x (describing general impression that NEPA has “open[ed] the federal process to public input” and “that this open process has improved the effectiveness of project design and implementation”).

¹⁴⁴ See, e.g., René H. Germain et al., *Public Perceptions of the USDA Forest Service Public Participation Process*, 3 FOREST POL'Y & ECON. 113, 113 (2001) (describing a nationwide survey of 178 appellants of Forest Service management decisions and finding that “public participants who appeal agency decisions are dissatisfied with the equity of the public participation process”); see also Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 335 (2009) (“The conclusion is that in certain

Those who have repeatedly engaged in the process know two things: (1) it is not user-friendly,¹⁴⁵ and (2) many comments seem to fall on deaf ears.¹⁴⁶ EISs typically range from 200 to more than 2,000 pages in length.¹⁴⁷ As explained below, they invite review by experts and attorneys, not lay persons.

One might argue that pre-decision public participation is less important given the opportunity to attack decisions after the fact in court. In reality, however, challenges to NEPA documents are the exception to the rule. In 2008, federal agencies submitted 543 EISs to the EPA,¹⁴⁸ while only 132 NEPA challenges were filed that year in federal court.¹⁴⁹ Of course, this is to say nothing of the relative costs associated with ex-post litigation versus ex-ante participation.

Although efforts to solicit input through web-based applications show promise—engaging more people and encouraging more productive dialogue among participants¹⁵⁰—they also bear the risk of further diluting the voices of marginalized communities.¹⁵¹ While access to the Internet is increasing around the world, the rural poor are still far less likely to be connected, and they are far more likely to struggle with literacy.¹⁵² Even in a world of universal connecti-

cases all Notice and Comment procedures achieve is pro forma participation, rather than providing a way to give power or a real say to stakeholders or the public.”)

¹⁴⁵ As those “who practice public participation law know, in environmental cases members of the general public rarely prepare or present the effective public comment and testimony. It is the class of professionals, usually attorneys and the consultant experts they retain, who conceive, write (or edit), and orchestrate the presentation of public testimony.” Mihaly, *supra* note 119, at 154.

¹⁴⁶ Unfortunately, it appears that no one has conducted an empirical study of the outcome relationship between public participation and agency decisions.

¹⁴⁷ NEPA TASK FORCE, COUNCIL ON ENVTL. QUALITY, MODERNIZING NEPA IMPLEMENTATION 65 (2003), available at <http://digital.library.unt.edu/ark:/67531/metadc31140/>.

¹⁴⁸ COUNCIL ON ENVTL. QUALITY, CALENDAR YEAR 2008 FILED EISs, available at http://web.archive.org/web/20130701000000*/http://ceq.hss.doe.gov/nepa/Calendar_Year_2008_Filed_EISs.pdf (last visited Oct. 12, 2013) (accessed by searching Internet Archive index).

¹⁴⁹ COUNCIL ON ENVTL. QUALITY, 2008 NEPA LITIGATION SURVEY, available at <http://web.archive.org/web/query?type=urlquery&url=http%3A%2F%2Fceq.hss.doe.gov%2Fnepa%2FNEPA2008LitigationSurvey.pdf&Submit=Go+Wayback%21> (last visited Oct. 12, 2013) (accessed by searching Internet Archive index).

¹⁵⁰ See THOMAS C. BEIERLE, DEMOCRACY ON-LINE: AN EVALUATION OF THE NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS (2002); Martin Nie, *Administrative Rule-making and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 735–37 (2004) (discussing electronic rulemaking possibilities).

¹⁵¹ World Summit on the Information Society, Geneva, Switz. and Tunis, Tunis., Dec. 10–12, 2003 and Nov. 16–18, 2005, *Declaration of Principles*, para. 10, U.N. Doc WSIS-03/GENEVA/DOC/4-E (discussing the “digital divide” and observing that the “benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies”).

¹⁵² See generally United Nations Conference On Trade and Development, *The Digital Divide Report: ICT Diffusion Index 2005*, U.N. Doc. UNCTAD/ITE/IPC/2006/5 (2006), available at

ty, online forums might simply increase participation by groups that are already engaged, rather than bring new voices to the fold. And, perhaps most importantly, increased public input will not necessarily correspond with increased consideration by the agency.¹⁵³

C. *Does The Consultation Model Under NEPA Encourage Deliberative Democracy?*

One of the purposes of public participation under NEPA is to promote deliberative decision-making.¹⁵⁴ A deliberative process is characterized by a “dialogue based in reason,” where the parties to the conversation transcend their personal interests and initial opinions in favor of an emerging conception of the common good.¹⁵⁵ The resulting decision may favor some individuals more than others, but the guiding force is collective well-being, and dispositions are expected to evolve through dialogue.¹⁵⁶ Participants do not simply change their minds in response to the pressure of arriving at a consensus, but rather because the deliberative process has broadened their perspective.¹⁵⁷ “When things work well, the ideals of participation and deliberation converge; the optimal mix of participation and deliberation will ensure breadth as well as depth and focus in agency decisions.”¹⁵⁸

Has public consultation under the NEPA model delivered on this front? According to the literature, it has not. Jonathan Poisner probed the issue by asking seven questions: (1) Does NEPA promote “[d]ialogue [a]mong [c]itizens?”;

http://www.unctad.org/en/docs/iteipc20065_en.pdf; Mauro F. Guillén & Sandra L. Suárez, *Explaining the Global Digital Divide: Economic, Political and Sociological Drivers of Cross-National Internet Use*, 84 SOC. FORCES 681, 681 (2005). The rural-urban divide has also been documented in the United States. See generally Curt Stamp, *Left Behind: The Lack of Advanced Telecommunication Services in Rural America and Its Strain on Rural Communities—Policy Options for Closing the Digital Divide*, 7 DRAKE J. AGRIC. L. 645 (2002).

¹⁵³ See Lawrence Susskind & Liora Zion, *Can America’s Democracy be Improved?* (Consensus Bldg. Inst. and MIT-Harvard Pub. Disputes Program, Draft Working Paper, 2002), available at <http://www.lawrencesusskind.com/wp-content/uploads/2013/07/Improving-American-Democracy-Negotiation-Susskind-Zion.pdf>.

¹⁵⁴ See Jeffrey Rudd, *The Evolution of the Legal Process School’s “Institutional Competence” Theme: Unintended Consequences for Environmental Law*, 33 ECOLOGY L.Q. 1045, 1061 (2006) (discussing NEPA’s aim to “engage the public’s views through interactive deliberative processes”).

¹⁵⁵ Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 205–06 (1997); see also Poisner, *supra* note 8, at 56 (“At the risk of great oversimplification, deliberative decision making refers to a mode of discussion in which participants engage in reasoned discourse about what action serves the common good of the community involved.”).

¹⁵⁶ See Rossi, *supra* note 155.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 179.

(2) To the extent there is a dialogue, does it focus on the “common good”?; (3) Does the dialogue engender “[c]ritical [r]eflection on the [v]alues [u]nderlying the [p]roposal?”; (4) Does the process foster the development of “character traits consistent with deliberative decision-making”?; (5) Does it involve live, face-to-face communication?; (6) Does the process involve citizens speaking for themselves, or does it tend to involve representatives hired to speak for others?; and (7) Does NEPA include input from all “[s]ignificant [s]ectors of the [c]ommunity?”¹⁵⁹ The answers Poisner found are troubling. With respect to every criterion, NEPA came up short.¹⁶⁰

Poisner’s conclusions are largely consistent with those reached by the CEQ in its 1997 study on NEPA’s efficacy.¹⁶¹ Looking back over twenty-five years of NEPA practice, the CEQ determined that study participants (including agencies, NGOs, academics, businesses, and lay persons) generally perceived federal agencies to be more accountable under NEPA.¹⁶² The consensus view was that NEPA was a helpful “framework for collaboration.”¹⁶³ But participants’ approval of the overall framework hardly meant they were satisfied. Indeed, frustration with the regime was wide-spread, pointing to fundamental problems with the NEPA decision-making model.¹⁶⁴ As the CEQ put it:

[T]he Study determined that frequently NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials, particularly senior leadership, is inadequate. According to many federal agency NEPA liaisons, the EIS process is still frequently viewed as *merely a compliance requirement* rather than as a tool to effect better decision-making. Because of this, millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decisionmaking.¹⁶⁵

Beyond these more basic shortcomings, the CEQ’s findings on the quality of citizen participation suggest a process all but devoid of meaningful deliberation.¹⁶⁶ Citizens reported feeling like “adversaries rather than welcome

¹⁵⁹ Poisner, *supra* note 8, at 86–92.

¹⁶⁰ *Id.* at 86.

¹⁶¹ CEQ STUDY, *supra* note 39.

¹⁶² *Id.*; Poisner, *supra* note 8, at 54 (noting that “public confidence in the administration of government appears to have gone down, not up, during this period”).

¹⁶³ CEQ STUDY, *supra* note 39, at 7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.*

participants.”¹⁶⁷ They saw public hearings as stages where parties just “talk[ed] past each other,” doing “very little listening.”¹⁶⁸ While they seemed to understand that the process is not intended to accommodate every possible complaint, citizens lamented the dearth of “satisfying explanations for why suggestions were not incorporated.”¹⁶⁹ As a result, many citizens viewed litigation as their only vehicle to achieve meaningful participation.¹⁷⁰

Citizen frustration notwithstanding, the blame cannot be laid entirely at the doorstep of the agencies. Input from lay citizens often fails to engage the issues in a productive way—though this is perhaps unsurprising given the decision-making approach under NEPA and existing asymmetries in power and information. “[M]ost comment letters from private individuals are either emotional expressions or personal preferences or form letters with the same content but different signatures.”¹⁷¹

Lack of information and expertise provide a partial explanation for this phenomenon, but the fact that this sort of value-laden input is not useful points to a deeper identity crisis within NEPA.¹⁷² Essentially, NEPA is at war with itself, trying to mesh together synoptic and pluralist forms of decision-making.¹⁷³ The synoptic way relies on the expertise of agencies.¹⁷⁴ Though it finds common ground with pluralist (and, in some ways, deliberative) decision-making in the goal of maximizing overall social utility, the synoptic way supposes that this end is best achieved when “professionals exchange data so that they can then apply preset scientific rules to determine the optimal decision.”¹⁷⁵ Pluralist decision-making, on the other hand, is characterized by political bargaining. Under the pluralist model, there is no “common good” *per se*; the optimal result is simply the bargain struck between different interests competing on a level playing field.¹⁷⁶ As one might imagine, these two models will often point to different results. Yet, while NEPA incorporates both of these forms of decision-

¹⁶⁷ *Id.* at 18.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Rossi, *supra* note 155, at 226 (quoting Young-Seok Oh, *Public Participation in the Environmental Impact Statement Process: Policy Influence in Forest Service Land Management Planning* 38 (1992) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with Northwestern University Law Review)).

¹⁷² See also Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 401 (1981) (“The synoptic model demands that values be clearly and authoritatively articulated before any individual policy decisions are made.”).

¹⁷³ See Poisner, *supra* note 8, at 75–85.

¹⁷⁴ Poisner, *supra* note 8, at 57.

¹⁷⁵ *Id.* (citing Driver, *supra* note 172, at 396–99, 413–21).

¹⁷⁶ Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 21 (1998).

making, it makes no effort to reconcile them.¹⁷⁷ If there is an “inherent tension between science and politics,”¹⁷⁸ the NEPA model only exacerbates it.¹⁷⁹

This internal tug-of-war also explains why NEPA fails to promote deliberative decision-making.¹⁸⁰ In practice, the struggle has not been “resolved” but has simply devolved into a status quo where the synoptic model usually has the upper hand,¹⁸¹ with the pluralist model exerting light pressure through participatory events that feel hollow, part of a “compliance” scheme rather than “tool[s] to effect better decision-making.”¹⁸² In the end, “NEPA citizen participation generates more heat than light, creating citizen participation pathologies that leave both citizens and agencies frustrated by the process.”¹⁸³

The federal government is well aware of this frustration and, to its credit, has devoted considerable resources to identifying a remedy. The CEQ and the U.S. House of Representatives Committee on Natural Resources have both proposed a series of draft reforms that would, among other things, enhance communication and information sharing, educate the public on effective participation, develop a citizen’s guide to NEPA, expand public outreach beyond the Federal Register notice-and-comment period, clarify public involvement in the context of EAs, produce more user-friendly EISs through stricter page limits, and give decision-makers the ability to assign greater value to comments from local stakeholders.¹⁸⁴ Unfortunately, Congress has not acted upon these proposals.

That being said, it is not clear that these reforms would do much to foster deliberative decision-making. Even if they were to increase public participation both quantitatively *and* qualitatively—injecting greater force into the pluralist side of the equation—there would still be the clash with the synoptic framework that undergirds so much of NEPA and the administrative apparatus

¹⁷⁷ Poisner, *supra* note 8, at 85–86.

¹⁷⁸ Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 348 (1994).

¹⁷⁹ See Poisner, *supra* note 8, at 85.

¹⁸⁰ *Id.* at 86.

¹⁸¹ *Id.* at 85–86 (describing the relative influence of the pluralist and synoptic models); cf. Gauna, *supra* note 176, at 25 (“Environmental decision-making today continues to operate within a pluralistic structure, advancing utility maximization by agencies that provide opportunities for representation of recognized interests while maintaining agency neutrality.”).

¹⁸² CEQ STUDY, *supra* note 39, at 7.

¹⁸³ Poisner, *supra* note 8, at 55.

¹⁸⁴ NEPA TASK FORCE, COUNCIL ON ENVTL. QUALITY, *supra* note 147; H. COMM. ON RES., 106th CONG., RECOMMENDATIONS TO IMPROVE AND UPDATE THE NATIONAL ENVIRONMENTAL POLICY ACT (Comm. Print 2006), http://www.nma.org/pdf/NEPA_Task_Force_Final_Report.pdf.

in general. To surmount this impasse, a fundamental reorientation of NEPA and its foreign counterparts is needed.¹⁸⁵

D. No Room for Plebes: The Problem of Expert-Dominated Debates

An analysis of *who* is able to participate meaningfully in environmental decision-making reveals a disturbing strain of exclusivity. To influence the process, non-governmental actors—be they citizen groups, NGOs, think tanks, industry representatives, etc.—must command resources to which many ordinary people do not have access. Specifically, they must possess or have access to (1) expert training, and (2) adequate financial resources to overcome the economic hurdles to participation. This Section deals with the *de facto* requirement of expertise. I discuss consultation's financial exclusivity in the Section that follows.

Although lay citizens may speak their piece without the benefit of technical expertise or legal representation, such input will, by and large, go unheeded.¹⁸⁶ Environmental decision-making under NEPA and similar regimes is simply too complicated and nuanced for raw public input to have an effect.¹⁸⁷ When a new environmental issue emerges—when the public and policy-makers must forge initial positions and basic legislation—that is when lay input, value-laden as it is, can make a difference.¹⁸⁸ But value-formation and policy-making quickly give way to implementation, and that is when, at least under NEPA, the currency of lay input plummets.¹⁸⁹ Paradoxically, these statutes that were designed to engage the public “have operated to create a new forum for expertise more than empower the general public, and in the process . . . have given rise to a new class of professionals,” environmental consultants.¹⁹⁰ Even when lay citizens attend public hearings, they tend to be more technically sophisticated than the broader public.¹⁹¹ Another characteristic of NEPA case-law that tends to diminish the importance of public involvement is limited consideration of aes-

¹⁸⁵ Although some scholars have suggested that broad public participation is at odds with deliberative decision-making, *see, e.g.*, Rossi, *supra* note 155, at 175, this difference of opinion only underscores the point of agreement: Public participation in agency decision-making is not promoting genuine deliberation.

¹⁸⁶ Mihaley, *supra* note 119, at 167–68.

¹⁸⁷ *See id.* at 169–72.

¹⁸⁸ *See id.* at 170–71; Thomas O. McGarity, *The Courts, The Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 811 (1977) (“[C]itizen input is particularly important for broad policy decisions.”).

¹⁸⁹ *See* Mihaley, *supra* note 119, at 170–72.

¹⁹⁰ *Id.* at 198–99 (citing Josh Ashenmiller, Paper Presentation at the Annual Law and Society Ass’n meeting: Apres NEPA, Le Deluge: Citizen Suits and the Reported Demise of the Interests (May 27, 2004)).

¹⁹¹ CHARLES ECCLESTON, ENVIRONMENTAL IMPACT STATEMENTS: A COMPREHENSIVE GUIDE TO PROJECT AND STRATEGIC PLANNING 74 (2000).

thetic concerns.¹⁹² Again, the input that makes a difference—the input that agencies and courts credit—is largely the stuff of expertise.¹⁹³

Exceptional cases exist—such as when public opposition becomes so widespread as to force decision-makers to consider the political viability of a project¹⁹⁴—but then decision-makers are being influenced in response to generic pressure rather in response to specific content. One might argue that a referendum on consent would be the ultimate tool for the exercise of raw political power. If citizens were allowed to vote up or down on a project for any reason, valid or not, then wouldn't this swing the pendulum too far in the other direction, replacing technocracy with mob rule? Without a check, it would. This is precisely why community consent should only apply in certain cases (defined below) and, more importantly, should be a necessary but insufficient condition for moving forward with a project. Granted, this still leaves a major role for citizen participation in cases where the majority of the affected community *opposes* a project. As I explain below, this role is justified from both a normative and practical standpoint.

E. No Room for the Poor: How Consultation Favors the Wealthy

The late Professor Svitlana Kravchenko dedicated much of her scholarship to examining public participation models and how they consistently exclude the poor.¹⁹⁵ Indeed, the title of one article in particular—*The Myth of Public Participation in a World of Poverty*—sums up Kravchenko's view: Despite formal access, meaningful input by the poor is more legend than fact.¹⁹⁶

Tracking the findings of the World Resources Institute, Kravchenko identifies three main reasons why this is so: (1) “literacy (reading skills, language, and technical content)”; (2) “costs (of travel, official fees, forgoing

¹⁹² See Tabb, *supra* note 32, at 229–30 (citing *Friends of the Ompompanoosuc v. Fed. Energy Regulatory Comm'n*, 968 F.2d 1549 (2d Cir. 1992)).

¹⁹³ This runs counter to one of NEPA's main goals: “to facilitate widespread discussion and consideration of environmental risks and remedies associated with the pending project.” *LaFlamme v. Fed. Energy Regulatory Comm'n*, 852 F.2d 389, 398 (9th Cir. 1988) (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980)).

¹⁹⁴ See Mihaley, *supra* note 119, at 167 (“It is true that in some situations, content may not matter and participation can have an effect by its mere presence even if it is amateurish, repetitive and without substance. . . . The quantity, unilateral nature, or vehemence of citizen testimony may sway a decision-maker in marginal or heavily politicized settings, especially where the ultimate decision-maker is comprised of elected officials.”).

¹⁹⁵ See, e.g., SVITLANA KRAVCHENKO & JOHN BONINE, HUMAN RIGHTS AND THE ENVIRONMENT 259–310 (2008); Svitlana Kravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 613, 646 (2010); Svitlana Kravchenko, *The Myth of Public Participation in a World of Poverty*, 23 TUL. ENVTL. L.J. 33 (2009) [hereinafter *The Myth of Public Participation*].

¹⁹⁶ *The Myth of Public Participation*, *supra* note 195.

work, child care, and others)”; and (3) “personal and property risks from participating.”¹⁹⁷ Although the relationship between these factors and diminished participation may seem obvious, it is worth exploring in some detail. Beyond poverty’s inherent tendency to hamper participation, we should pay especially close attention to the tendency of consultation models to aggravate the poor’s already disadvantaged position.

In many areas of the developing world, adult literacy rates remain astonishingly low. According to UN statistics, the adult literacy rate for all of South Asia is a mere 62%.¹⁹⁸ It is only 63% for Sub-Saharan Africa, 77% for the Middle East and North Africa, and a still troubling 91% for Latin America and the Caribbean (with Haiti checking in at only 49%).¹⁹⁹ As with many statistics related to the developing world, these figures become far more shocking when compared with those of developed nations. For “Industrialized Countries/Territories,” the UN reports an adult literacy rate of 99%.²⁰⁰ The relationship between poverty and illiteracy, then, is a direct one. It is the poorer nations that struggle with literacy, and it is the poorer people within those nations who struggle the most. Incidentally, it is also these people who are more likely to be seriously affected by large public projects.²⁰¹ It is not just that the poor are more likely to be illiterate; it is that they are also more likely to live in rural areas and to earn livings through farming, hunting, fishing, forestry or other means dependent upon a reasonably stable and healthy environment.²⁰²

The question becomes, does consultation hold any relative advantages for the poor in light of the literacy problem? Not really. Meaningful participation is informed participation, and one who cannot read faces obvious challenges in acquiring the necessary information. Although there are other ways to acquire information—television, radio, conversation—these media are often inferior. More importantly, the public perception of consultation works against acquiring sound information through such media. The perception in developing nations that consultation is often little more than a charade²⁰³ tends to sap the

¹⁹⁷ *Id.* at 46–47.

¹⁹⁸ *Adult Literacy Rate*, U.N. DATA, <http://data.un.org/Data.aspx?d=SOWC&f=inID%3A74> (last updated June 19, 2013).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See, e.g., Clifford Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons From the Legal and Organizing Efforts of the Bayview-Hunters Point Community*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 407, 418–19 (1996).

²⁰² See, e.g., Andy Weiner, *The Forest and the Trees: Sustainable Development and Human Rights in the Context of Cambodia*, 151 U. PA. L. REV. 1543, 1559–60 (2003) (explaining that “impoverished communities [in Cambodia are] more commonly located in rural areas and [are] more dependent on natural resources for their survival”).

²⁰³ See, e.g., *La Consulta Es Teatro de Mala Calidad*, EL DIA (Bolivia), Sept. 9, 2012, http://www.eldia.com.bo/index.php?cat=386&pla=3&id_articulo=98806 (describing the consul-

public's enthusiasm to gather the necessary information and then participate. This critique may have more to do with how consultation is implemented than with its very essence, but there is still something of the latter. No matter how well implemented, consultation suffers from a problem of ambiguity (discussed in more detail below).²⁰⁴ It leads people to question the extent of their influence on the process, and thus to refrain from investing resources in gathering information. For the illiterate poor, who already lack the best means to inform themselves and may suffer from a more generalized feeling of disenfranchisement, this is especially problematic.

In addition to illiteracy, the poor are less likely to participate in public consultation because of the process's high costs.²⁰⁵ Under these circumstances, the poor often elect not to involve themselves in the process or do so in only the most superficial of ways.²⁰⁶ Meaningful participation in consultation entails, at the least, a serious investment of time. Gathering the necessary information, attending meetings, waiting one's turn to speak, or (assuming literacy) taking the time to submit a written comment—these steps take a fair amount of time and, because of that, money. If a person is struggling to make ends meet and working with little job security, taking time off from work to participate may not be an option.²⁰⁷ If the person has children—and birth rates are still much higher for the world's poor²⁰⁸—the situation becomes even more difficult. In addition, transportation costs can be prohibitive. Even if the government makes reasonable efforts to hold a consultation in a convenient location, the nature of rural demographics means that some people will still have to travel a fair distance, often without easy recourse to cars or buses.²⁰⁹ Meaningful participation thus becomes a luxury of the relatively well-off.

tation process in Bolivia as “theatre of poor quality”); Lantau Kim Chai, *Public Consultation for Incinerator Proposal is Just a Charade*, SOUTH CHINA MORNING POST, Dec. 5, 2011, <http://www.scmp.com/article/986867/public-consultation-process-incinerator-proposal-just-charade>; Cyril Mychalejko, *Guatemala: The Violence of “Free Trade,”* 117 AGAINST THE CURRENT, July–Aug. 2005, available at <http://www.solidarity-us.org/site/node/262> (“Consultation is more of a public relations exercise than a meaningful legal process.”).

²⁰⁴ See *infra* Part III.F–G.

²⁰⁵ See Joshua Glasgow, *Not In Anybody's Backyard? The Non-Distributive Problem With Environmental Justice*, 13 BUFF. ENVTL. L.J. 69, 115 (2005) (“Many avenues for public participation are more open to communities with greater resources.”).

²⁰⁶ *Id.*

²⁰⁷ Rodolfo Mata, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENVTL. L.J. 375, 392 (“At the same time, . . . residents of a poor community may not have adequate free time to participate at even a minimal level.”).

²⁰⁸ JULIE DAVANZO & DAVID M. ADAMSON, FAMILY PLANNING IN DEVELOPING COUNTRIES: AN UNFINISHED SUCCESS STORY 2 (1998), available at http://www.rand.org/content/dam/rand/pubs/issue_papers/2005/IP176.pdf.

²⁰⁹ PAUL STARKEY ET AL., IMPROVING RURAL MOBILITY: OPTIONS FOR DEVELOPING MOTORIZED AND NONMOTORIZED TRANSPORT IN RURAL AREAS V (2002), available at <http://www4.worldbank.org/afr/ssap/Resources/WoldBank-TechnicalPapers/TP525.pdf>.

To overcome these economic barriers, international organizations have recommended financing NGOs to mobilize the poor or serve as their proxies.²¹⁰ Within the rubric of the consultation model, this seems like a reasonable approach. The problem, however, is that NGOs frequently misrepresent (unintentionally or otherwise) the feelings of the poor.²¹¹ It is, in effect, a form of representative democracy, but without the degree of accountability that comes with election. If the NGOs are also responsible for disseminating information about the proposed project, their ability to manipulate increases further. There is also a real problem with capture. Putting aside the possibility of government simply creating an NGO for consultative purposes²¹²—designed in a way to advance government interests—organically formed NGOs are subject to capture by the economic interests that may have been their erstwhile opponents. Poorly funded NGOs may accept funding by pro-development interests, and slowly modify their stance in favor of their funders' agenda. In other words, NGOs are subject to capture by the very forces they seek to confront.²¹³ This is not a blanket argument against NGO involvement in the consultative process, but rather an acknowledgement that the consultative process, by its costly nature, requires spokespersons for the poor. As I argue below, consent can avoid some of this.

Finally, there is the problem of personal and financial risks associated with participation. Again, this problem is most acute for the world's poor, people who are generally more vulnerable to threats, intimidation, and actual violence.²¹⁴ This problem, too, is aggravated by the consultation model. Although many consultation schemes provide for anonymous input—made easier with the aid of the Internet—this form of participation is not a viable option in many

²¹⁰ See WORLD BANK OPERATIONAL POLICY, ENVIRONMENTAL ASSESSMENT 4.01, para. 14, available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

²¹¹ See OBIORA CHINEDU OKAFOR, LEGITIMIZING HUMAN RIGHTS NGOS: LESSONS FROM AFRICA 123–50 (2006); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1107–08 (2004) (“The same concerns about NGOs that arise in a domestic political setting—such as the lack of accountability of many, the pernicious aims of some, and the phenomenon of capture by well-financed interest groups—are also relevant in transnational settings. The most influential NGOs operating transnationally tend to be supported by financially privileged sectors and staffed by professional elites.”); but see Sophie Smyth, *NGOs and Legitimacy in International Development*, 61 U. KAN. L. REV. 377, 407 (2012) (“Unlike government representatives, NGOs cannot afford to fall out of touch with their constituents. Their very existence requires them to convey their constituents’ views both at a national and an international level . . .”).

²¹² *The Myth of Public Participation*, *supra* note 195, at 45–46.

²¹³ Ramiro Salvochea, *Clientelism in Argentina: Piqueteros and Relief Payment Plans for the Unemployed—Misunderstanding the Role of Civil Society*, 43 TEX. INT’L L.J. 287, 319 (2008).

²¹⁴ See Gary Haugen & Victor Boutros, *And Justice for All: Enforcing Human Rights for the World’s Poor*, HUFFINGTON POST (May 20, 2010), http://www.huffingtonpost.com/gary-haugen/and-justice-for-all-enfor_b_583217.html.

parts of the developing world.²¹⁵ Even if the community at issue has ready access to the Internet, the literacy problem once again complicates matters. For these and other reasons, live consultations provide the most realistic avenue for widespread participation by the poor in developing nations. Unfortunately, they also expose participants to intimidation and retribution.

F. Consultation Gives Insufficient Voice to Local Concerns

Although NEPA was pushed forward by a growing sense of concern regarding the state of the environment at large, there was also a sense that current rules failed to take into account community interests. One of the more interesting phenomena of the 1960s was the “freeway revolts” that sprung up in response to the construction of the Interstate Freeway System.²¹⁶ The freeways were designed mainly with regional and national interests in mind; how they would affect local communities was either not considered or simply dismissed as collateral damage.²¹⁷ From Atlanta to Washington, D.C., citizens organized and protested.²¹⁸ Their efforts produced mixed results: Some freeway plans were scrapped, others modified, and others executed as originally designed.²¹⁹ In addition, though, the freeway revolts informed the design and enactment of NEPA.²²⁰ To at least some extent, NEPA was supposed to ensure that local concerns were considered and not automatically subordinated to the national or regional interests served by major development projects.²²¹

Does the consultation and public-comment process accomplish this goal? Only if our standards are very low. Comments by individual citizens are often dismissed or given little weight, even when a number of citizens echo each other.²²² Comments by groups or organizations have far more influence, and even then there is evidence that participation by public-interest groups has been eclipsed in recent years by business.²²³ And although much of the public-

²¹⁵ *Digital Divide Closing, but Still Significant, Says United Nations Telecoms Agent*, U.N. NEWS CENTRE (Oct. 11, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43265&Cr=digital+divide&Cr1=#.URwSD2fAFNY>.

²¹⁶ Domonic A. Bearfield & Melvin J. Dubnick, *All Mega-Projects Are Local? Citizen Participation Lessons from the Big Dig*, 21 J. OF PUB. BUDGETING, ACCT. & FIN. MGMT. 392, 402 (2009).

²¹⁷ *See id.*

²¹⁸ *Id.*

²¹⁹ *Id.* (citing Raymond A. Mohl, *Stop the Road: Freeway Revolts in American Cities*, 30 J. URB. HIST. 675 (2004), available at <http://juh.sagepub.com/content/30/5/674.full.pdf>).

²²⁰ *See* Bearfield & Dubnick, *supra* note 216.

²²¹ *See id.* at 405.

²²² *See* Poisner, *supra* note 8, at 91.

²²³ *See generally* Jason Webb Yackee & Susan Webb Yackee, *A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) (finding a “bias

choice scholarship suggests that small interest groups are the most likely to organize, and thus wield disproportionate influence,²²⁴ this hardly means that small interest groups represent the policy preferences of “small” or marginalized peoples.²²⁵ Quite to the contrary, the most organized and sophisticated groups often represent narrow but powerful economic interests—not to be confused with the public good—leaving local concerns, especially local concerns that hold little weight in the broader economy, overlooked.²²⁶

But why should that matter? Or, to put it more precisely, why should we be particularly concerned about a failure to consider local opposition as opposed to a failure to consider any opinion—in favor or opposed—no matter the source? The reason is that not all opinions are created equal. Though we might not wish to limit input entirely to those who have a direct stake in the environmental impact of a project, it seems reasonable to insist that people with a large stake should have a meaningful say in what happens, one that is commensurate with their stake. If an upstream community opposes a dam project because it will force relocation and destroy its pastoral economy, most would accord that concern more weight—at least per capita—than the support of a community far outside the watershed that looks forward to cheaper electricity.

Unfortunately, the consultation model fails to account for the fact that large public works, especially infrastructure and extraction projects, distribute costs and benefits in an uneven manner. The local site community—often numerically small—bears the brunt of the costs, while the larger regional community enjoys most of the benefits. This phenomenon of uneven cost and benefit distribution has been observed in a number of contexts, including roads,²²⁷ dams,²²⁸ mines,²²⁹ and oil and gas extraction and processing sites.²³⁰

towards business” based on a study of comments submitted in connection with forty rulemakings by four different agencies).

²²⁴ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). On the other hand, “if the group is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group’s chances for successful joint action.” John Shepard Wiley Jr., *A Capture Theory of Anti-trust Federalism*, 99 HARV. L. REV. 713, 724 (1986).

²²⁵ Consider, for instance, the fact that “[t]he oil and gas industry outspent environmentalists nearly eight-fold [in 2010] in federal lobbying on climate change legislation.” Jessica Durando, *Oil Lobby’s Spending Blows Away Environmental Groups*, USA TODAY, Aug. 25, 2010, http://content.usatoday.com/communities/greenhouse/post/2010/08/climate-change-environment-groups/1#.Ud72Brjn_IU.

²²⁶ See Gary Minda, *Interest Groups, Political Freedom, and Anti-Trust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 947 (1992) (“Public choice theorists . . . predict that political activity is likely to be dominated by small interest groups seeking to advance their own special interests, frequently at the expense of the public good.”).

²²⁷ See Nober, *supra* note 11, at 232.

²²⁸ See, e.g., PEARCE, *supra* note 11.

²²⁹ See, e.g., Langton & Mazel, *supra* note 11, at 36.

It is important to distinguish this situation from classic “not in my back yard” behavior (“NIMBYism”). NIMBYism describes the phenomenon where individuals hope to enjoy the benefits of a certain activity or project but seek to avoid the costs.²³¹ Thus, for instance, a NIMBY might favor wind turbines in the abstract (because she likes the idea of renewable energy for environmental and economic reasons) but oppose their construction offshore of her local beach (because it would obstruct the ocean view). The phenomenon I describe does not entail this sort of selective advocacy. The local opposition with which I am concerned is not characterized by simultaneous support for the activity or project in another place. NIMBYs want the project, just “not in my back yard.” The opponents I have in mind don’t want the project at all (or are largely indifferent to whether it occurs in some other place).²³² This is because they do not see themselves as ever truly benefiting from these projects. The rural poor—disconnected from the economic machinery that these projects tend to serve—are the most visible members of this group.

G. *Consultation’s Failure to Secure Legitimacy and Acceptance*

One of the more basic rationales for public participation is that it tends to breed acceptance of outcomes, even when those outcomes are inconsistent with public desires.²³³ In the United States, this is especially important in the case of decisions made by agencies, whose directors and staffs lack direct ac-

²³⁰ See James B. Lebeck, *Liquefied Natural Gas Terminals, Community Decisionmaking, and the 2005 Energy Policy Act*, 85 TEX. L. REV. 243, 243 (2006) (“In contrast to the[ir] extremely localized costs, the majority of the benefits derived from constructing an LNG [liquefied natural gas] terminal are quite diffuse.”).

²³¹ Another useful acronym is SOBBY (“some other bugger’s back yard”). SOBBY and NIMBY seem to be interchangeable, though the former emphasizes the pro-development stance of the individual while the latter emphasizes her core objection.

²³² This point lies at the heart of the distinction. Although some authors have described the NIMBY problem as the very distribution problem I have in mind, see, e.g., Barak D. Richman, *Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response*, 20 UCLA J. ENVTL. L. & POL’Y 223, 223 n.1 (2002), most have emphasized to some degree the unprincipled nature of the NIMBYist objection, see, e.g., Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 245–46 (1994) (articulating argument that NIMBYism is parochial and selfish). “NIMBY” is pejorative not simply because NIMBYs want to avoid sacrifice, but because they want to reap benefits while avoiding sacrifice (i.e., they want to externalize the costs).

²³³ Discussing NEPA in Congress, Senator Henry M. Jackson stated that “[a] primary purpose of the bill is to restore public confidence in the Federal Government’s capacity to achieve important public purposes and objectives.” 115 CONG. REC. 19,010 (1969); see also Rossi, *supra* note 155, at 187 (“Persons and entities subject to agency regulations are more likely to view agency decisions as legitimate if the procedures leading to their formulation provide for fair consideration of their views.”).

countability through the ballot box.²³⁴ The importance of a just, participatory process looms even larger in the case of decisions affecting the environment, where solutions satisfying everyone are almost impossible to come by.²³⁵ Theoretically, then, the arrival of NEPA's consultation process should have given way to increased public confidence in agency decisions.

It does not appear that this has actually happened. Although the data is incomplete, the information we do possess is cause for concern. Even while U.S. citizens have ostensibly enjoyed increased opportunities to participate in agency decisions over the last 40-plus years, public confidence in government has gone down, not up.²³⁶ Small-scale studies have confirmed that confidence increases when agencies engage the public in earnest under NEPA,²³⁷ and there is little reason to doubt the overall correlation between participation and confidence.²³⁸ The problem, instead, appears to be a combination of poor implementation and the uncomfortable relationship between participation and the dominant synoptic model.

H. *The "Controversial" Factor: NEPA's Mirage*

The rationale in favor of moving from consultation to consent is largely rooted in the idea that government should not be able to foist major projects on communities over their objection. Before laying out the details of this position, however, we should examine whether NEPA accommodates this idea in any way. Certainly, NEPA and other consultation-driven statutes do not provide for

²³⁴ Rossi, *supra* note 155, at 182–83.

²³⁵ Aryeh Botwinick & Peter Bachrach, *Democracy and Scarcity: Toward a Theory of Participatory Democracy*, 4 INT'L POL. SCI. REV. 361 (1983).

²³⁶ See Poisner, *supra* note 8, at 54; Rossi, *supra* note 155, at 177; Richard Morin & Dan Balz, *Americans Losing Trust in Each Other and Institutions: Suspicion of Strangers Breeds Widespread Cynicism*, WASH. POST., Jan. 28, 1996, at A1 (describing survey results that show loss of public confidence in government); Jeffrey M. Jones, *Trust in Government Remains Low: Only 26% Are Satisfied with Way Nation is Being Governed*, GALLUP (Sept. 18, 2008), <http://www.gallup.com/poll/110458/trust-government-remains-low.aspx> ("Gallup's annual Governance poll finds a continued deterioration in public confidence in U.S. government institutions."); see also Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 351 (1991) ("An important lesson of the last twenty years is that EPA simply cannot do its job effectively without greater public confidence in the agency.").

²³⁷ See, e.g., J. Douglas Wellman & Terence J. Tipple, *Governance in the Wildland-Urban Interface: A Normative Guide for Natural Resource Managers*, in CULTURE, CONFLICT AND COMMUNICATION IN THE WILDLAND-URBAN INTERFACE 337, 345–46 (Alan W. Ewert et al. eds., 1993) (discussing survey and benefits of public participation in management of Upper Delaware Scenic and Recreational River).

²³⁸ See also NEPA TASK FORCE, COUNCIL ON ENVTL. QUALITY, *supra* note 147, at xiii–xiv (finding that collaborative approaches to engaging the public and assessing the impacts of federal actions under NEPA can increase public trust and confidence in agency decisions).

this directly; by definition, “consultation” implies something less than a community veto.²³⁹ Yet, as a statutory matter, NEPA does account for widespread opposition to a project, even if the weight it attaches to that factor is less than satisfying.²⁴⁰

In determining whether a federal action will “significantly” affect the environment, thus triggering the duty to prepare an EIS,²⁴¹ agencies must consider several factors.²⁴² One of these factors is “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”²⁴³ Courts have interpreted this as referring to cases in which there is a substantial dispute about the nature or effect of a major federal action, rather than the mere existence of opposition.²⁴⁴ To give rise to controversy, the concerns should have “some technical or professional focus, as manifested by differences among experts, quarrels over predictions, or doubts about the extent of pollution that might ensue.”²⁴⁵ In addition to this qualitative limitation, there is also a quantitative limitation: Almost every project will ruffle a few feathers, but courts are looking for a “critical mass” of opposition, something that a few naysayers won’t be able to muster.²⁴⁶

This approach is insufficient to account for public opposition for two reasons. First, a determination that a project is “highly controversial” has no

²³⁹ See THE AM. HERITAGE DICTIONARY 395 (5th ed. 2011), available at <http://www.ahdictionary.com/word/search.html?q=consultation> (defining “consultation” as, “A conference at which advice is given or views are exchanged.”).

²⁴⁰ For an informative, general critique of the jurisprudence in this area, see generally Tabb, *supra* note 32.

²⁴¹ 42 U.S.C. § 4332(c)(ii) (2012).

²⁴² 40 C.F.R. § 1508.27 (2013).

²⁴³ *Id.* § 1508.27(b)(4).

²⁴⁴ *Ind. Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d 851 (7th Cir. 2003); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

²⁴⁵ WILLIAM H. RODGERS, JR., *ENVT. L. IN INDIAN COUNTRY* § 1:19 (2012).

²⁴⁶ See, e.g., *Ind. Forest Alliance*, 325 F.3d at 859 (finding a “controversy” where four bird experts testified to the uselessness of maintaining “openings” in Hoosier National Forest); *North Carolina v. FAA*, 957 F.2d 1125, 1133–34 (4th Cir. 1992) (controversy cannot be equated with opposition lest the matter be subject to a “heckler’s veto”); *West Houston Air Comm. v. FAA*, 784 F.2d 702, 705 (5th Cir. 1986) (opposition by local residents did not render proposed airport “highly controversial” where number of objectors was not large in relation to total population to be served by the airport); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986–87 (9th Cir. 1985) (finding no controversy where there was “virtual agreement among local, state, and federal government officials, private parties, and local environmentalists,” notwithstanding disagreement by plaintiff and its two experts); *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 828 (E.D. Mich. 2008) (“[T]he plaintiffs demonstrate only mere public opposition; they present no evidence disputing the size, nature, or effect of the [exploratory oil and gas drilling] project.”); *Coal. on Sensible Transp., Inc. v. Dole*, 642 F. Supp. 573, 587–88 (D.D.C. 1986) (rejecting “highly controversial” argument despite 307 comments at public hearings because no agency had opposed the project).

substantive effect. Instead, it simply serves as one of the non-dispositive factors that will militate in favor of the agency preparing a full-blown EIS.²⁴⁷ If the EIS procedure is itself an inadequate vehicle for soliciting and responding to public opposition—as I have argued—then the controversy factor is not a game-changer. Second, given the regulatory language and the gloss applied by courts, only some forms of opposition are cognizable. Controversy over environmental effects (e.g., what will happen and to what extent) tilts the scale in favor of an EIS; general neighborhood opposition does not.²⁴⁸ Yet, given the comparative advantage held by the wealthier and more sophisticated on these more technical forms of opposition, this approach to public controversy leaves much to be desired.

IV. COMMUNITY CONSENT AS A WAY FORWARD

The idea of using consent to curb abuse and secure influence commensurate with stake is not a new one. This is, after all, the basic notion behind prior informed consent in health-care law.²⁴⁹ In the environmental context, however, most arguments for consent—and certainly those that have found the most purchase—have been limited to decision-making within indigenous communities.²⁵⁰ Whereas these arguments stem from conceptions of native sovereignty over natural resources, the community consent I propose is rooted in different ideas.²⁵¹

In this Part, I discuss (a) why consent should be favored over consultation in certain cases, (b) the extent to which consent should be required (i.e., in which cases it should apply), and (c) the process by which communities should express or withhold their consent. After discussing these points and setting forth the operative rules, I then briefly analyze the consent framework from a Rawlsian perspective. Because this framework approximates the rules society would adopt behind a veil of ignorance, we should at the least recognize it as an ideal towards which to aim, even if we struggle to achieve this ideal in practice.

²⁴⁷ Courts can and do affirm decisions to forgo preparation of an EIS even in the face of controversy. *See, e.g., Ind. Forest Alliance*, 325 F.3d at 860–61.

²⁴⁸ RODGERS, *supra* note 245.

²⁴⁹ *Human Rights and Environmental Regulation*, *supra* note 18, at 255.

²⁵⁰ *See, e.g., Kinnison*, *supra* note 15; UNDRIP, *supra* note 12; *cf.* U.N. Convention on Biological Diversity, art. 14, Dec. 29, 1993, 1760 U.N.T.S. 79 (recognizing the rights of both indigenous peoples and other local community members).

²⁵¹ For another take on how this argument might be made, with special emphasis on the human-rights dimension, see *Human Rights and Environmental Regulation*, *supra* note 18, at 291–96.

A. *Why Consent?*

There are four main reasons why the consent of local communities should be required in the context of environmentally significant projects: (1) the need to give due weight to local interests; (2) the need to apportion risk according to stake; (3) the need to give voice to local knowledge; and (4) the need to enhance legitimacy and acceptance of the resulting decision. In addition to these four reasons pegged to local communities, we might identify a fifth reason not so exclusively pegged: reducing the risk of manipulation.²⁵²

1. Voice Commensurate with Interest: Consent, Democratic Values, and Emerging Notions of Human Rights

Giving local communities a say in environmental decisions finds support from a normative perspective. We can describe this rationale along two related lines: traditional notions of fairness (or consistency with democratic values)²⁵³ and evolving notions of human rights.

Finding its roots in deontological justifications of democracy, the fairness argument states that individuals ought to have a say in public policy and decisions affecting them because the first principles of liberty and equality suggest as much.²⁵⁴ Liberty is a person's right to choice; it is the right to decide how to act and live. Equality balances liberty by imposing limits on the range of acceptable choices. Equality means that the exercise of liberty must not go so far as to impede another's liberty. In the realm of collective decision-making, equality means that one person's preferences are neither superior nor inferior to another's based upon the sheer identity of the person (a person's preferences may be superior based upon their content or deserving of more weight based upon the proponent's stake in the matter).

Liberty and equality find voice in the notion of decision-making with the consent of the governed. If a public project—be it a road, energy facility, or authorization for a mine—is to occur in a specific region, liberty and equality demand that the people living in that region have a say in *some* manner and to *some* extent. If we subscribe to democracy in any form, that much should be a given. Room for debate opens up with the questions of: (1) How *much* say

²⁵² For a general discussion of some of the rationales for public participation in agency decision-making, see Rossi, *supra* note 155, at 180 (listing “increased accountability and oversight,” “minimizing excessive concentration of power,” “better quality information for decisionmakers and citizen participants,” “proceduralist values,” and “breeding citizenship”).

²⁵³ See *id.* (“Participation is sacrosanct to modern democracy.”).

²⁵⁴ As an inherently democratic reform—consent being more democratic than consultation—the full panoply of theoretical and empirical arguments supporting democracy could be rolled out in favor of introducing an element of consent in environmental decision-making. See *Democracy*, STANFORD ENCYCLOPEDIA OF PHIL. (2006), <http://plato.stanford.edu/entries/democracy/>.

should the people have?; and (2) By what means should they exercise that influence?

In many parts of the world, representative democracy responds to these questions with the public exercising its influence by periodically electing officials. If we are accustomed to this form of democracy, a requirement of consent may initially strike us as unusual. But that seems more a function of our conditioned expectations than the product of normative reflection. Indeed, by conventional representative democracy standards, even NEPA's public comment regime pushes the envelope.

Nevertheless, more direct forms of democracy are not unheard of even in large developed nations—consider the rise of the ballot measure in the United States—and there is good reason to depart from representative democracy if it fails to satisfy the underlying demands of equality and liberty. This is often the case with large, environmentally-significant projects, especially infrastructure and extractive projects. The persons who stand to lose the most are not given a say commensurate with their interest. Because the projects tend to distribute benefits across wide regions with greater populations while concentrating the costs among narrower regions with lesser populations,²⁵⁵ representative democracy fails to produce equitable results. In situations such as this, a large number of people with little or nothing to lose is able to override a smaller group that is set to bear the brunt of the negative consequences.

Although taking this argument too far could wreak havoc upon government institutions and processes, modest reforms that bring us closer to democratic fairness should be carefully considered. Certainly, the idea that influence should correspond with interest is common in a slew of legal, business, and political contexts, including: (1) standing to bring a lawsuit;²⁵⁶ (2) intervention in a lawsuit;²⁵⁷ (3) joinder;²⁵⁸ (4) corporate shareholder voting;²⁵⁹ and (5) the requirement that, in the context of proving state practice for purposes of identifying customary international law, “those States that are particularly affected by the proposed norm” be among those nations that have historically acted in accordance with the norm.²⁶⁰

Another way to approach the normative case for consent is from a human-rights perspective. In an article that focuses on the link between public participation in agency decisions and trust in outcomes—a connection I explore

²⁵⁵ See *supra* note 11 and accompanying text.

²⁵⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

²⁵⁷ *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 132 (1967).

²⁵⁸ FED. R. CIV. P. 19.

²⁵⁹ See generally Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129 (2009).

²⁶⁰ DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW & POLICY* 308 (4th ed. 2011).

later on—Rebecca Bratspies describes the emerging understanding of prior informed consent in environmental decisions as a fundamental human right.²⁶¹ As Bratspies notes, the notion of prior informed consent is rooted in personal autonomy and most strongly associated with health law.²⁶² Yet, as our understanding of the relationship between environmental health and bodily health grows—and as the “right to a healthy environment” finds increasing purchase in policy discussions—the case for consent as a human right in the environmental context is likewise bolstered.²⁶³

Legal recognition of this idea is admittedly in the nascent stages. Only in the last few decades have we seen prior informed consent become a relevant concept in environmental law, and even then with limited reach and many a qualification. In terms of binding treaty law, the international community has embraced the idea of prior informed consent in the Basel Convention,²⁶⁴ the Convention on Biological Diversity,²⁶⁵ and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals in International Trade.²⁶⁶ However, all of these instruments center around the state as the party that can give or withhold consent.²⁶⁷

It is only in the area of non-binding instruments, so-called “soft law,” that we see consent at the community level. The most promising examples tend to involve the rights of indigenous communities.²⁶⁸ Projects that impact indigenous communities often epitomize the uneven distribution of benefits and costs that inheres in so many public works. Indigenous peoples frequently feel the severest of environmental and cultural impacts while receiving little of the benefit.²⁶⁹ Given this dynamic, and their historic political vulnerability, indigenous

²⁶¹ *Human Rights and Environmental Regulation*, *supra* note 18, at 250–58.

²⁶² *Id.* at 254.

²⁶³ *Id.* at 265 (citations omitted).

²⁶⁴ Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal art. 4(1)(c), Mar. 22, 1989, 1673 U.N.T.S. 57, 131 (1992) (“Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the state of import does not consent in writing to the specific import.”).

²⁶⁵ United Nations Convention on Biological Diversity art. 19, Dec. 29, 1993, 1760 U.N.T.S. 79 (“The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organisms resulting from biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity.”).

²⁶⁶ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade art. 1, Sept. 10, 1998, 38 I.L.M. 1734.

²⁶⁷ *Human Rights and Environmental Regulation*, *supra* note 18, at 255.

²⁶⁸ *See generally* Wiessner, *supra* note 13.

²⁶⁹ *See* Melissa A. Jamison, *Rural Electric Cooperatives: A Model for Indigenous Peoples’ Permanent Sovereignty over Their Natural Resources*, 12 TULSA J. COMP. & INT’L L. 401, 454 (2005) (“The reality is that indigenous peoples, besides being excluded from decision-making, also bear a significant and disproportionate amount of the harm resulting from such projects.”);

communities have often been seen as those most in need of empowerment through prior informed consent.²⁷⁰ Responding to this concern, UNDRIP requires states to obtain the “free, prior and informed consent” of indigenous peoples in the event of proposed relocation,²⁷¹ legislative or administrative measures that may affect them,²⁷² storage or disposal of hazardous materials,²⁷³ and “project[s] affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”²⁷⁴

Although instruments like UNDRIP bring us closer to the regime I envision, two important shortcomings must be noted. First, the gap between “soft law” and binding law is not easily bridged. Acknowledging an aspirational principle is one thing; committing to and enforcing it is quite another.²⁷⁵ Second, demanding that states seek consent from indigenous peoples is in some ways less radical than requiring consent from local communities without the indigenous distinction.²⁷⁶ In the United States, at least, indigenous peoples have historically been afforded separate (though not satisfactory) legal treatment for the very reason that they were considered sovereign nations.²⁷⁷ To the extent that the consent requirement in UNDRIP is motivated by this distinction in conjunction with human-rights concerns, it appears more like a relatively modest extension of the state-consent provisions in the Basel, Cartagena, and Rotterdam Conventions.

Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 836–37 (2011).

²⁷⁰ See Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevron-Texaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN. L. REV. 445, 462–63 (2007).

²⁷¹ UNDRIP, *supra* note 12, at art. 10.

²⁷² *Id.* at art. 19.

²⁷³ *Id.* at art. 29.2.

²⁷⁴ *Id.* at art. 32.2. In addition to these forward-looking provisions, UNDRIP calls for redress for past violations (i.e., when the state took offending actions without prior informed consent). UNDRIP, *supra* note 12, at art. 11.2, 28.1.

²⁷⁵ See Eric W. Orts, *The Legitimacy of Multinational Corporations*, in PROGRESSIVE CORPORATE LAW 247–66 (Lawrence E. Mitchell ed., 1995), reprinted in Donald K. Anton & Dinah L. Shelton, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 869 (2011) (explaining that soft law often “amounts to ineffectual hortatory declarations”) (internal quotation marks omitted); Nicholas A. Fromherz, *The Case for a Global Treaty on Soil Conservation, Sustainable Farming, and the Preservation of Agrarian Culture*, 39 ECOLOGY L.Q. 57, 104 (2012) (discussing soft-law instruments relating to soil conservation).

²⁷⁶ See *supra* Part.II.A.

²⁷⁷ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

At any rate, and despite the fact that prior informed consent at the local level is far from a universal norm, a movement in that direction does exist.²⁷⁸ Citing this progressive evolution, Bratspies calls upon states to “internalize the notion that it is the government’s responsibility to empower the individuals and groups most affected by environmental problems in order to facilitate their participation in decision-making that will affect them.”²⁷⁹ One way to accomplish that is through the consent mechanism I outline in this paper.

2. Voice Commensurate with Risk: Consent and Moral Hazard

The tragedy of the commons teaches us that environmental stewardship is more likely by an actor who has a stake in the land at issue.²⁸⁰ When an actor has skin in the game—when she has something to lose and not just something to gain—then she is more likely to act with due care.²⁸¹ As discussed above, environmentally significant projects often yield concentrated risks alongside diffuse benefits.²⁸² If project beneficiaries have an outsized voice in the decision-making process, there is a risk of moral hazard.²⁸³ With misaligned incentives, there is a danger that project proponents will effectively decide how much risk to take while forcing others to bear that risk.²⁸⁴

The imbalance between the concentration of costs and benefits is, to a significant degree, a function of how “undeveloped” natural resources are used. Take the case of an undammed watershed. Left to flow as nature intended, the human benefits of the river may include healthier and more abundant fish populations, stable plant and animal environments, and the support of human riparian communities that have been built along the water over centuries. The human costs may include unpredictable flooding, seasonal fluctuations of available

²⁷⁸ See, e.g., Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 777 (2012) (discussing developments in Uganda).

²⁷⁹ *Human Rights and Environmental Regulation*, *supra* note 18, at 258

²⁸⁰ See Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), available at http://www.geo.mtu.edu/~asmayer/rural_sustain/governance/Hardin%201968.pdf.

²⁸¹ *Id.*

²⁸² Perhaps the best example of this phenomenon is energy generation. Hydroelectric dams provide cheap electricity to billions around the world, but they do so by displacing local communities and radically transforming the environment surrounding the dam-site. Coal-fired plants provide over 20% of the U.S.’s energy needs. U.S. DEP’T OF ENERGY, *Coal*, ENERGY.GOV, <http://energy.gov/coal> (last visited Oct. 20, 2013). We all pay for this electricity, but those who pay the most—breathing in the filthy smoke, drinking contaminated water—are the communities hosting these plants.

²⁸³ See PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008*, at 63 (2009) (describing moral hazard as “any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly”).

²⁸⁴ See *id.*

water that negatively impact irrigation, and untapped hydro-electrical resources.

Viewed in the aggregate and from an “objective” standpoint, the decision to dam may seem a toss-up. But if we remove the veil of objectivity—if we assume an identity—we see that the decision depends upon that very identity. By and large, it is the far off, “cosmopolitan” interests that benefit from the development of the hinterland.²⁸⁵ So, while costs and benefits may balance out *overall*, the balance is hardly felt by impacted communities. More frequently, a community either wins big (and that’s usually the “cosmopolitan” community) or loses big (and that’s usually the rural or indigenous community).

Within the context of dams, China’s Three Gorges may be the most well-known example of this phenomenon.²⁸⁶ Nevertheless, an even starker example may exist along the banks of the Mekong. Hardly the longest or biggest river by volume, the Mekong holds one very important distinction: From season to season, its flow varies more than any major river on Earth. When the monsoon hits, the Mekong swells to fifty times its dry-season size, backing up tributaries and flooding enormous areas of rainforest.²⁸⁷ This seasonal fluctuation creates one of the world’s truly robust fish nurseries, providing dependable protein for millions of rural Cambodians. The poorest of the poor eat well. But

²⁸⁵ A growing body of literature is available on the topic of the geographic and demographic disconnect between the costs and benefits of goods and services that rely heavily on natural resources (i.e., people in one region or economic stratum pay the cost while people in another region or economic stratum receive the benefit). *See, e.g.*, MILLENNIUM ECOSYSTEM ASSESSMENT, LIVING BEYOND OUR MEANS: NATURAL ASSETS AND HUMAN WELL-BEING 5, 16–22 (2005) (highlighting example of mangrove forests converted to for-export shrimp farms); THE WORLD BANK, WORLD DEVELOPMENT REPORT 1992: DEVELOPMENT AND THE ENVIRONMENT 1–2 (1992) (“It is often the poorest who suffer most from the consequences of pollution and environmental degradation.”). While many observers have faulted free trade and globalization as opening the door to the exportation of environmental costs, *see, e.g.*, Herman Daly, *Problems with Free Trade: Neoclassical and Steady-State Perspectives*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 156 (1993), the phenomenon has a deep history within domestic contexts. Landfills and hazardous waste sites in the U.S. are tucked away from the spotlight, foisted upon marginalized communities that usually lack the political and economic wherewithal to resist. *See, e.g.*, Robert D. Bullard & Beverly Wright, *Disastrous Response to Natural and Man-Made Disasters: An Environmental Justice Analysis Twenty-Five Years After Warren County*, 26 UCLA J. ENVTL. L. & POL’Y 217, 218 (2008).

²⁸⁶ *See* Peter H. Gleick, *Three Gorges Dam Project, Yangtze River, China*, in THE WORLD’S WATER, 2008-2009: THE BIENNIAL REPORT ON FRESHWATER RESOURCES 139 (2009), available at <http://www.worldwater.org/data20082009/WB03.pdf>; PEARCE, *supra* note 11 (“Usually urban elites gain most, especially from hydroelectricity, while the poor in the countryside lose most, as their fields are flooded or the rivers and wetlands on which they depend are wrecked.”); Li Dun, *Death of Three Gorges Dam Architect Marks End of Era*, CHINA DIALOGUE (Sept. 27, 2012), <http://www.chinadialogue.net/article/show/single/en/5182-Death-of-Three-Gorges-Dam-architect-marks-end-of-era>; Sui-Lee Wee, *Thousands Being Moved from China’s Three Gorges—Again*, REUTERS (Aug. 22, 2012), <http://www.reuters.com/article/2012/08/22/us-china-threegorges-idUSBRE87L0ZW20120822>.

²⁸⁷ PEARCE, *supra* note 11, at 95–96.

there is fear in the air. As dams have been erected upstream over the years, the floods have lost their strength and the catch has suffered. The flooding in 2003 was the poorest on record, and the fishing was by all accounts “terrible.”²⁸⁸ Yet these incredible costs do not seem to impact development decisions. Again, the answer lies in the demographic disconnect between costs and benefits. “[T]he Mekong fishery’s place in Cambodian society and its economy is largely hidden from urban elites and government. Most of the fish caught on the river never reach commercial markets and never appear in government data.”²⁸⁹ In other words, the incentives of decision-makers and investors are misaligned with those of the rural poor.

This disconnect is not isolated to the developing world. Indeed, sticking with the theme of food-production, one of the best examples comes from the United States. Over the past few decades, livestock producers in the United States have significantly modified their operations to become more efficient—at least in terms of inputs and outputs reflected in the marketplace—by converting farms into factories.²⁹⁰ The term that has come to be associated with this model is “CAFO,” the acronym for “concentrated animal feeding operation.”²⁹¹ As this term suggests, CAFOs are places where animals are housed in claustrophobic conditions and fattened on grains brought to the site from elsewhere.²⁹² Apart from the animal-welfare concerns—many hogs go insane from being kept in gestation crates their whole lives,²⁹³ and chickens are frequently de-beaked to prevent cannibalization of their neighbors²⁹⁴—CAFOs introduce a slew of environmental problems. Concentrated animals yield concentrated, often unmanageable amounts of manure that can contaminate groundwater and surface water, degrade ambient air quality, produce noxious odors, and, in combination with digestive processes, produce significant amounts of greenhouse gases.²⁹⁵

²⁸⁸ *Id.* at 95.

²⁸⁹ *Id.* at 104.

²⁹⁰ CARRIE HRIBRAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACTS ON COMMUNITIES I (2010), available at http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

²⁹¹ *What is a CAFO?*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region7/water/cafo/> (last updated Sept. 10, 2012).

²⁹² Jodi Soyars Windham, *Putting Your Money Where Your Mouth Is: Perverse Subsidies, Social Responsibility, and America’s 2007 Farm Bill*, 31 ENVIRONS 1, 21 (2007).

²⁹³ *The Pork Industry*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/issues/animals-used-for-food/pork-industry.aspx>.

²⁹⁴ See HRIBRAR, *supra* note 290, at 11; Robyn Mallon, *The Deplorable Standard of Living Faced by Farmed Animals in America’s Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm*, 9 MICH. ST. U. J. MED. & L. 389, 404 (2005).

²⁹⁵ See also *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492–93 (2d Cir. 2005).

Aside from this last byproduct, the negative environmental impacts of CAFOs are highly localized.²⁹⁶ The economic downsides of CAFOs are likewise concentrated in close proximity to the site. Although proponents have leaned on job-creation, the evidence for this is scant.²⁹⁷ It is dwarfed by the evidence of plummeting property values of the homes and lands that surround these mega-farms.²⁹⁸

Of course, CAFOs have a major upside that at least partially explains their proliferation: They “provide a low-cost source of meat, milk, and eggs, due to efficient feeding and housing of animals, increased facility size, and animal specialization.”²⁹⁹ These cheap animal products aren’t so cheap when one considers all the externalities that, by definition, aren’t reflected in the sale price.³⁰⁰ But for our purposes the noteworthy point isn’t that CAFOs dominate the market by leveraging externalities; it’s the fact that local communities are in effect asked to subsidize CAFOs by bearing the brunt of these externalities while the broader consumer market reaps the rewards of low-cost food. The fact that people living near CAFOs also enjoy the option of lower-priced food may render the distributional profile less lopsided, but it hardly balances things out. People who live in cities or towns far away from CAFOs get food for the same price without the nuisance of contaminated water, noxious odors, and depressed property values.

In sum, even if the EPA were to take a more aggressive tack under the Clean Water Act and consistently subject CAFOs to permitting that triggers preparation of an EA or EIS under NEPA,³⁰¹ there would still be the issue of

²⁹⁶ HRIBRAR, *supra* note 290, at 3.

²⁹⁷ Mallon, *supra* note 294, at 404.

²⁹⁸ DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, *CAFOs UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS* 61 (2008); HRIBRAR, *supra* note 290, at 3.

²⁹⁹ HRIBRAR, *supra* note 290, at 2.

³⁰⁰ *See generally* GURIAN-SHERMAN, *supra* note 298 (describing externalities associated with CAFOs and claiming that meat prices do not reflect the true cost of production).

³⁰¹ EPA’s regulation of CAFOs is complicated and shifting. Although the Clean Water Act recognizes CAFOs as “point sources,” 33 U.S.C. § 1362(14) (2012), and therefore seemingly requires CAFOs to obtain a NPDES permit from the EPA, the agency has been stymied in its efforts to require CAFOs to apply for permits. *See Nat’l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (striking down regulation that required CAFOs to apply for permits if they “proposed to discharge,” where CAFOs were said to “propose to discharge” if they were “designed, constructed, operated, or maintained such that a discharge would occur”). In addition, the EPA lacks information on the number and location of CAFOs operating in the United States. In 2001, the EPA estimated that only 20% of CAFOs that should have permits have actually been issued one. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3080 (proposed Jan. 12, 2001) (“Under the existing regulation, EPA estimates that about 12,000 facilities should be permitted but only 2,530 have actually applied for a permit.”). Consistent with this statement, the Government Accountability Office concluded in 2008 that “that

moral hazard. When the lion's share of the environmental and social cost is borne by the communities hosting CAFOs, while the economic benefits are enjoyed by a much larger population base, there is a danger that the agency will be captured not only by the regulated industry but also by the numerically superior consumers of CAFO products. And because these CAFO "winners" aren't being asked to live with the social and environmental costs, they (acting through the agency) exert force against regulations that they would be much more likely to favor if they were placed in the position of the CAFO "losers" (i.e., the local communities that surround these operations).

Yet, as I explain below, community consent should not be required anytime there is *some* geographic and demographic disconnect between costs and benefits (or, to put it differently, any time there is *some* risk of moral hazard). It is only when such asymmetry rises to the level of a *profound* disconnect—as suggested in the above two examples—that community consent should be the norm.

One might argue that the moral hazard framework is inapt because, in the context of environmental harm, we all feel the effects. Project proponents, therefore, have just as much reason to weigh these costs and mitigate where possible. There are two problems with this logic. First, even if environmental degradation theoretically affects everyone, it affects some more than others. Second, moral hazard isn't eliminated simply because one has *something* to lose. Rather, it persists so long as the personal (as opposed to aggregate) costs are outweighed by the personal benefits. Situations of moral hazard throw a monkey wrench into utilitarian calculus because some costs—those felt by others—are ignored.³⁰²

The optimal policy response to this dynamic is, admittedly, subject to debate. There are many ways to force internalization of costs, including litigation, the imposition of fiduciary duties, and insurance.³⁰³ Yet consent holds at

EPA does not have comprehensive, accurate information on the number of permitted CAFOs nationwide." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN (2008), available at <http://www.gao.gov/products/GAO-08-944>. Therefore, while one can find examples of the EPA having conducted NEPA analysis prior to issuing a permit to a CAFO, see, e.g., U.S. ENVTL. PROT. AGENCY, COVERAGE OF THE HORIZON ORGANIC DAIRY UNDER THE NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM GENERAL PERMIT FOR CONCENTRATED ANIMAL FEEDING OPERATIONS IN IDAHO (2013), it appears that many CAFOs go unregulated.

³⁰² KRUGMAN, *supra* note 283.

³⁰³ John M. Church, *Lender Liability for Hazardous Waste: An Economic and Legal Analysis*, 59 U. COLO. L. REV. 659, 672–75 (1988) (discussing the power of liability through litigation as a means to force internalization); David R. Hodas, *NEPA, Ecosystem Management, and Environmental Accounting*, 14 NAT. RES., ENERGY & ENV'T 185, 191 (2000) (discussing insurance options); Scott H. Mollett, *Intracorporate Opportunism: Redistributive Compensation and Fixing Underexposed Abuses of Corporate Wealth*, 9 HASTINGS BUS. L.J. 141, 188 (2013) ("[F]iduciary duties help internalize the cost of opportunistic decisions in a variety of situations.").

least one clear advantage: its directness. Rather than addressing moral hazard by encouraging investors to internalize risk—something not easily accomplished³⁰⁴—a consent regime would confront the problem by giving those who bear the costs a direct voice in the matter.

3. Voice Commensurate with Knowledge: Consent and the Search for Information

One does not have to accept the normative arguments in favor of consent to embrace it as an improvement over the current model. Starting with local knowledge, the next three arguments expand upon the practical rationale for moving towards consent.

Local people know things about their land and society that far-off technocrats do not. “Environmental knowledge, like economic knowledge, is highly decentralized. Specific knowledge about local ecological conditions—threats, problems, and solutions—is more likely to be found at the local level than in a centralized regulatory bureaucracy.”³⁰⁵ Accordingly, an EIA that fails to include local input is quite likely to be data-deficient.³⁰⁶ The history of dam development in the western United States proves the point.³⁰⁷ Whereas local knowledge of land and water would have scrubbed many a project at the planning stage, we ended up with a slew of inefficient dams drawn up by faraway bureaucracies.³⁰⁸

Even where agency staff have identified the right risks, they may not appreciate their gravity or nuance. “Tunnel vision” may cause them to gloss over risks that appear minor at first glance, only revealing their problematic nature upon closer examination.³⁰⁹ The familiarity of local communities with local characteristics can counteract this tendency.

In the end, a regime that requires and heeds broad input from the affected community is more likely to produce informed decisions.³¹⁰ This is not

³⁰⁴ W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 82 (1989) (“[I]nformation and transactions [sic] costs make complete internalization of the costs of risk impossible.”).

³⁰⁵ Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 77 (2007).

³⁰⁶ FRANK FISCHER, *CITIZENS, EXPERTS AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE* 117 (2000).

³⁰⁷ See generally MARC REISNER, *CADILLAC DESERT* (1993).

³⁰⁸ Donald Snow, *Wallace Stegner’s “Geography of Hope,”* 24 ENVTL. L. xi, xv (1994).

³⁰⁹ Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 HARV. ENVTL. L. REV. 93, 121 (1999).

³¹⁰ This is the case not only because the community provides information to the agency, but also because the agency provides information to the community. Rossi, *supra* note 155, at 187.

to suggest that the public understands the situation, in all its details, better than an agency. Rather, the idea is that communities can provide to agencies important data that may otherwise go unconsidered. This is especially true in the case of local environmental conditions and socio-cultural factors. And, knowing that community consent is a prerequisite to major projects, agencies would be more likely to give due weight to these concerns.

4. Consent as a Path Towards Legitimacy, Acceptance, and a Stable Business Environment

Democracies enjoy a perception of legitimacy to the extent they involve, or appear to involve, the public in the work of governance.³¹¹ The broader and more direct the participation, the stronger this perception of legitimacy.³¹² Unfortunately, in environmental decision-making, consultation has failed to lead to sufficient legitimacy and acceptance because public participation is neither broad nor direct.³¹³ Moving towards consent would respond to this deficiency.³¹⁴

The potential of consent to yield legitimacy and lasting community acceptance has not been lost on private enterprise. Despite the absence of laws requiring such action, for instance, firms engaged in mining and oil extraction in Canada and Australia have taken it upon themselves to seek the consent of affected indigenous communities.³¹⁵ Though these moves might be motivated in part by changing notions of corporate social responsibility, they also reflect sound business judgment. As incidents around the world have shown—from Bolivia to China—local resistance can render a project unworkable.³¹⁶ Even if

³¹¹ *Id.* Some scholars have argued that this might be the case even where citizen participation is entirely futile, affecting nothing. *See, e.g.,* Mihaley, *supra* note 119, at 165.

³¹² Zhao, *Public Participation in China*, *supra* note 87, at 90 (“[I]nvolving the public in the EIA process contributes to consensus building and can effectively reduce potential conflicts and litigation at a later stage.”).

³¹³ *See supra* Part II.

³¹⁴ *See generally* STEVEN HERZ, ANTONIDA VINA & JONATHAN SOHN, WORLD RES. INST., DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT (2007), available at http://pdf.wri.org/development_without_conflict_fpic.pdf; *see also* Kylie Wilson, *Access to Justice for Victims of the International Carbon Offset Industry*, 38 *ECOLOGY L.Q.* 967, 1019 (2011) (“There is also a strong business case for more extensive public participation and EIA procedures. . . . Stricter public participation requirements will enable project developers to recognize and address community needs, gain community support early in the project cycle, and avoid delays and financial risks associated with legal action or local unrest . . .”).

³¹⁵ George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights*, 33 *MICH. J. INT’L L.* 627, 646–47, 649 (2012).

³¹⁶ OSCAR OLIVERA, TOM LEWIS & VANDANA SHIVA, COCHABAMBA!: WATER WAR IN BOLIVIA (2004); *China Wastewater Pipeline Scrapped After Protest*, BBC NEWS (July 28, 2012), <http://www.bbc.co.uk/news/world-asia-china-19026464>.

legally permitted, the costs of such resistance eventually take their toll. This is particularly true in many developing nations, where direct action like road blockades and sabotage are more common.³¹⁷ Firms are rightfully taking note; if fiercely opposed, an otherwise profitable project may not make sense. Community consent, on the other hand, engenders stability, a rare and valuable commodity that benefits the bottom line even as it satisfies normative preferences.

Obtaining consent, of course, will often necessitate modifications to the project or its execution. Such modifications will often result in projects more aligned with the dual goals of sustainable development: ecologically sound use of the environment and the reduction of poverty.³¹⁸ Putting aside for the moment concerns over “buying” consent—addressed in the following section—an otherwise meritorious project that fails to secure community approval can be adjusted to account for specific environmental concerns or to direct more of the benefits to the local community. In some cases, the amount and type of modifications necessary to win consent will render the project unfeasible. If the community withholds consent for reasons of local ecology or economy, this is not a bad result. In many cases, though, the modifications will not affect the essence of the project but nevertheless respond to local concerns in meaningful ways.

In the Philippines, for instance, Shell made significant changes to the Malampaya Deep Water Gas-to-Power Project in response to local concerns.³¹⁹ The largest industrial development in the nation’s history, the \$4.5 billion Malampaya project began operation in 2002, extracting natural gas from the seabed off Palawan Island (lightly populated and described by Jacques Cousteau as the “most beautiful place” he had ever explored)³²⁰ and pumping it over 500 kilometers to a refining plant on Luzon Island (the economic and political center of the Philippines³²¹).³²² Upon refinement, the gas fuels three power

³¹⁷ Patrick J. Garver et al., *Investment Decision Making in the Extractives Industry in “Challenging” Places*, 58 ROCKY MTN. MIN. L. FOUND. INST. 2-1, 2-18 (2012) (discussing clashes over projects in the Niger Delta, where “companies experienced widespread violence, sabotage of infrastructure, bunkering (i.e., oil theft from pipelines), kidnapping, and much more”).

³¹⁸ Scott D. Calahan, *NIMBY: Not In Mexico’s Back Yard? A Case for Recognition of a Human Right to a Healthy Environment in the American States*, 23 GA. J. INT’L & COMP. L. 409, 419 (1993).

³¹⁹ HERZ ET AL., *supra* note 314, at 19.

³²⁰ Michell Jana Chan, *The Philippines: The Islands Less Well Traveled*, THE TELEGRAPH (Feb. 16, 2008), *available at* <http://www.telegraph.co.uk/travel/destinations/asia/philippines/748878/Philippines-The-islands-less-travelled.html>.

³²¹ HERZ ET AL., *supra* note 314, at 19.

³²² *Id.*

plants.³²³ The plants are expected to supply Luzon with 2,700 megawatts of electricity, or some 30% of national power needs.³²⁴

Well before starting construction in 1998, Shell decided to engage in a consultative process with the aim of securing community consent.³²⁵ Although Philippine law at the time required public participation in the EIA process,³²⁶ Shell arguably went beyond the legal minimum by not only holding town-hall meetings and public hearings, but by responding to concerns through substantial project modifications.³²⁷ For instance, during the early stages of the project, three pipeline routes were considered for delivery of the gas to the refinery. The cheapest route—the one initially favored by Shell—would have crossed Mindoro Island. But when community members expressed fear that the route would disrupt areas of rich biodiversity, Shell backed down and looked to other options.³²⁸ The second option was an offshore route, but this too was rejected because the path went through ancestral waters of the Tagbuna tribe.³²⁹ Finally, Shell selected an offshore route that “avoided the most significant environmental and social impacts of the other two options, and therefore averted potential community pressure in the affected areas.”³³⁰ This is but one of many adjustments or accommodations made by Shell as a result of its dialogue with affected communities.³³¹

Did Shell do this out of the kindness of its heart? Probably not. Instead, Shell perceived the alignment between fiscal, environmental, and social responsibility. The company “estimates that its total costs of engaging the affected communities and gaining their consent—including staff time, meetings, community compensation, changed plans, and other related expenses—was approximately \$6 million.”³³² In the context of a \$4.5 billion project that generated revenues of \$685.7 million between 2002 and 2004, Shell’s expenditures on engagement are a drop in the bucket.³³³ Indeed, the company actually saved money compared to projections because the lack of conflict allowed it to complete work ahead of schedule.³³⁴ Throw in indirect benefits—a boon to compa-

³²³ *Id.* at 20.

³²⁴ *Id.* at 19.

³²⁵ *Id.* at 21–22.

³²⁶ *Id.* at 22.

³²⁷ *Id.* at 22, 24.

³²⁸ *Id.* at 24.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 25.

³³³ *Id.*

³³⁴ *Id.*

ny goodwill and a better relationship with the government—and Shell’s outlays on public engagement look like an incredible investment.³³⁵

Shell’s approach in the Philippines stands in stark contrast to the approach taken by a pair of firms in Peru.³³⁶ In the Peruvian Andes, the open-pit Minera Yanacocha Gold Mine Project (Yanacocha) spans some 160 square kilometers and has extracted over \$7 billion worth of gold since opening in 1992.³³⁷ One of the world’s largest and most profitable gold mines, Yanacocha is co-owned by United States-based Newmont Mining Corporation and Peruvian-based Compañía de Minas Buenaventura, with the final five percent stake held by the International Finance Corporation. Despite its massive scale, the existing operation at Yanacocha represents only a small fraction of the overall concession—Newmont and Buenaventura hold development rights over an additional 1500 square kilometers.³³⁸ When the operation began to yield unexpectedly high amounts of gold in the 1990s, Newmont and Buenaventura launched a campaign of aggressive expansion. By the end of the decade, the mine was exerting a “gravitational force” throughout the area, disrupting the pastoral economy and way of life.³³⁹ Even though Peruvian law required that half of all tax revenues go to local government, the mine’s environmental, social, and economic impacts were the source of rising tension. While Yanacocha provided employment for many, it also cut a deep divide between those residents able to gain work at the mine and those left out—the majority population. Instead of seeing the mine as a boon, residents who maintained their pastoral livelihoods saw it as a negative, damaging the local watershed upon which they depended.³⁴⁰

The situation boiled over in 2000 when a mining contractor spilled mercury along a local road.³⁴¹ Unaware that the liquid metal was a toxic by-product of the mining process, children played with it and some adults collected it and brought it home.³⁴² Making a bad situation worse, management at the mine delayed reporting the spill and allegedly paid villagers to clean up the spill without proper safety gear.³⁴³ In the end, over 1,000 residents stated that they suffered from acute mercury poisoning.³⁴⁴

³³⁵ *Id.* at 25–26.

³³⁶ *Id.* at 40.

³³⁷ *Id.* at 40–41.

³³⁸ *Id.* at 40.

³³⁹ *Id.*

³⁴⁰ *Id.* at 42–43.

³⁴¹ *Id.* at 42.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

Shortly thereafter, things took another turn for the worse—at least from the mine’s perspective. With its eyes on developing Cerro Quilish, a site within the concession estimated to hold 3.7 million ounces of gold, the consortium assured community members that the project would not affect water quality.³⁴⁵ Increasingly skeptical of the company line, the community threw a monkey wrench into the plan when Cajamarca, the largest town in the area, passed a municipal ordinance declaring Cerro Quilish off-limits.³⁴⁶ Turning to the judiciary, the firms won back their rights when the Peruvian Supreme Court held that Cajamarca had exceeded its authority.³⁴⁷ Predictably, this ruling did not end the controversy.³⁴⁸ When the miners moved equipment onto the site to begin exploratory drilling, the people took to the streets.³⁴⁹ They blocked the road and, following a police crackdown, launched a general strike that culminated in 10,000 people filling the plaza.³⁵⁰ Forcing negotiations, the conflict was finally resolved when local leaders met with the Ministry of Mines and company officials.³⁵¹ The firms apologized for their actions and petitioned the Ministry to revoke the permit relating to Cerro Quilish.³⁵² With an estimated worth of \$2.23 billion and low recovery expenses, the trouble at Cerro Quilish amounted to a loss of as much as \$1.69 billion in company earnings.³⁵³ Newmont’s stock fell 7% during the two-week protests.³⁵⁴

Although we cannot be certain the consortium would have had success at Cerro Quilish had it first sought community consent, it only could have helped. By failing “to meet the public’s expectations of transparency, meaningful participation in decision making, and good corporate citizenship,” Newmont and Buenaventura sowed the seeds of their own destruction.³⁵⁵ Had they approached the matter under the rubric of consent, they might have realized that the project was doomed from the start and cut their losses; or they might have restructured the project to address local concerns, engaging in an iterative process marked by compromise and genuine listening. Either way, the companies would have emerged with their reputations burnished rather than tarnished.

Apart from environmental concerns, projects often meet local resistance based on the perception (often accurate) that the benefits inure to dis-

³⁴⁵ *Id.* at 43.

³⁴⁶ *Id.* at 42.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at 43.

³⁵⁴ *Id.* at 44.

³⁵⁵ *Id.* at 44.

tant rather than local interests. To secure community approval, some firms have responded to this perception by awarding subcontracts to local businesses, employing local labor, and on occasion packaging the main project with community development projects such as schools and hospitals.³⁵⁶ Even if these efforts seem an incomplete response to the economic concerns raised by site communities—construction jobs, for instance, would hardly replace a lost economy based on fishing and hunting—they still represent significant progress towards sustainable development. By forcing the issue, consent makes these approaches more likely.

Yet, reflecting on these tales, one might conclude that consultation *does* work (as in the Philippines), and that it only fails to work when the effort is half-hearted or disingenuous (as in Peru). If that is the case, the argument continues, we should focus on implementation of the current framework rather than supplementing consultation with consent. While the initial observation is spot-on—there *is* an implementation problem, especially in the developing world—it fails to recognize an important fact: When consultation works, the process *looks very much like consent*. The cases that seem to satisfy us—like the Malampaya project in the Philippines—do so because the people have effectively given their consent. If that is what we really want, we should adopt a regime that requires it explicitly.

5. Consent, Transparency, and Manipulation

The final argument in favor of consent relates to the problems of transparency and manipulation. Although a consent regime would still be vulnerable to these problems—one need look no further than ballot irregularities in political races to recognize as much—it would be an improvement over the current model of consultation.

As I have shown above, consultation under NEPA and similar regimes has failed to produce public participation as advertised.³⁵⁷ But even when there has been widespread input, the nature of the consultation model precludes a precise understanding of how much impact that participation has had on any given decision. When the deciding body sets forth and discusses public comments in its final opinion, one might fairly assume that the body did in fact consider those comments in rendering its decision. But there is never a way of knowing *how much* weight the comments actually received.³⁵⁸

³⁵⁶ See, e.g., HERZ ET AL., *supra* note 314, at 19; NATURAL RES. CAN., PARTNERSHIP AGREEMENTS: VALE INCO-NEWFOUNDLAND AND LABRADOR (2008), <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/minerals-metals/files/pdf/mms-smm/abor-auto/pdf/vale-08-eng.pdf>.

³⁵⁷ See *supra* Part II.

³⁵⁸ A recent case in point comes from the Ninth Circuit's decision in *Cal. Trout v. Federal Energy Regulatory Commission*, 572 F.3d 1003 (9th Cir. 2003). California Trout had attempted to

The consent regime resolves this ambiguity: Community approval is a necessary but not sufficient condition for the project at issue. In cases where the community withholds consent, the weight of its input will be absolutely clear. In cases where the community grants consent, ambiguity may still remain, as such approval will be but one factor in the ultimate decision to proceed with or to abandon the project. Still, because the larger concern from the community's perspective arises when projects are approved over its objections, consent would resolve ambiguity problems in their most vexing form.

If ambiguity tends to undermine public confidence indirectly, manipulation of the consultative process attacks it head-on. Manipulation of public input is one of the fears fed by an ambiguous process. Under a consultation regime, this fear is often well-founded. This is especially true in many developing countries where manipulation and corruption run rampant and oversight is weak.³⁵⁹ The Chad-Cameroon Oil and Pipeline Project, completed in 2007, illustrates how governments can check the consultation box while avoiding meaningful public input. Contrary to the requirements triggered by World Bank funding, the process was a sham; The people themselves had virtually no input, and "the only NGOs consulted were, for the most part, either created for the purpose in hand or commanded no allegiance in the production region."³⁶⁰ With a clearly defined process of consent, this sort of manipulation can be avoided.

B. *To What Extent?*

The consent requirement that I envision would be rather limited. A regime that wholly turned on consent would be rightly criticized by conservationists and developmentalists alike. That is not what I propose. Rather, the requirement I envision would be limited in the following ways: (1) it would apply only in situations passing the eligibility test (described below); (2) it would apply only to the affected local community (defined below), not the community at large; and (3) community approval would not constitute legal authorization (i.e., it would be a necessary but not sufficient condition).

intervene in a FERC proceeding addressing renewal of the California Aqueduct's license. FERC denied the motion to intervene at the agency level, and the Ninth Circuit upheld on appeal. Although FERC did not allow California Trout to intervene, the appellate court noted with approval the agency's statement that "California Trout's comments are in the record and will be given the same weight as those of any other entity, whether a party or not." Cal. Dep't of Water Res. and L.A., Project 2426-206, 120 FERC ¶ 61248, 62030 (Sept. 20, 2007); see *Cal. Trout*, 572 F.3d at 1017.

³⁵⁹ Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LIT. 1320, 1321-22 (1997).

³⁶⁰ Letter from Ngarleju Yorongar to the Inspection Panel at the World Bank (Dec. 15, 2000), available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/RequestEnglishtranslation.pdf>.

1. Projects Requiring Consent and the Eligibility Test

Not all public works should be subject to community consent. Just as many projects are exempted from NEPA under what is essentially a cost-benefit rationale,³⁶¹ so too should many projects be exempted from any consent requirement grafted onto NEPA and its counterparts. In this section, I describe one version of what I call the “eligibility test,” a test to determine whether a project should in fact trigger the consent requirement. After discussing this test (and an option for rebuttal in special cases), I go on to address what role, if any, consent should play in projects and regulations that tend to enhance the natural environment rather than cause it harm.

When should a project trigger the requirement of consent? In the introduction, I suggested that consent should only be mandatory when the project will (1) have a “significant” impact on the environment, and (2) yield a profound disconnect between those who enjoy its benefits and those who bear its environmental costs. As will become more obvious, it will take a fairly special project to satisfy both criteria. A ready example would be a large hydro-electric dam that forces upstream subsistence farmers to relocate while the energy fuels a big city hundreds of miles away. While this project would satisfy the two criteria—significance and a profound disconnect—most projects would not.

a. Significant Impact

Under NEPA, the responsible agency only prepares an EIS for projects having a “significant” effect on the quality of the human environment.³⁶² “Significant” is defined to require consideration of the intensity of the environmental effects and the context in which they occur.³⁶³ Although regulations enumerate various factors,³⁶⁴ the determination of “significance” is ultimately made on a case-by-case basis, first by agencies and then, if challenged, by the courts.³⁶⁵ Determining “significance” is not an exact science; it is complicated

³⁶¹ See Boling, *supra* note 34, at 319 (explaining that categorical exclusions “were designed to avoid repetitive analysis of actions that normally do not involve significant impacts”); Moriarty, *supra* note 40, at 2312 (“The public need not participate in minor decisions, and requiring them to do so would only distract them from environmentally significant decisions and unnecessarily burden agencies. Categorical exclusions thus promote agency efficiency and avoid masses of paper that might otherwise divert attention away from federal actions with real environmental effects.”).

³⁶² *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 823–24 (E.D. Mich. 2008).

³⁶³ 40 C.F.R. § 1508.27 (2013).

³⁶⁴ *Id.*

³⁶⁵ See, e.g., *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 812, 816 (8th Cir. 2006) (holding that issuance of a FONSI constituted final agency action under NEPA and, accordingly, was subject to immediate judicial review).

by the lack of a clear baseline,³⁶⁶ and by agencies' incentive to downplay the impacts of a project to avoid the resource expenditure involved in preparing an EIS.³⁶⁷ On the other hand, the agency incentive to avoid an EIS is at least partially counteracted with the jurisprudence on uncertainty (requiring agencies to prepare an EIS where the uncertainty of impacts may be resolved by further data collection),³⁶⁸ cumulative impact (requiring agencies to evaluate a project's "significance" not in a vacuum, but rather in light of "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"),³⁶⁹ and segmentation (prohibiting agencies from "divid[ing] artificially a 'major Federal action' into smaller components to escape the application of NEPA to some of its segments").³⁷⁰ Even if it is sometimes difficult to predict the outcome of a significance determination, few observers have called for re-drawing the line altogether.

The language of "significance" is common throughout the world's EIA regimes. At the international level, the prospect of significant impacts triggers the duty to prepare an EIA under such instruments as the Convention on Biological Diversity,³⁷¹ Principle 17 of the Rio Declaration,³⁷² and the United Nations Convention on the Law of the Sea.³⁷³ In keeping with this trend, the United Nations General Assembly has grouped EIA among the fundamental principles of international environmental law—along with such staples as the polluter-pays principle and the precautionary principle—and has suggested that such assessments "should be undertaken for proposed activities that are likely

³⁶⁶ Kass, *supra* note 29, at 57–58.

³⁶⁷ See generally Karkkainen, *supra* note 8.

³⁶⁸ Nat'l Parks & Conservation Assn. v. Babbitt, 241 F.3d 722, 732 (9th Cir. 2001).

³⁶⁹ Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 180 (3d Cir. 2010); 40 C.F.R. § 1508.7 (2013).

³⁷⁰ Save Barton Creek Ass'n v. Fed. Highway Admin., 950 F.2d 1129, 1139 (5th Cir. 1992).

³⁷¹ United Nations Conference on Environment and Development: Convention on Biological Diversity art. 7, July 1, 1992, 31 I.L.M. 818 (requiring parties "as far as possible and as appropriate . . . [to] . . . introduce appropriate procedures . . . [requiring environmental impact assessment of proposed projects that are] . . . likely to have significant adverse effects on biological diversity").

³⁷² United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (Vol. I), Annex I (July 1992), reprinted in 31 I.L.M. 874 ("Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.").

³⁷³ See Third United Nations Conference on the Law of the Sea: Final Act, Nov. 1, 1982, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261 art. 206 (calling for assessment of activities that have potential effects on the marine environment).

to have a significant adverse impact on the environment.”³⁷⁴ At the national level, significance is the touchstone in the European Union,³⁷⁵ Brazil,³⁷⁶ Canada,³⁷⁷ Australia,³⁷⁸ China,³⁷⁹ India,³⁸⁰ and countless other countries.³⁸¹

In sum, significance is the consensus threshold point identified by the international community. Absent a compelling argument to the contrary, we should not deviate from this in the context of a consent-based regime.

b. Profound Disconnect

Community consent should only be necessary where it appears likely that the project in question would produce a profound disconnect between those who would enjoy the benefits of the project and those who would suffer its environmental harms. To some extent, public projects will always yield asymmetry. If a state builds a road between two cities, some people will see incredible benefits (construction crews and transportation firms), others significant benefits (businesses from one city with a commodity that is scarce in the other city), others modest benefits (consumers who might buy newly available goods or services), and others virtually no benefits (poor people with no reason or money to travel and with no money to spend on newly available products). And so it goes with the costs: Some will pay a heavy price (farmers forced to relocate), some a significant but lesser price (residents along the thoroughfare who face increased pollution), and some very little at all (well-to-do citizens living away from the thoroughfare).³⁸² In the absence of other aggravating factors,

³⁷⁴ Overall Review and Appraisal of Further Implementation of Agenda 21, ¶ 118, U.N. GAOR, 19th Spec. Sess., U.N. Doc. A/S-19/29 (June 28, 1997).

³⁷⁵ EIA Directive 85/337, 1985 O.J. (L 175) (EEC); see also Paul Grace, *UK Environmental Impact Assessments: The Battle Continues*, 20 NAT. RESOURCES & ENV'T 63, 64 (2005).

³⁷⁶ Humberto Dalla Bernardina De Pinho, *The Role of the Department of Public Prosecutions in Protecting the Environment under Brazilian Law: The Case of “Favelas” in the City of Rio de Janeiro*, 24 GA. ST. U. L. REV. 735, 739 (2008).

³⁷⁷ See Kamta Prasad, *Environmental Impact Assessment: An Analysis of the Canadian Experience*, 30 INT'L STUDIES 299 (1993).

³⁷⁸ See *Do You Need Approval Under the EPBC Act?*, AUSTL. GOV'T DEP'T OF THE ENV'T, <http://www.environment.gov.au/epbc/approval.html> (last visited Oct. 10, 2013).

³⁷⁹ Lemmer, *supra* note 124, at 293–97.

³⁸⁰ *Id.*

³⁸¹ See BARRY SADLER, ENVIRONMENTAL ASSESSMENT IN A CHANGING WORLD: EVALUATING PRACTICE TO IMPROVE PERFORMANCE 118–21 (1996), available at http://www.ceaa-acee.gc.ca/Content/2/B/7/2B7834CA-7D9A-410B-A4ED-FF78AB625BDB/iaia8_e.pdf (discussing various approaches to determining “significance”).

³⁸² One might object that I have ignored the cost of paying taxes. If there is a progressive tax structure, then wealthy citizens may well pay more (in terms of economic if not environmental costs) than citizens of modest means. Indeed, I would hope to see policy-makers (and courts)

however, this would not qualify as a *profound* disconnect. Change the facts, and it might.

Sticking with the case of a publicly-financed road, one can imagine a situation where the costs and benefits flow to such distinct communities and economic interests that the disconnect demands more than consultation. Imagine that the road will be built between two distant cities and cut through a national park populated sparsely by an indigenous community. The community has lived in the park's rainforest for centuries, depending on hunting and fishing for food and largely sheltered from outside contact. The road might bring the park community some benefits—access to medicine, economic opportunity in the way of increased tourism—but the road is being built for the cities, and they clearly stand to gain the lion's share of the benefits. The environmental costs, on the other hand, will be felt disproportionately by the residents of the park. The road will split the park in two; the trees that are chopped down will expose fragile soils that will wash into the rivers, fouling the habitat of fish; the noise and smoke of heavy equipment will make their way into a jungle that has never known them; and, looking into the future, the road will invite numerous settlers who will take advantage of the road to practice slash-and-burn agriculture and sell off the timber. The environment will change and the indigenous community will change with it. Perhaps the community members will welcome this—or perhaps not. But, either way, they should be given the choice. If the project sponsor fails to secure the community's consent, the project should not be allowed.

The above example—based loosely on the ongoing “TIPNIS” conflict in Bolivia³⁸³—would satisfy the criterion of a profound disconnect. *But wouldn't the community in this case—an indigenous group—already have the protection of consent under UNDRIP? Aren't you arguing for something that the international community has already embraced?* Not quite. Consent for indigenous peoples under UNDRIP finds its theoretical roots in notions of sovereignty and communal property rights. In my TIPNIS-inspired example, consent could be invoked under *either* UNDRIP *or* the regime I propose, which relies on a different theoretical foundation. Whereas the UNDRIP version of consent hinges on a community's status as “indigenous,” my own hinges on the degree of a community's exposure to a disproportionately high share of the costs and a disproportionately low share of the benefits. This disconnect is frequently seen

consider all costs and benefits when discerning the presence of a profound disconnect. I have left out the matter of taxes in the above example for brevity's sake alone.

³⁸³ See generally Nicholas Fromherz, *The Rise and Fall of Bolivia's Evo Morales*, FOREIGN AFFAIRS, Oct. 18, 2011, <http://www.foreignaffairs.com/features/letters-from/the-rise-and-fall-of-bolivias-evo-morales> [hereinafter, *The Rise and Fall*].

with projects in indigenous territory, but it is likewise common in non-indigenous communities.³⁸⁴

c. Rebutting Consent

Although satisfaction of the above two criteria will typically occur in cases where a right of consent is normatively desirable, one can envision atypical cases—cases in which, despite satisfaction of the eligibility criteria, a right of consent would be unfair. In many ways, the consent regime can be thought of as a tool for environmental justice. If granting a consent right in a given case would, despite satisfaction of the eligibility criteria, undermine rather than further the goal of environmental justice, the consent right should not pertain.

A concrete example will help to clarify the point. For more than a decade, controversy over a proposed offshore wind farm (“Cape Wind”) has embroiled Cape Cod, Massachusetts.³⁸⁵ The plan calls for the construction of 130 turbines some 4 to 11 miles offshore, in an area of Nantucket Sound known as Horseshoe Shoal.³⁸⁶ Though it might surprise Melville—and the not insignificant numbers of year-round residents who live below the national poverty line—the Cape and its neighboring islands of Martha’s Vineyard and Nantucket have come to be associated with wealth and privilege.³⁸⁷ The Kennedy Compound in Hyannis Port is perhaps the most potent symbol of the area’s lofty status in the American conscious. The Kennedy residence commands a breathtaking view of the waters over Horseshoe Shoal—precisely where Cape Wind developers hope to plant their turbines.³⁸⁸

If applied rigidly, the eligibility criteria might point in the direction of consent rights for the communities surrounding the Cape Wind site. Cape Wind certainly qualifies as a “significant” project for purposes of NEPA, and there is a reasonable argument that the communities within eyesight of the turbines will suffer a disproportionate share of the environmental costs of the project. Under one version of the narrative, while the broader population will enjoy the benefits of cleaner energy, it is only the close-in communities that will suffer de-

³⁸⁴ See, e.g., ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 3–8 (1994) (discussing race-and-class-based discrimination in the siting of toxic dumps and municipal waste facilities in the United States).

³⁸⁵ See generally WENDY WILLIAMS & ROBERT WHITCOMB, *CAPE WIND: MONEY, CELEBRITY, CLASS, POLITICS, AND THE BATTLE FOR OUR ENERGY FUTURE* (2007).

³⁸⁶ Susan Lorde Martin, *Wind Farms and NIMBYS: Generating Conflict, Reducing Litigation*, 20 *FORDHAM ENVTL. L. REV.* 427, 450 (2010).

³⁸⁷ Roger L. Freeman & Ben Kass, *Siting Wind Energy Facilities on Private Land in Colorado: Common Legal Issues*, 39 *COLO. LAW.* 43, 44 (2010).

³⁸⁸ See Elinor Burkett, *A Mighty Wind*, *N.Y. TIMES*, June 15, 2003, at 48; Wayne Drash, *Nine-Year Wind Farm Fight Splits Cape Cod*, *CNN* (April 20, 2010, 12:52 PM), <http://www.cnn.com/2010/TECH/04/20/cape.cod.wind.farm/index.html>.

creased property values and a disrupted fishery.³⁸⁹ Although it is not clear that this particular distribution of costs and benefits would be so asymmetrical as to meet the requirement of a “profound disconnect,” the mere fact that one could make this argument calls for a response. If consent is to be a tool of environmental justice rather than a lever of NIMBYism, it follows that consent should not empower naysayers who favor off-shore wind in the abstract—and who benefit from countless other initiatives—but who would rather not play host.

One way to mitigate this risk is to view satisfaction of the eligibility criteria as giving rise to a rebuttable presumption. If the agency determines that a project is both significant and likely to distribute costs and benefits in an acutely asymmetrical manner, this gives rise to a presumption of extending a consent right to the disproportionately burdened community. Yet, if the agency discerns that the disproportionality in the case at hand is offset by an inverse, favorable disproportionality in other past initiatives—where the community has received a disproportionate benefit from other environmentally significant projects or policies—the community should have no right to consent.

Consent’s appeal is strongest when the distribution of costs and benefits follows a historically unjust pattern, when the community saddled with the costs in a given case has been on the outside looking in many times in the past. The appeal of consent diminishes as the uneven cost-benefit distribution begins to appear less like a pattern and more like an anomaly. There may be situations, of course, where the distribution at issue is so severely lop-sided that it would be unfair to consider the off-set effect of past initiatives. This is why a situation that has satisfied the eligibility criteria should trigger a presumption in favor of consent, a presumption that can only be rebutted when the community has, in the aggregate, enjoyed disproportionate benefits from past initiatives. Consent should primarily be a tool for marginalized communities in the fight against environmental injustice.

2. The Problem of Conservation-Enhancing Projects, Regulations, and Withdrawals

In 1996, Bill Clinton used his authority under the Antiquities Act³⁹⁰ to create the Grand Staircase-Escalante National Monument in Utah.³⁹¹ At 1.9 million acres, it was the largest National Monument ever created in the conti-

³⁸⁹ See Dominic Spinelli, *Historic Preservation & Offshore Wind Energy: Lessons Learned from the Cape Wind Saga*, 46 GONZ. L. REV. 741, 746–48 (2011) (summarizing positions for and against Cape Wind); Iva Žiža, *Siting of Renewable Energy Facilities and Adversarial Legalism: Lessons from Cape Cod*, 42 NEW ENG. L. REV. 591, 595 (2008).

³⁹⁰ 16 U.S.C. § 431 (2012).

³⁹¹ Proclamation No. 6920, 3 C.F.R. § 64 (2013).

mental United States.³⁹² It was also one of the most controversial.³⁹³ Sitting atop some 62 billion tons of coal, the land that became the Grand Staircase-Escalante National Monument was coveted by the energy industry and, regionally, looked upon as a great source of future employment.³⁹⁴ By all accounts, the people living in and around the area did not want the monument; it was foisted upon them despite their vigorous objections.³⁹⁵

The Grand Staircase-Escalante controversy highlights a potential problem with requiring consent: what to do in the case of conservation-enhancing projects, regulations, and withdrawals? The simplest answer is to say that consent should not be required when the government proposes a conservation measure, but only in the case of a project that could potentially *damage* the environment. This simplest of answers is the right one, but it takes some explanation.

The explanation lies in the *raison d'être* of environmental law. NEPA and its counterparts are designed to *encourage* environmental protection, not to place obstacles in its path. Though NEPA's procedural safeguards "may be used to benefit those who assert development interests, just as the safeguards may be used to benefit those who assert conservation interests, . . . NEPA's policy objectives must not be thwarted in the process."³⁹⁶ Applying NEPA so as to unduly hamper conservation projects—such as designating lands roadless, restricting timber harvests, creating new parks, etc.—is to turn the statute "on its head."³⁹⁷ Because NEPA and its foreign counterparts aim to protect the environment by requiring agencies to consider environmental impacts, requiring community consent in the case of a conservation-enhancing proposal would be at cross-purposes with the underlying regimes.³⁹⁸ While U.S. courts have failed to rule consistently on the extent to which NEPA applies in the case of conservation projects or measures,³⁹⁹ there is no good reason to tack on an additional procedural obstacle such as consent.

³⁹² Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L.J. 477, 477–78 (1998).

³⁹³ See generally Eric C. Rusnak, *The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 704–07 (2003).

³⁹⁴ *Id.*

³⁹⁵ See John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 308 (2001).

³⁹⁶ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122 (9th Cir. 2002).

³⁹⁷ *Id.*

³⁹⁸ One possible exception might be in the extreme case where a government proposes a conservation withdrawal or regulation in bad faith, e.g., out of a desire to punish a certain group of people.

³⁹⁹ Compare *Douglas County v. Babbitt*, 48 F.3d 1495, 1506 (9th Cir. 1995) ("[W]hen a federal agency takes an action that prevents human interference with the environment, it need not

3. Defining the Local Community

The foregoing points have dealt with the scope of the consent requirement primarily in terms of the nature of the project. That is perhaps the most important part of the equation, but the question of scope also extends to population. I have stated that the “local community” holds the right of consent, but who exactly belongs to that community? The ongoing TIPNIS struggle in Bolivia demonstrates how important—and complicated—this question can be.

At first blush, the TIPNIS case would appear an easy nut to crack—at least as concerns the issue of defining the affected local community (i.e., the community that would hold consent rights under my proposal). The Bolivian government proposed building a road between two departments (counterparts to the United States), with the road cutting through a national park and protected indigenous territory (known as “TIPNIS”).⁴⁰⁰ As one might predict, public opposition to the road overwhelmingly concerned the path through TIPNIS; the proposal to build a road connecting the two departments was not, as such, the subject of controversy.⁴⁰¹ After months of wrangling, the government finally decided to consult the affected community.⁴⁰² But if that decision brought closure to one debate, it only initiated another: *exactly who should be able to participate in the consultation?*⁴⁰³ Because the “consultation” was understood to be something more like a referendum—the government implicitly acknowledging that it would need community approval to move forward with the project—defining the eligible public was of critical importance.⁴⁰⁴

Yet, as I say, the TIPNIS case appears an easy one. Because the road was to cut through a park and protected indigenous territory—and it was that particular detail that sparked the protests and marches—one might fairly conclude that, under a consent regime, park residents alone should hold consent rights. Facts on the ground, however, complicate matters. For starters, the park

prepare an EIS.”), *with* Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1231 (10th Cir. 2002) (ordering the FWS to prepare an EIS in connection with proposed critical habitat designation).

⁴⁰⁰ *The Rise and Fall*, *supra* note 383.

⁴⁰¹ See Nicholas Fromherz, *Waking from a Dream in Bolivia: The TIPNIS Victory That Never Was*, TERRANULLIUS (Feb. 20, 2012), <http://terra0nullius.wordpress.com/2012/02/20/waking-from-a-dream-in-bolivia-the-tipnis-victory-that-never-was/#more-2498> [hereinafter *Waking from a Dream*].

⁴⁰² See Emily Achtenberg, *Bolivian Congress Adopts Controversial TIPNIS Consultation Law*, N. AM. CONGRESS ON LATIN AM. (Feb. 10, 2012), <https://nacla.org/blog/2012/2/10/bolivian-congress-adopts-controversial-tipnis-consultation-law> (discussing “the critical issue of who will be consulted”).

⁴⁰³ *Id.*

⁴⁰⁴ Interview with Mauricio Sanchez Patzy, Professor of Sociology, Universidad de San Simon, in Cochabamba, Bol. (Sept. 27, 2013).

is roughly the size of Connecticut.⁴⁰⁵ With groups of people distributed unevenly throughout the park's reaches, it is not obvious that everyone living in the park would be affected in even approximately the same way.⁴⁰⁶ While communities that straddle the path of the road would feel its impacts immediately, people living far from the road might not feel its effects for years to come.

So there is the geographic factor. In addition, there is the even thornier question of demographics. Despite its name, many would argue that not everyone living in the park is "indigenous"—or at least that not everyone merits that title for purposes of determining the park's future. The indigenous peoples "originally" from the territory encompassed by the park belong to three tribes: the Moxeño, Yuracaré, and Chimane.⁴⁰⁷ Yet these people are not the only ones who live or work in TIPNIS. Following the collapse of Bolivia's mining industry in the 1970s and 1980s, thousands of highlanders came to the area surrounding TIPNIS and began to cultivate coca.⁴⁰⁸ These people overwhelmingly identify themselves as "indigenous"—of indigenous Andean descent—and it is hard to argue with that assessment.⁴⁰⁹ But they are not indigenous to the immediate area of TIPNIS,⁴¹⁰ a tropical rainforest strikingly different from the high plains to the west, so many say they should not participate in the consultation.⁴¹¹ This

⁴⁰⁵ Noah Friedman-Rudovsky, *Bolivia's Battle over a Road and a Way of Life*, YALE ENV'T 360 (Aug. 27, 2012), http://e360.yale.edu/feature/video_bolivia_battles_over_highway_and_way_of_life/2565/ (documentary film).

⁴⁰⁶ *Consulta a los Indígenas del Territorio y Parque Nacional Isiboro Secure*, FUNDACIÓN TIERRA, http://www.ftierra.org/ft/index.php?option=com_content&view=article&id=10916:rair&catid=101:graficos&Itemid=149 (last visited Oct. 8, 2013) (map showing park and community sites).

⁴⁰⁷ Franz Chávez, *BOLIVIA: Morales Clashes with Natives Protestors over Road Through Tropical Park*, INTER PRESS SERVICE (Aug. 24, 2011), <http://www.ipsnews.net/2011/08/bolivia-morales-clashes-with-native-protesters-over-road-through-tropical-park/>.

⁴⁰⁸ See BENJAMIN DANGL, *THE PRICE OF FIRE: RESOURCE WARS AND SOCIAL MOVEMENTS IN BOLIVIA* 31–58 (2007); Interview with Mauricio Sanchez Patzy, *supra* note 404.

⁴⁰⁹ See Interview with Mauricio Sanchez Patzy, *supra* note 404; *Denuncian Que Consulta en TIPNIS Tiene Presion Cocalera*, EL MUNDO (July 30, 2012), <http://www2.elmundo.scz.in/index.php/nacional/10116-denuncian-que-consulta-en-tipnis-tiene-presion-cocalera>.

⁴¹⁰ See *Denuncian Que Consulta en TIPNIS Tiene Presion Cocalera*, *supra*, note 409; see also DEP'T OF REG'L DEV., ORG. OF AM. STATES, *Case study 5 - The Chapare region study, Bolivia*, in INTEGRATED REGIONAL DEVELOPMENT PLANNING: GUIDELINES AND CASE STUDIES FROM OAS EXPERIENCE (1984), available at <http://www.oas.org/dsd/publications/Unit/oea03e/ch10.htm#iv>. implementing the recommendations (discussing government-sponsored and spontaneous colonization of region surrounding TIPNIS).

⁴¹¹ See *MSM: Consulta Solo Debe Hacerse a Los Tres Pueblos Indígenas*, LA PATRIA, Oct. 13, 2011, <http://lapatriaenlinea.com/?nota=85431> (reporting position of opposition party leader, who maintains that the government consultation "should only apply to the three indigeneous peoples [who inhabit TIPNIS] . . . and which have nothing to do with the colonoziers, loggers, and coca growers") (author's translation); Interview with Mauricio Sanchez Patzy, *supra* note 404.

is no academic issue; the coca growers are generally die-hard supporters of the Morales government and the planned road.⁴¹² If they were to be included in the consultation, the outcome could change altogether.⁴¹³

The point of this story is not to suggest a particular approach in the TINPIS case or any other controversy. Rather, it is to acknowledge that it is no easy task to identify the local, affected community for purposes of a regime based on consent. That being said, one can sketch a basic framework for approaching the issue, recognizing that adjustments may be required in individual cases.

The starting point should be a presumption in favor of narrowly defining the affected local community. Even with the limits I propose, consent is a powerful tool that should only be invested in communities clearly finding themselves on the wrong side of the cost-benefit disconnect. Using the existing hierarchy of geopolitical units, the smallest unit should be favored as that whose inhabitants exercise consent. So, if a dam is to be constructed in Municipality X of County Y, the community with consent rights should be Municipality X unless all other municipalities within County Y are equally affected. Whether we think of this as a riff on the principle of subsidiarity⁴¹⁴ or as a way to curb dilution of local interests by regional interests, the presumption in favor of narrowly defining the affected community is sound.

To ensure some degree of order, the agency in charge of permitting the project should probably be assigned the task of initially defining the local community in light of this principle. While employing the presumption in favor of narrowly defining the affected community, the agency should still be granted discretion to consider the various factors—ecological, economic, and social—that reasonably inform this judgment call. Essentially, the determination of the relevant community for purposes of consent would be a “scoping” task.⁴¹⁵ Under NEPA, this determination would be subject to judicial review, but only following final agency action, and even then the decision would be somewhat insulated through the abuse-of-discretion standard.⁴¹⁶ However, given the importance of this decision, it might make sense to allow interlocutory review, at least in exceptional cases.

⁴¹² *The Rise and Fall*, *supra* note 383; *see also* Interview with Mauricio Sanchez Patzy, *supra* note 404.

⁴¹³ *See Waking from a Dream*, *supra* note 401.

⁴¹⁴ Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 359 (2012).

⁴¹⁵ Under NEPA, an agency has “the discretion to determine the physical scope used for measuring environmental impacts” so long as the scope of analysis is “reasonable.” *Idaho Sporting Cong. Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002).

⁴¹⁶ *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1235 (D. Idaho 2001).

4. Consent as a Necessary but Insufficient Condition

Some readers might claim that it is unprincipled to treat consent as a necessary but insufficient condition for a project. Why should a community effectively hold a veto right (in the event that it rejects a project) yet not hold a corresponding right to authorize a project? Why give the “people” great power when they are against a project, but only limited power when they are in favor of a project? There is a very simple answer to these questions—an answer that points to a neutral principle rather than bias in favor of a particular outcome. Simply put, a power to veto an otherwise proper government action is categorically different than a power to determine or authorize a government action. While the former represents a limited check on government power, the latter represents appropriation—and perhaps even usurpation—of government power.

An analogy to the relationship between Congress and the President serves to illustrate the point. While the President has the power to veto a bill with which he disagrees—and thus scuttle an otherwise lawful act of Congress—his favorable opinion of a bill does not automatically make it law. Rather, while the President must sign the bill for it to become law, the bill must first garner majority support from both the House and the Senate.⁴¹⁷ Furthermore, if the act is challenged in court as unconstitutional, the President’s approval will not save it from the court’s judgment. And while the President has the right to veto a bill with which he disagrees, that right becomes a *duty* only in the limited case of unconstitutional (as opposed to imprudent) legislation.⁴¹⁸

The power of a community invested with a right to consent is thus similar to the President’s power in relation to legislation. Consent is a check on a power that is wielded by a government institution. It is not a means to transfer that power from an agency to a community, just as the Presidential veto power does not transfer legislative authority from the Capitol to the White House.⁴¹⁹ Instead, like the Presidential veto, it is a bargaining chip that a community may use to re-calibrate the balance of power.⁴²⁰ Viewed in this light, consent is more like a tool of negotiation (whose force is palpable whether or not the communi-

⁴¹⁷ U.S. CONST. art. I, § 7, cl. 2.

⁴¹⁸ See Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2127 (1989).

⁴¹⁹ See Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of a Separation of Powers*, 53 Am. U. L. Rev. 1, 31 (2003) (“[A]lthough legislative power is distinctively associated with Congress, the President has considerable claim to exercising this power as well, contributing to the lawmaking process through the presidential veto and the power to propose legislation.”).

⁴²⁰ See Sidak, *supra* note 418 (“The President is free under the Constitution to use his veto threat as a bargaining chip in the lawmaking process. He can agree with Congress to withhold a veto of one bill in order to secure their passage of a different bill he values more.”).

ty exercises the right formally) than a blunt instrument to override legitimate policy choices.⁴²¹

In some limited sense, of course, to grant a community the right to consent is to grant a community the right to authorize. But this is so only in the narrowest of ways: A community may “green light” a project which otherwise complies with all relevant laws and has the support of the government or agency in charge. It may not “authorize” a project that is otherwise legally deficient or in want of political support. Any broader interpretation of consent’s power to authorize would allow the community to exercise core government functions, even to the end of forcing the government to spend public funds on projects that only benefit the community empowered with consent. This would turn the principle on its head. Consent should be a shield against unjust projects, not a spear for hunting pork.

C. *By What Process?*

It is one thing to argue that consent represents an improvement from consultation, at least when cabined by the limits described above. It is quite another to overcome the perceived and real barriers to establishing a just process. Apart from limiting the situations in which consent would be required—and advancing the critical rule that consent would in all events be a necessary but insufficient condition—I propose three procedural approaches to ensure that the community (1) is sufficiently informed; (2) sufficiently participates; and (3) exercises consent freely.

1. Informing the Community: A Deferential Approach

The only consent worth the name is informed consent. Informing the public about the environmental effects of proposed actions has always been a goal of NEPA and similar regimes.⁴²² Whether the regime is one of consultation or consent, it is only an informed public that can participate in a meaningful way.

As discussed above, the voluntary nature of participation under consultation models leads to a situation where only the most informed and (already) interested inject themselves into the process.⁴²³ In other words, those who participate are likely to be informed. On the other hand, consultation fails to encourage a *broadly* informed public: It fails to provide those who should be interested with the necessary incentive to *become informed* and, thereby, to recognize the depth of their interest.

⁴²¹ See *id.*

⁴²² Tabb, *supra* note 32, at 207.

⁴²³ See *supra* Part III.D–E.

How, then, to inform the public about a pending project while at the same time avoiding manipulation? Readers familiar with NEPA might see this question as a non-starter. Under NEPA, the agency in charge of preparing the EA or EIS is also responsible (in conjunction with the EPA) for making it available to the public. The public comment period formally begins with publication of the notice of availability of the draft impact statement in the Federal Register. The public then has a period of time, usually 45 to 60 days in the case of draft impact statements, to register comments.⁴²⁴ While the agency preparing the EIS must automatically send a copy to interested federal, state, and local agencies, the law does not require active dissemination to the public at large.⁴²⁵ If the agency so chooses, it may legally require civil society either to make a request or search for the document in the Federal Register.⁴²⁶ In practice, agencies have proven more generous. Recognizing that outreach efforts and a critical mass of public input builds legitimacy and goodwill, agencies frequently establish websites soliciting comments⁴²⁷ and hold town-hall meetings to receive oral input.⁴²⁸ Combined with NGO efforts, actively interested members of the public have reasonable access to the relevant information.

Yet, under the rubric of consent, this model of dissemination is insufficient because (1) the heightened authority embodied in consent demands a more informed public, and (2) in many developing nations, on-the-ground factors dictate a more active approach. The first point is fairly intuitive. If you are going to enhance the power of the people, you should also take further steps to ensure they are informed. Of course, one should not take this notion to the extreme—requiring literacy or conditioning participation on a knowledge test would at best disproportionately impact the poor and more likely be intentionally employed to disenfranchise critics.⁴²⁹ Still, a minimally and *broadly* informed community—not just groupings of people—is required if consent is to work. This may seem daunting, but keep in mind that we are not talking about informing an entire nation or even region—we are usually talking about a distinct community that is relatively small in size. The task is achievable.

As I mention, however, on-the-ground factors in developing nations must also be considered. Among these factors are corruption, intimidation, illiteracy, and deep-seated mistrust of state authorities and foreign actors alike. Although these factors pose particular problems under consultation regimes

⁴²⁴ 40 C.F.R. § 1506.10 (2013).

⁴²⁵ *Id.* § 1502.19.

⁴²⁶ *See id.*

⁴²⁷ *See, e.g., Forest Service NEPA Information*, USDA FOREST SERVICE, http://www.fs.fed.us/nepa/nepa_home.php (last visited Oct. 10, 2013).

⁴²⁸ Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 121 (2003).

⁴²⁹ Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 353 (1998).

(which, by their opaque nature, invite manipulation and misinformation), they are solvable under consent.

So, if the NEPA-style approach to informing the public is insufficient in cases requiring consent, what should take its place? The answer depends on just how creative we are willing to get. From one perspective, the fresh approach that consent embodies militates in favor of re-thinking the ways in which information is disseminated in all voting situations. From another perspective, it does just the opposite. Adopting a model of consent is change enough; incrementalism and political realism suggest a conservative tack when addressing related issues like the delivery of information.

To my way of thinking, the latter argument is superior. This means, in practical terms, that the state (or its agency) should have discretion over how it will disseminate information in situations requiring consent. This will often mean that the state adopts the very model used in other local voting scenarios, but it may occasionally imply the creation of a new procedure altogether.

Why should states be given this discretion when they are, under my proposal, denied the discretion to choose consultation over consent? To begin with, consent is the more important principle—the higher goal—and it certainly seems that individual states would be more likely to adopt consent regimes if they felt like they at least had some latitude with the corresponding procedure. Apart from this concern—what we might call a “marketing” concern—we have the subsidiarity principle and considerations of efficiency. The subsidiarity principle holds that “power and responsibility should be devolved to the lowest level of government capable of exercising it well.”⁴³⁰ In regions with high literacy rates and reliable postal service, distribution of a written pamphlet (with equal content supplied by both proponents and opponents) might be appropriate. In regions with low literacy, radio and television programs might be the way to go. In cultures with a strong tradition of oral deliberation, the superior method might be town-hall meetings and project presentations. Individual states are in the best position to identify what works regionally and locally, and attempts to specify granular procedural rules may do more harm than good. In addition to the subsidiarity principle and the context-dependent nature of effective procedures, moreover, the status quo should be favored to avoid the costs of implementing new information-delivery rules.

That being said, existing models should be defaults and discretion must have its limits. Procedures adopted by states can and should be replaced if they fail to meet the basic goal of a broadly informed public. Further—and this may be the more critical point—developing nations proceeding in good faith may often struggle to muster the financial resources necessary to finance their information programs. To overcome this barrier, a multilateral fund supported by developed nations would likely be required. Developed nations would have an

⁴³⁰ Decker, *supra* note 414, at 359.

incentive to support such a fund because, over the long run, the certainty and conflict-reducing nature of consent regimes would engender a more stable environment for foreign investment in development projects. Rule-of-law programs in general,⁴³¹ and the European Union's work in implementing the Aarhus Convention in Central Asia in particular,⁴³² suggest that the Global North would be willing to allocate money to this effort.

2. Ensuring Sufficient Participation: The Case for Mandatory Voting

If I am ready to show deference to governments in the delivery of information, I am less inclined to do so when it comes to ensuring participation. The model I propose would require mandatory voting by all adults living within the affected community. This may seem over the top. Why *require* people to vote? Why not just give them the right to do so and then allow them to decide for themselves whether they wish to exercise that right? The answer to this question is that the absence of a strong, universal rule could lead to troubling situations—situations that would not only defeat the purpose of consent but that would further entrench existing injustices.⁴³³

To citizens of the United States, mandatory voting sounds odd and potentially inconsistent with democracy.⁴³⁴ For many around the world, however, mandatory voting is the norm and an effective way to enhance participation and curb voter apathy.⁴³⁵ Compulsory voting in elections exists and is enforced in Argentina, Australia, Brazil, Democratic Republic of the Congo, Ecuador, Luxembourg, Nauru, Peru, Singapore, and Uruguay.⁴³⁶ Compulsory voting also exists—but is rarely or unevenly enforced—in Belgium, Bolivia, Costa Rica, Dominican Republic, Egypt, Greece, Honduras, Lebanon, Libya, Mexico, Panama, Paraguay, and Thailand.⁴³⁷ Even if mandatory voting is not a global norm,

⁴³¹ See, e.g., *ABA Rule of Law Initiative*, A.B.A., http://www.americanbar.org/advocacy/rule_of_law.html (last visited Oct. 10, 2013).

⁴³² *Focus on the Aarhus Convention in Central Asia*, STRENGTHENING PUB. PARTICIPATION AND CIV. SOC'Y SUPPORT TO IMPLEMENTATION OF AARHUS CONVENTION, July 2008, available at http://www.unece.org/fileadmin/DAM/env/pp/Media/TACIS_July_2008_CA_Region.pdf.

⁴³³ See Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior, and Informed Consent to Development*, 27 *BERKELEY J. INT'L L.* 570 (2009) (for a defense of using community referenda as the appropriate mechanism to implement FPIC).

⁴³⁴ Eric Liu, *Should Voting be Mandatory?*, *TIME* (Aug. 21, 2012), <http://ideas.time.com/2012/08/21/should-voting-be-mandatory/>.

⁴³⁵ Amanda Kelley Myers, *Importing Democracy: Can Lessons Learned from Germany, India, and Australia Help Reform the American Electoral System?*, 37 *PEPP. L. REV.* 1113, 1149 (2010).

⁴³⁶ *Compulsory Voting*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, http://www.idea.int/vt/compulsory_voting.cfm (last updated Mar. 21, 2012).

⁴³⁷ *Id.*

it is standard practice in a number of nations covering a broad range of cultural and economic constituencies.

Some might argue—validly so—that subjecting every nation to the voting preferences of a few nations would be unjust. But that is not what I am proposing. Rather, I am suggesting compulsory voting in the limited category of certain public projects, where the persons required to vote are only those persons who live in the local community that would bear the brunt of the negative environmental consequences. The fact that many nations have embraced compulsory voting for *national* elections tends to show that compulsory voting in these limited circumstances is less radical than it might otherwise seem.

But this still does not answer the question: Why require voting by everyone? Why not determine the presence of consent based on the majority of ballots cast, however many that may be? The answer is two-fold: (1) to ensure that the majority of the community is actually in favor of the project and (2) to curb intimidation of community members in expression of their positions. By requiring compulsory voting, in other words, the outcome has more legitimacy as a matter of both substance and procedure. One of the major problems with consultation regimes is that, even when ideally designed and executed, they necessarily cater to the most vocal participants.⁴³⁸ Minority factions can create the illusion of majority support for their positions by playing an outsized role in the consultative process. Supplementing this process with optional voting tends to reduce the danger of domination by minority factions, but not as effectively as mandatory voting. In addition—and this is a pressing concern in many developing nations—mandatory voting serves to counter intimidation of would-be voters. Just as the secret ballot precludes deterrence through after-the-fact retaliation,⁴³⁹ mandatory voting precludes efforts to intimidate or deter voters before they cast their ballots. When a person chooses to exercise a right rather than satisfy a legal duty, she is more vulnerable to external pressure.

Finally, there is little to the argument that mandatory voting violates democratic principles. The contention here is that voting should be a right, not a duty, because the freedom voting embodies is not simply freedom of choice (choosing between alternatives) but also the liberty to participate or opt out altogether. This argument has conceptual power, but only when directed against a rather extreme vision of compulsory voting—a vision I do not share—and which at any rate seems less applicable in the context of environmental decision-making.

⁴³⁸ See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1349 (2010) (describing the influence of a “vocal constituency of unhappy interest groups”).

⁴³⁹ Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 482 n.332 (2003).

Certainly, in the case of national elections for political office, mandatory voting could pose problems if the public were simply given the choice between a few candidates representing a limited range of the political spectrum. Even if the “Tweedle Dee or Tweedle Dum” scenario is not endemic to compulsory-voting systems, it seems more problematic if the people are *forced* to choose between undesirable alternatives and not given the option to boycott the process altogether. But mandatory voting need not place people in this position even in the extreme case of national elections—and, in many nations, it does not. In Bolivia, for instance, citizens are deemed to have complied with their duty by casting a blank ballot.⁴⁴⁰ Voters unsatisfied with the choices or the process are allowed to express that frustration.⁴⁴¹

Still, even if a vehicle for boycott is preserved, “Tweedle Dee or Tweedle Dum” scenarios are troubling for more fundamental reasons. If a consent regime encouraged these scenarios, then that would be considerable grounds for its rejection. Yet, there is no reason why this should happen. Just as NEPA requires consideration of alternatives—including the alternative of no action—a regime incorporating consent would function within this larger framework.⁴⁴² Ultimately, a local community would be asked to grant or withhold its consent for a specific version of a project, but that vote would take place against the background of other alternatives. Again, consent does not displace consultation, but rather supplements it. A consent regime might not ameliorate the frustration expressed by some critics that NEPA and other consultative regimes fail to promote consideration of true alternatives,⁴⁴³ but neither would it aggravate that frustration.

3. Free Exercise of Consent

In April 2012, after the Bolivian government had agreed to consult TIPNIS residents on the matter of the road, local news stations broadcast images of President Evo Morales visiting select communities with gifts in hand.⁴⁴⁴ The gifts ranged from outboard motors to promises to construct a sports stadi-

⁴⁴⁰ *El Gobierno Dice Que Voto Nulo es un Derecho*, LOS TIEMPOS (July 21, 2011), available at http://www.lostiempos.com/diario/actualidad/politica/20110721/el-gobierno-dice-que-voto-nulo-es-un-derecho-un-hace_134638_274007.html (recounting Vice President’s acknowledgment that casting a blank ballot is a constitutional right).

⁴⁴¹ *See Bolivia: El Voto Nulo Domina Elecciones*, EL UNIVERSAL (Oct. 17, 2011), available at <http://www.eluniversal.com.mx/internacional/74756.html> (describing situation where 44% of Bolivians cast blank ballots in elections for the Constitutional Court).

⁴⁴² 42 U.S.C. § 4332(C)(iii) (2012).

⁴⁴³ *See, e.g.*, Michael E. Lackey, Jr., *Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants*, 60 GEO. WASH. L. REV. 1232 (1992).

⁴⁴⁴ Nicholas Fromherz, *The Cruellest Month: April in Review*, S. AM. L. & POL’Y (May 3, 2012), <http://southamericanlaw.com/2012/05/03/the-cruellest-month-april-in-review/>.

um.⁴⁴⁵ With the “consultation” being interpreted and planned as a binding decision—in effect more like an exercise in consent—Morales was clearly trying to curry favor with those who had a say. Opponents of the road, both inside and outside TIPNIS, panned the move as a brazen attempt to buy votes. And so perhaps it was. But the fiercest of criticisms were directed not at the distribution of gifts *per se*, but at the discriminating nature of that distribution. Morales didn’t give gifts to everyone in TIPNIS; he targeted only those communities and leaders who he thought were predisposed (or who could be swayed) to support the project. It was a classic case of divide and conquer.⁴⁴⁶

This chapter of the TIPNIS saga illustrates another obstacle to consent-based regimes. Absent effective safeguards, a framework based on consent will invite coercion. Whether through the threat of a stick or the promise of a carrot, political and economic factions that support a project may try to execute an end-run around the requirement of consent by influencing the people to decide in their favor.

One approach to this problem—perhaps the most obvious—is to ban all attempts to influence the peoples’ decision through material means. In other words, proponents and opponents of the project must sway the community through arguments based on the merits of the project and nothing else. While tempting, this approach would go too far, and its limits would be difficult to define in practice. Would an alternative iteration of the project—one that mitigated costs and amplified benefits to the site community—be off limits? And what if, rather than adjusting the nature of the project itself, the sponsor packaged the project with development aid specifically earmarked for public health and education? Even if the motive were anything but altruistic, would we want to prohibit such a move as coercive?

There is no need for a sledgehammer when a flyswatter will do. Rather than prohibiting all attempts to influence the process through material means, the better approach is to condemn only those “gifts” that tend to benefit particular individuals or groups within the community rather than the community as a whole. Thus, returning to TIPNIS, the law would prohibit the government from distributing outboard motors but would potentially allow investment in public education and health facilities. I say “potentially” because, even then, the law should allow for challenge where there is reason to believe that the side project will inure to the benefit of one sector of the community rather than the community as a whole. If the intent and effect are to divide and conquer, that should not be tolerated.

Two final points should be made. First, note that we are considering the case of gifts or investments *adjacent to* and *separate from* the project itself. If

⁴⁴⁵ Emily Achtenberg, *New Twist for TIPNIS Road: Bolivia Cancels Highway Contract*, N. AM. CONGRESS ON LATIN AM. (April 16, 2012), <https://nacla.org/blog/2012/4/16/new-twist-tipnis-road-bolivia-cancels-highway-contract>.

⁴⁴⁶ *Id.*

the basic project design is modified to respond to local concerns or enhance local benefits, there is less reason for skepticism and this rubric does not apply. Second, even within the category of investments adjacent to the main project, not all such investments are created equal. I would not have the law categorically prevent a government from cutting checks to all local households to influence their vote,⁴⁴⁷ but neither should this be encouraged or viewed as the normative equal of, say, building a public health clinic. How this distinction should be effectuated—and whether it is the task of law or other forces—is a valid question, but one for separate consideration.

D. Considering the Consent Framework from a Rawlsian Perspective

In addition to some of the more specific objections that I have tried to address along the way, I anticipate that many readers may harbor a more generalized reticence to move from consultation to consent. One way to test the legitimacy of such generalized reticence is to consider the matter from the “original position” described by John Rawls.⁴⁴⁸ If we would favor consent over consultation from this original position, then our reluctance to accept it would appear to be based not in normative preference but in considerations of practicalities or, more disturbingly, as a function of our unique identities. In other words, we might hesitate to move towards consent because we think it difficult as a practical matter or because we find it hard to identify with those who suffer under the current regime. If these are the reasons for our resistance—reasons that are *not* normative—addressing them becomes more straightforward.

In Rawls’s version of social-contract theory, the original position is the state from which free and equal citizens negotiate the rules of society.⁴⁴⁹ It is a hypothetical position designed to identify the basic norms we would agree to if our judgment was not blurred by the power asymmetries that exist in real life.⁴⁵⁰ Rawls’s most significant contribution to social-contract theory does not lie in the idea of the original position itself, however, but in his characterization of this position through the “veil of ignorance.”⁴⁵¹ The veil of ignorance asks us to ignore much of what we know about ourselves: whether we are intelligent or slow, endowed with a strong constitution or prone to sickness, diligent or distracted, wealthy or poor, and so on.⁴⁵² It also strips us of the ability to know the

⁴⁴⁷ But note that, in such a case, the definition of the impacted local community would become even more important.

⁴⁴⁸ JOHN RAWLS, A THEORY OF JUSTICE 15–19 (rev. ed. 1999).

⁴⁴⁹ *Id.* at 248.

⁴⁵⁰ See generally Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001).

⁴⁵¹ See RAWLS, *supra* note 448 at 136–42 (describing veil of ignorance).

⁴⁵² *Id.*

statistical likelihood that we will draw one of these lots over another.⁴⁵³ Rawls posits that, behind the veil of ignorance, the principles we would select are inherently just principles because, forcing us to imagine ourselves in a range of positions of societal advantage and disadvantage, we are likely to select norms that would be considered fair by everyone. The veil of ignorance is thus a simple and powerful construct that allows us to identify the rules we would select if we know little about our identities and accompanying strengths and weakness. Significantly, although Rawls originally applied the veil of ignorance to free and equal individuals within the same society, human-rights scholars have extended the veil to include the possibility of life within any one of the world's nations or societies.⁴⁵⁴ Viewing matters behind this even thicker veil, persons in the original position would not know whether they were to live in a developed or developing nation.

Rawls's veil of ignorance, modified with the additional unknown of national origin, provides a compelling vantage point from which to evaluate consent versus consultation. Standing a chance of being in a disadvantaged position vis-à-vis a publicly-sponsored project—say, a subsistence farmer living in the reservoir site of a proposed dam—one is more likely to favor rules that dampen rather than deepen asymmetries of power. Consent does just that. Indeed, a regime based on consent flows quite naturally from a Rawlsian original position because it maximizes the prospects of the least advantaged in comparison to other alternatives.⁴⁵⁵

All this is not to suggest that one *must* view consent as superior to consultation from a normative perspective. Strong utilitarians will reject the Rawlsian framework as flawed from the very start.⁴⁵⁶ But because many people

⁴⁵³ *Id.*

⁴⁵⁴ See, e.g., Edward B. Foley, *The Elusive Quest for Global Justice*, 66 *FORDHAM L. REV.* 249, 268 (1997); Dennis C. Mueller, *Rights and Liberty in the European Union*, 13 *SUP. CT. ECON. REV.* 1, 9–10 (2005).

⁴⁵⁵ Note that this this principle, known as the “*maximin criterion*,” does not rule out all social inequality. It simply asks us to pick a rule with which we would be comfortable if our enemy could choose our place in society. With this in mind, “Rawls reasons that people behind the veil might be open to some social inequality, but only if they are guaranteed a minimum threshold of civil liberties and material welfare, and only if departures from an egalitarian distribution serve to increase the social pie and make even the lowest member of society better off than they otherwise would be.” David A. Dana, *Adequacy of Representation after Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 *EMORY L.J.* 279, 291 (2006). Further, Rawls does not insist that the maximin principle applies to all choices. As common sense indicates, even rational actors are willing to gamble when even the worst outcome isn't all that bad. In contrast, people in the original position will employ the maximin approach when making decisions that “affect [their] life-prospects.” John Rawls, *Some Reasons for the Maximum Criterion*, *AM. ECON. REV.*, May 1974, at 141, 144.

⁴⁵⁶ David A.J. Richards, *Contractualist Impartiality in the American Struggle for Justice: A Comment on Professor Allen's “Social Contract Theory in American Case Law,”* 51 *FLA. L. REV.* 41, 43 (1999).

accept Rawls's framework as a helpful thought experiment, critics should at least consider the analysis when discerning normative objections to this proposal.

V. A PAIR OF OBJECTIONS

In this final Part, I briefly discuss what I consider to be two of the more salient objections to my proposal. These objections are (1) that the proposal is anti-development, and even anti-sustainable development and (2) that granting consent rights to non-indigenous peoples would undermine consent rights for their indigenous counterparts.

A. *This Proposal Is Anti-Development*

One reaction to my proposal runs something like this: *By advocating consent rather than consultation, you are in effect advocating fewer projects that affect the environment. You are seeking a substantive end that is anti-development, perhaps even anti-sustainable development. And you are doing all this by creating an opportunity for a minority to override the desires of the majority.*

The response to this critique is multifaceted, and it begins with a candid acknowledgment: A requirement of consent would indeed represent a hurdle to many projects and activities that require or could require government action or permitting. Yet, having admitted as much, there are three additional points to consider.

First, it is unfair to judge the consent proposal by its effects on "development" in the undifferentiated aggregate. Unless we are ready to deem all such "development" change for the better—a dubious proposition in the twenty-first century—we have to differentiate between projects that represent sustainable advancement for communities (and the global community at large) and those that do not. If consent would tend to screen out projects that are not environmentally sustainable—or that are not worth the candle in terms of community sacrifice—then a dip in the aggregate level of "development" might actually represent an improvement in the overall quality or composite of development.

Second, and related to the first point, is the notion that we urgently *need* a reduction both in aggregate development and in resource-intensive development. Since 2007, the Intergovernmental Panel on Climate Change (IPCC), hardly an alarmist organization, has maintained that warming of the earth's climate system is "unequivocal," and that "[m]ost of the observed increase in global average temperatures . . . is very likely [i.e., between 90-95%] due to the observed increase in anthropogenic greenhouse gas concentra-

tions.”⁴⁵⁷ Meanwhile, there is a strong consensus within the scientific community that we are living smack in the middle of the sixth great mass extinction.⁴⁵⁸ But this time the die-off is not the result of an asteroid—it is the fruit of human activity.⁴⁵⁹ If we don’t slow down—if we do not complement sustainable development (where it is needed) with sustainable contraction (where it, too, is needed)—we are headed for disaster.⁴⁶⁰

Third, the contention that the consent-based regime would stifle genuine sustainable development and projects required to meet basic human needs—all while allowing a minority to frustrate the legitimate desires of the majority—only works if one ignores the limits built into the model. A quick example will serve to illustrate this. Suppose that a growing town in the developing world lacks a plant for the treatment of wastewater. Health studies have shown a direct relationship between the growing sanitary issue and increasing outbreaks of typhus and other diseases. Almost everyone in the town wants the government to build a plant—even if that means they foot the bill with public tax dollars—but when it comes time to pick the site, the erstwhile supporters become critics. Everybody is in favor of improved sanitation, but nobody wants the facility in their neighborhood. And so, alternative site after alternative site, the government fails to obtain local consent. In the end, the government scraps the plan, leaving in place a status quo that is both politically unpopular and environmentally unsustainable.

Would this sort of scenario occur under the consent regime that I have proposed? No. While the construction of the plant might indeed qualify as environmentally “significant,” there would not clearly exist a profound disconnect between costs and benefits. Virtually everyone in the town would benefit from the construction of such basic sanitary infrastructure. While some might feel the costs more than others—those living in the neighborhood ultimately picked for the site—it would be a stretch to call them victims of a project that distributed costs and benefits in a deeply asymmetrical way. In this situation, then, consent would not be required. Consultation would apply just as it (hopefully) would today.

⁴⁵⁷ *Understanding and Attributing Climate Change*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://www.ipcc.ch/publications_and_data/ar4/wg1/en/spmssp-Understanding-and.html (last visited Oct. 9, 2013).

⁴⁵⁸ Timothy E. Wirth, *Environmental Policy and International Cooperation: A Framework for the 21st Century—Despair or Determination?*, 35 STAN. J. INT’L L. 221, 225 (1999); see also Thomas Lovejoy, *Biodiversity: Dismissing Scientific Process*, SCIENTIFIC AMERICAN, Jan. 2002, at 69.

⁴⁵⁹ Wirth, *supra* note 458, at 225.

⁴⁶⁰ See generally Paul Ekins, *The Sustainable Consumer Society: A Contradiction in Terms?*, 3 INT’L ENVTL. AFF. 243, 243–57 (1991); cf. Robert Goodland & Herman Daly, *Environmental Sustainability: Universal and Non-Negotiable*, ECOLOGICAL APPLICATIONS 1003–13 (1996) (suggesting that “[f]uture Northern growth should be sought from productivity increases in terms of throughput (e.g., reducing the energy intensity of production)”).

Yet, if we take the wastewater-treatment scenario one step further, we can see how the consent regime would allow governments flexibility even when the initial triggering conditions are satisfied. Imagine that instead of siting the plant within city limits, the government or agency proposes to build the plant fifteen miles away, in a small rural community just marginally integrated in the urban economy. The rural community has no immediate need for the plant's services—its land base is sufficient to assimilate the waste produced by the small, spread-out population—yet it is being asked to host the plant and the odors and risk of water-contamination that come with it.⁴⁶¹ Under these circumstances, the triggering conditions for consent would appear to be satisfied: (1) a “significant” project that (2) exhibits a profound disconnect between those who benefit from the project and those who suffer its environmental costs. Of course, the government could try to obtain the consent of the rural community—and it might just succeed. But assuming that it wouldn't succeed—and assuming that it still wanted to continue with the project—the government could modify the project in a number of ways. The government might make modifications either (a) to bridge the demographical disconnect (perhaps by granting a preference to local construction and operation labor) and thus avoid triggering the requirement of consent, or (b) to mitigate the perceived environmental impacts, thus securing community approval within the very rubric of consent.

Admittedly, this might entail hard choices for a cash-strapped government (and, by extension, for a city desperate for sanitation). But if a government or part of its constituency proposes an environmentally significant project that distributes costs and benefits in such a lopsided fashion, it hardly seems unfair to demand that these choices be made.

B. Extending Consent to Non-Indigenous Peoples Would Dilute Indigenous Rights

Native peoples fought long and hard to secure FPIC as a core component of the United Nations Declaration on the Rights of Indigenous Peoples. While some indigenous-rights advocates favor consent for non-indigenous peoples, others fear that expanding this right could lead to dilution. They worry that a broader regime might trade in a strong form of consent for some for a watered-down version of consent for all. Even organizations that insist upon broad-based public participation for all projects have acknowledged “the understanding that the rights of all communities cannot be considered the same as

⁴⁶¹ Although the hypothetical scenario I sketch takes place in a developing nation, readers from Ireland might find parallels in a recent controversy regarding the development of wastewater treatment plant outside Dublin. See Marie O'Halloran, *Sewage Plant to Serve a Million People but “Not One House” in Fingal, FF Claims*, THE IRISH TIMES, June 11, 2013, <http://www.irishtimes.com/news/environment/sewage-plant-to-serve-a-million-people-but-not-one-house-in-fingal-ff-claims-1.1423797>.

the rights of Indigenous Peoples with regard to consent.”⁴⁶² This is correct as a descriptive matter, but it fails from a prescriptive standpoint.

First, there is simply no convincing reason to categorically grant consent rights to indigenous peoples yet categorically deny those rights to non-indigenous peoples.⁴⁶³ Though there may be differing rationales— notions of sovereignty, property, and cultural preservation auguring in favor of consent for indigenous peoples; ideas of democracy and stake supporting consent for all others—the result should be the same. Would anyone seriously argue that consent should control a project in rural Ecuador (where the indigenous/non-indigenous dichotomy finds purchase) but not control a project in rural Africa (where this framework may not be so familiar)?⁴⁶⁴ Or, if the keys are historical property rights and cultural preservation, are these interests really only limited to “native” peoples? What about a community like the N’djuka people in Suriname, who were brought over as slaves and, following escape centuries ago, have lived ever since as a tight-knit tribe?⁴⁶⁵

Second, differential treatment for indigenous and non-indigenous peoples could create new tensions or aggravate existing tensions between these peoples.⁴⁶⁶ Projects that affect indigenous peoples also often affect non-indigenous peoples. Even if the ethnic or cultural distinction between these peoples is clear—hardly a given—requiring consent from one group but not the other can cause resentment, driving a wedge between the communities and fueling backlash against the developer.⁴⁶⁷ Recognizing as much, groups representing the diverse interests of environmental protection, human rights, and development have all advocated for only a subtle distinction between FPIC (for

⁴⁶² CHRISTINA HILL, SERENA LILLYWHITE & MICHAEL SIMON, *GUIDE TO FREE PRIOR AND INFORMED CONSENT* 6 (2010).

⁴⁶³ See Robert Goodland, *Free, Prior, Informed Consent and the World Bank Group*, in *SUSTAINABLE DEVELOPMENT LAW & POLICY* 69 (2004) (for a terse but strong argument in favor of extending FPIC to non-indigenous peoples).

⁴⁶⁴ See Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT’L L. 439, 442–44 (discussing the concerns of Asian and African states regarding the definition of “indigenous” peoples); cf. Willem van Genugten, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT’L L. 29, 38 (2010) (“[M]any aspects of the classical approach to indigenous rights . . . clearly do not fit the African situation.”).

⁴⁶⁵ See *Moiwana Village v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005), available at <http://www1.umn.edu/humanrts/iachr/C/124-ing.html>.

⁴⁶⁶ AMY K. LEHR & GARE A. SMITH, *IMPLEMENTING A CORPORATE FREE, PRIOR, AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES* 7 (Foley Hoag 2010), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEcQFjAD&url=http%3A%2F%2Fwww.foleyhoag.com%2F~%2Fmedia%2FFiles%2FPublications%2FBooks%2FFOLEY-HOAG-Informed_Consent_Policy_eBook.ashx&ei=NOP2UOzGIKWVjAkcpIHYBQ&usq=AFQjCNF16nb5UWAtGHs1brPMBjs6UAt1iQ&bvm=bv.41018144,d.cGE.

⁴⁶⁷ *Id.* at 7.

indigenous peoples) and consultation (for non-indigenous peoples).⁴⁶⁸ Whether the motivation is risk prevention or the sentiment that all peoples deserve a say, the general consensus is that FPIC principles should “guide” if not control consultation for non-indigenous peoples.⁴⁶⁹

Third, rather than diluting indigenous rights, consent for non-indigenous peoples would reinforce those rights. If the goal is differential treatment for its own sake, then expansion of the consent model would admittedly cut against this—the right of consent would become theoretically universal, its applicability depending on the nature of the project and the likely effects, rather than the ethnic or cultural character of the community at hand. But if the real concern is erosion of the right itself—FPIC backsliding into normal consultation by virtue of extension to non-indigenous peoples—this seems possible only if consent for non-indigenous peoples is somehow watered down. If consent is expanded to cover both indigenous and non-indigenous peoples, then there will be only one interpretation of what this means. If “consent,” so universalized, were to mean something less than FPIC, then indigenous-rights advocates would have a legitimate gripe. But the regime I envision would only strengthen consent rights for indigenous peoples, clarifying that consent entails the power of veto.⁴⁷⁰ Fears of a poorly fashioned consent regime shouldn’t stop us from approaching the matter altogether.

VI. CONCLUSION

If NEPA is the “Magna Carta of environmental law”—providing a fundamental structure for decision-making and informing legal regimes the world over—then perhaps it is time for an update. Just as we look back on the emergence of the Magna Carta as a watershed moment in the history of the rule of law, so too do we revere NEPA for its impact on how we make choices in a fragile world. But reverence is not the same as satisfaction. Experience reveals room for improvement, and, hopefully, we have the courage to act on that.

The consultative approach to environmental decision-making should not be scrapped, but it should be modified. At least in the most serious of cases—where the decision will have a significant impact and there is a profound demographical disconnect between costs and benefits—consent should replace consultation.

⁴⁶⁸ See HERZ ET AL., *supra* note 314, at 7–11; Lehr, *supra* note 466, at 28–29.

⁴⁶⁹ Lehr, *supra* note 466, at 28–29.

⁴⁷⁰ In the consent-based framework proposed in this Article, the requirement of informed consent would confer a veto right. In contrast, the presence of a veto right under UNDRIP is unclear. See *supra* note 13 and accompanying text. By making the presence of a veto right explicit, the proposed framework would tend to strengthen the rights of indigenous peoples rather than dilute them.

Requiring consent in this limited set of cases would represent the responsible democratization of the law of environmental decision-making. The current model (public consultation) implicitly recognizes the value of public input in decisions impacting the natural environment. Yet this model stops short of giving the public (or any subset thereof) a power of veto. This makes sense in what may well be the majority of environmentally significant decisions. In many cases, the costs and benefits of a project are distributed in a roughly even way.⁴⁷¹ In these situations, where everyone has approximately the same stake, it would be unfair to require the consent of—and thus grant a veto right to—a particular subset of the population. A public referendum open to all would be less objectionable, but placing the final decision in agency hands, following an opportunity for public comment, hardly seems unreasonable.

Yet not all projects are characterized by a balanced distribution of costs and benefits. Instead, many public projects produce a split distribution: The benefits inure to one segment of the population while the costs are borne by another. And frequently this asymmetry follows a pattern of broader social inequity, such that already marginalized groups are further marginalized through environmental decision-making. In these scenarios, it is unfair to grant equal participation rights to the entire population. Although the consultation model of environmental decision-making is hardly an exercise in raw democracy—agency officials, typically unelected, still have the final call—public participation means that the governed do have at least some say in the process. My proposal to grant a consent right raises the stakes, prompting reflection on when, if ever, a minority may trump the will of the majority or an arm of government (in this case, an administrative agency).

The appeal of majority-rule is at its strongest when the minority is, despite its opposition, compensated for its sacrifice and duly included in the decision-making process. In the case of projects that drastically affect the local environment to the benefit of non-local interests (or local but demographically narrow interests), neither of these preconditions is satisfied. The local community is not materially compensated for its sacrifice, and its inclusion in the decision-making process is inadequate as both a matter of law and fact. Formally, NEPA-style consultation regimes grant every member of the public an equal right to participate in the decision-making process. Yet, even if this right is exercised in equal measure and given equal effect (and it is not), it seems unfair to extend identical participation rights to both the underwriters and the beneficiaries. At least when a project yields a profound disconnect between the distribution of costs and benefits, the government should first be required to obtain the consent of the disproportionately burdened community.

Adding a narrow consent requirement to NEPA and other EIA regimes would not amount to a revolution but rather an evolution. The consultation

⁴⁷¹ Or, even if the distribution of costs and benefits of a given project is uneven, the distribution levels out in the aggregate (when the distribution of other projects is considered in the mix).

model inherently recognizes the need for public input in environmental decision-making. It recognizes that, for all their expertise, agencies still need to hear from voices outside the administrative state. In some cases, though, hearing from the public is not enough. In these extreme cases, the disproportionately burdened community should be able to say “no.”