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ABOUT THE JOURNAL

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. Together, we foster a community of like-minded students who are passionately engaged in learning and debate about the critical issues of our time.

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BEHIND THE COVER



Frederic Edwin Church’s *Twilight in the Wilderness*

Credit: Cleveland Museum of Art

LETTER FROM THE EDITORS

Dear Readers,

We are proud to present the latest issue of the Claremont Journal of Law and Public Policy, a publication that reflects not only rigorous scholarship but also the dedication of the community behind it. In this issue, we recognize the exceptional contributions of Priscilla Matthews (PO '28), recipient of the Byron Cohen Prize for excellence in research, writing, and analysis, and Daphne Coplon (PO '28), recipient of the Isaac Cui Prize for excellence in editing and editorial leadership. This edition continues CJLPP's tradition of elevating student voices that engage critically with the most pressing global issues in law and public policy.

We are also excited to publish for the first time in several years a piece from an author outside of the Claremont Colleges. In her piece, Lauren Le (UCLA '26) argues that disagreements about implementation, rather than political partisanship, have slowed the rollout of children's online privacy protections. Utku Özgür (PO '29) then analyzes the origins of the Cyprus dispute and proposes a novel constitutional framework to guide the establishment of a confederation designed to promote political equality and self-government on the island. Next, Jay Chinchankar (PO '29) compares two pollution reduction policies, California's Cap-and-Trade program and Delhi's Graded Response Action Plan, drawing on their shortcomings to present three policy equity-focused policy changes.

Looking internationally once again, Matthews examines how the Militarized Communist Party of Peru has exploited Peru's due process requirements to evade prosecution. Luca Davis (PZ '27) then challenges the Environmental Protection Agency's legal rationale for weakening greenhouse gas emissions regulations, arguing that the decision is contradictory and "self-defeating." Finally, Chloe Eshagh (SC '28) argues that the long-term instability of Affordable Care Act subsidies caused by partisan bargaining is "structurally unsound," recommending that Congress make these subsidies permanent.

We would like to extend our sincere gratitude to our editors and writers, whose dedication and care made this issue possible. Finally, we thank you, our readers, for engaging with us and making CJLPP part of your intellectual journey!

Sincerely,

Dannhi Nguyen Graham Robbins

Co-Editors-in-Chief

EVERYONE AGREES, SO WHY HASN'T CONGRESS ACTED?

THE PARADOX OF CHILDREN'S PRIVACY IN THE UNITED STATES

INTRODUCTION

A child can open a social media app in seconds, but the data collected about them can follow them for years. As children increasingly grow up online, policymakers have struggled to agree on who should be responsible for protecting them. The rapid expansion of digital platforms has intensified concerns about how children's personal data is collected, used, and monetized, particularly as social media algorithms progressively shape youth behavior and development. Zuboff and Livingstone & Third have noted that digital environments are not neutral spaces, but rather systems structured around maximizing data collection and behavioral influence.[1] As a result, children, who are less equipped to understand or manage these dynamics, have become a focal point of policy concern.[2]

In the United States, for over fifteen sessions of Congress, policymakers across party lines have expressed strong support for strengthening children's online privacy protections, signaling rare bipartisan agreement in technology policy debates.[3] However, despite this consensus, Congress has repeatedly failed to pass comprehensive legislation updating existing privacy frameworks.[4] With such widespread agreement that children deserve stronger protections online, why has federal reform consistently stalled?

This Article argues that the failure of children's online privacy legislation is not due to a lack of agreement over policy goals, but rather to institutional and political-economic conflicts embedded in the design of reform proposals. Specifically, disputes over preemption, enforcement authority, and lobbying pressure redistribute power between regulators, states, and technology firms, creating conflict in the political economy beneath surface-level consensus.

Part I surveys the existing legal framework and its limitations. Part II sets forth the methodology used to identify the structural drivers of legislative gridlock. Part III presents the three institutional and political-economic conflicts that consistently derail reform: federalism and preemption, enforcement and liability, and industry incentives. Part IV evaluates and rejects two leading alternative explanations—partisan polarization and technological complexity. Part V considers broader implications, including the comparative lessons offered by the European Union's General Data Protection Regulation. Part VII concludes.

I. THE EXISTING LEGAL FRAMEWORK AND ITS LIMITATIONS

The primary federal law governing children's online privacy is the Children's Online Privacy Protection Act (COPPA), enacted in 1998 to regulate the collection of personal data from children under the age of thirteen.[5] COPPA requires websites and online services directed to children, or that knowingly collect personal information from children, to obtain verifiable parental consent before such collection occurs.[6] While this framework was a significant step at the time, in today's digital environment, COPPA's limitations have become increasingly apparent.

Designed for an earlier, static internet era, the statute does not adequately address current dynamic platforms driven by behavioral advertising, algorithmic recommendation systems, and continuous data collection.[7] Its reliance on parental consent has proven difficult to enforce, as age and identity verification measures remain unreliable, allowing children to bypass protections in practice.

In addition, COPPA's narrow scope excludes teenagers, who are among the most active users on these platforms yet still face many of the same risks as children under thirteen.[8] Lastly, limited enforcement capacity and a largely reactive regulatory approach further constrain COPPA's effectiveness, particularly in light of the Federal Trade Commission's (FTC) finite oversight resources.

As a result, lawmakers have proposed various reforms that would expand age protections, strengthen enforcement mechanisms, and shift toward more structural, design-based safeguards for minors online. Notably, COPPA 2.0 aims to modernize existing federal privacy law, while new legislation such as the Kids Online Safety Act (KOSA) reflects a more expansive approach by imposing a duty of care on platforms and extending protections to minors up to age seventeen.[9] These proposals mark a broader shift toward greater platform accountability and regulatory intervention. Yet none has secured passage, despite substantial bipartisan endorsement.

At the same time, states have begun to fill the regulatory gap left by federal inaction. California, in particular, has enacted some of the strongest laws of any U.S. jurisdiction, including the California Age-Appropriate Design Code Act, which holds companies responsible for implementing children's online design and risk-assessment protections.[10] While these efforts showcase policy

1 Shoshana Zhuboff, The Age Of Surveillance Capitalism 8–9 (2019); Sonia Livingstone & Amanda Third, *Children and Young People's Rights in the Digital Age: An Emerging Agenda*, 19 New Media & Soc'y 657, 658–59 (2017).
2 Candice L. Odgers & Michaeline R. Jensen, *Annual Research Review: Adolescent Mental Health in the Digital* Child Psychol. & Psychiatry 336, 337 (2020).
3 Cong. Rsch. Serv., R47542, Children's Online Privacy And Safety: Federal Legislative Proposals 1–2 (2023).
4 Daniel J. Solove, Understanding Privacy 1–6 (2d ed. 2021); Kenneth A. Bamberger & Deirdre K. Mulligan, Privacy On The Ground: Driving Corporate Behavior In The United States And Europe 1–3 (2015).
5 15 U.S.C. §§ 6501–6506 (2018); see also Cong. Rsch. Serv., *supra* note 3, at 4–5.
6 15 U.S.C. § 6502(b)(1)(A)(ii); 16 C.F.R. § 312.5 (2024).
7 Kathryn C. Montgomery & Jeff Chester, *Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age*, 45 J. Adolescent Health S18, S20–22 (2009).
8 Livingstone & Third, *supra* note 1, at 663–65.
9 Kids Online Safety Act, S. 1409, 118th Cong. § 3 (2023); *Alex LaCasse, COPPA 2.0, KOSA Among 18 Children's Online Safety Bills Advanced by U.S. House Subcommittee*, Int'l Ass'n Of Privacy Pros. (Dec. 12, 2025), https://iapp.org/news/a/coppa-2-0-kosa-among-18-children-s-online-safety-bills-advanced-by-us-housesubcommitte.
10 Cal. Civ. Code §§ 1798.99.28–99.40 (West 2024); Cal. Assemb. B. 2273, 2021–2022 Reg. Sess. (Cal. 2022).

momentum, they contribute to a growing patchwork of state-level regulations, introducing a host of compliance challenges for companies operating across state lines and raising recurring questions about the appropriate balance between state and federal authority.[11]

Understanding why federal reform has stalled despite this momentum is important not only for U.S. technology policy, but for broader debates about how democratic governments can effectively regulate emerging technologies that affect minors.

II. METHODOLOGY

This Article employs a qualitative policy analysis to examine the institutional and political-economic factors contributing to legislative gridlock on U.S. children's online privacy reform. The analysis draws on three categories of primary and secondary sources. First, I analyzed legislative documents, including COPPA, the proposed KOSA, COPPA 2.0, the California Age-Appropriate Design Code Act, the California Consumer Privacy Act (CCPA), the Nurture Originals, Foster Art, and Keep Entertainment Safe Act (NO FAKES) Act, the Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act (TAKE IT DOWN) Act, and the European Union's General Data Protection Regulation (GDPR). Second, I reviewed congressional records and testimony, including statements from bipartisan co-sponsors and whistleblower testimony from former technology industry employees. Third, I synthesized secondary scholarship from peer-reviewed legal, policy, and technology studies literature to contextualize findings within broader debates on federalism, regulatory design, and platform governance.

The Article uses a comparative framework, contrasting U.S. fragmentation with the EU's centralized regulatory approach to showcase how institutional design influences legislative outcomes. The analysis is structured around three dimensions of conflict identified through inductive coding of legislative debates and reform proposals: federalism and preemption, enforcement and liability, and industry incentives. Alternative explanations—partisan polarization and technological complexity—were evaluated against the available evidence to assess explanatory adequacy.

This methodology is appropriate for examining how the redistribution of regulatory authority shapes policymaking outcomes in emerging technology domains, where empirical experimentation is limited and institutional dynamics are best understood through close readings of legislative texts, comparative case studies, and political-economic analyses.

III. THE THREE DRIVERS OF LEGISLATIVE GRIDLOCK

The analysis identifies three institutional and political-economic conflicts that consistently emerge across reform proposals and explain the persistent failure of federal children's online privacy legislation. These findings are presented in the order of their prominence within congressional debates and legislative drafting: federalism and preemption, enforcement and liability, and industry incentives.

A. FEDERALISM AND PREEMPTION

One of the most significant barriers to federal children's privacy legislation is disagreement over preemption—whether a national law should override stronger state-level regulations. This issue reflects broader fights over power between states and the federal government and has become a central point of conflict in privacy debates.[12] The Supremacy Clause allows federal lawmakers to make law that takes precedence over conflicting laws by state lawmakers, transforming a routine constitutional choice into one of the most contested provisions in any privacy reform.

Supporters of strong federal preemption argue that a uniform national standard would reduce compliance costs and provide clarity for business.[13] From this perspective, navigating a single regulatory framework is more efficient than a patchwork of state laws, particularly for companies operating across multiple jurisdictions. Industry groups especially tend to favor preemption, as it limits the obligation to conform to stricter state regulations. This concern is particularly relevant in states such as California, which have pursued privacy protections that extend beyond existing federal standards and have expressed interest in maintaining the ability to adopt stronger safeguards.[14] For these stakeholders, preemption is both an efficiency measure and a structural insulation from the more stringent regulations of certain states.

On the other hand, many policymakers, especially at the state level, oppose broad preemption, viewing it as a threat to state authority and innovation.[15] California, through the CCPA and the California Age-Appropriate Design Code Act, has taken a leading role in imposing stricter requirements on companies, including high-privacy default settings for minors, proactive risk evaluation of algorithmic design, and restrictions on data use.[16] Supporters of state authority argue that broad federal preemption could weaken these more robust protections by replacing them with a less stringent national standard influenced by business and industry groups, thereby limiting states' ability to respond to emerging technological risks.[17]

These two distinct positions make compromise difficult. Preemption becomes a debate over which level of government holds regulatory power, rather than a debate over what protections children require. This dynamic reinforces the broader argument advanced here: even when lawmakers agree on the substantive need for stronger protections, disagreements over federalism can derail legislation. The result is gridlock that is structural rather than ideological.

B. ENFORCEMENT AND LIABILITY

A second major area of conflict stems from how children's privacy laws should be enforced. Currently proposed legislation often includes provisions related to two possible enforcement mechanisms: (1) individuals having the right to sue companies directly, commonly called a private right of action, or (2) government agencies, such as the FTC, having sole authority to enforce the law.[18]

Industry actors strongly oppose the first path, arguing that private rights of action would lead to excessive litigation and create significant financial burdens for companies, especially large technology firms that could face frequent lawsuits, costly legal defense,

11 Int'l Ass'n Of Privacy Pros., U.S. State Privacy Law Developments And Federal Preemption Debates (2023), https://iapp.org/news/a/retrospective-2025-in-state-data-privacy-law.

12 Neil M. Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law,* 99 Wash. U. L. Rev. 961 (2021), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4055&context=faculty_scholarship.

13 Int'l Ass'n Of Privacy Pros., *supra* note 11.

14 Bamberger & Mulligan, *supra* note 4, at 142–47.

15 Neil M. Richards & Woodrow Hartzog, *supra* note 12, at 1701–05.

16 Perkins Coie Llp, Key Considerations For Implementing The California Age-Appropriate Design Code Act (2023), https://www.jdsupra.com/legalnews/four-key-considerations-for-4571902/.

17 Int'l Ass'n Of Privacy Pros., *supra* note 11.

18 Cong. Rsch. Serv., *supra* note 3, at 9–11

and substantial statutory damages.[19] These concerns are reinforced by existing privacy litigation under laws such as the CCPA, which authorizes statutory damages of up to $750 per consumer per violation— potentially resulting in hundreds of millions of dollars in liability from a single incident.[20] At scale, even minor violations—such as failures in age verification or targeted advertising practices—can trigger wide class-action exposure and heightened liability risk. From this perspective, enforcement should rest solely with federal agencies, which can provide more streamlined and predictable oversight.

Critics counter that relying solely on agency enforcement is structurally insufficient given limited regulatory resources and capacity. Agencies such as the FTC cannot realistically monitor the vast number of digital services or proactively address emerging harms affecting minors, particularly as platforms rapidly evolve.[21] From this perspective, private enforcement can serve as an essential supplement, creating additional accountability through parents, guardians, or affected individuals where regulatory oversight is limited. Without such a mechanism, even a well-drafted federal statute risks becoming dormant in practice.

These disagreements model deeper conflicts about institutional design. A private right of action empowers individuals and courts, often directly on behalf of minors, while agency enforcement centralizes authority within the executive branch. Because these choices affect who has the power to enforce the law, and at what level of intensity, they remain hotly contested in every reform proposal. The result is that even bills with strong substantive provisions can collapse over enforcement design alone.

C. INDUSTRY INCENTIVES

A third significant area of pushback involves industry incentives, which play a critical role in shaping children's privacy legislation. Many digital platforms are built on data collection and targeted advertising as key components of their business models, particularly through behavioral profiling and algorithmic recommendation systems.[22] For companies such as Meta Platforms and Google, restrictions on data collection or targeted advertising—like those central to COPPA 2.0—would directly affect user engagement and, thus, revenue streams linked to personalized advertising and user retention.

These economic stakes are reinforced by the substantial lobbying power of the technology sector. Amazon, Meta Platforms, and Google together spend tens of millions of dollars annually on federal lobbying, allowing them to exert significant influence on key provisions such as preemption, enforcement mechanisms, and advertising restrictions.[23] As a result, companies often support federal legislation that aligns with their interests and economic well-being, while opposing provisions that constrain their core operations. Congressional testimony from former Meta employees exemplifies these incentives, with one whistleblower stating that Meta consistently chooses profit over safety, highlighting the broader tension between industry business models and stronger regulatory standards.[24]

Consequently, industry influence substantially contributes to legislative gridlock. It narrows the range of politically feasible options, frequently sidelining stronger protections that prioritize children's welfare over corporate interests. Yet without sufficient regulatory provisions, it is difficult to obtain majority support from policymakers and advocates. The result is a recurring pattern in which bills are diluted in negotiation until they no longer command sufficient support to pass—and so they fail to do so.

IV. EVALUATING ALTERNATIVE EXPLANATIONS

Some may argue that, rather than these three structural factors, the cause of legislative gridlock is in fact partisan polarization. However, this explanation is limited, as children's online safety has consistently attracted bipartisan concern and legislative attention across multiple sessions of Congress.[25] For example, KOSA has been co-sponsored by lawmakers from both parties, including Senators Richard Blumenthal (D-CT) and Marsha Blackburn (R-TN).[26] The presence of sustained, shared concern across partisan lines indicates that polarization alone cannot explain legislative failure. If anything, the bipartisan consensus on this issue throws the failure into sharper relief—demonstrating that the obstacle lies elsewhere.

Another explanation cites concerns about technological complexity, arguing that rapidly evolving digital platforms make baseline regulation difficult to implement. While this challenge is real, it has already been addressed elsewhere. Other legislative bodies, particularly the European Union, have enacted comprehensive frameworks—such as the GDPR—that address data collection, algorithmic systems, and protections for minors directly.[27] The GDPR demonstrates that technological complexity does not inherently prevent legislative action; rather, it requires strong institutional capacity and the political will to centralize baseline standards.

These alternative explanations overlook the central role of actors in the current political economy. The issue is not simply disagreement or technical complication, but rather the redistribution of power between states and the federal government, between businesses and individuals, and between policymakers and industry groups. In such an emerging space, a comprehensive law could set the precedent for this redefinition of power, prompting competing actors to shape rules in ways that maximize their influence. Polarization and complexity are surface-level diagnoses; the underlying disease is structural.

V. BROADER IMPLICATIONS

A. COMPARATIVE LESSONS FROM THE EUROPEAN UNION

The failure of U.S. children's privacy legislation has broader societal consequences and, given the rapid pace of technological change, calls for urgency in addressing these challenges. Widening gaps in federal legislation are increasingly pronounced in the context of artificial intelligence (AI), as generative AI and deepfake technologies enable new forms of manipulation, data profiling, and targeted advertising that heighten risks to children.[28] These concerns have raised alarms in Congress across the aisle and brought a wave of bipartisan discussion and legislation, including the NO FAKES Act and the TAKE IT DOWN Act, the latter of which recently passed

19 Bamberger & Mulligan, *supra* note 4, at 198–202.
20 Cal. Civ. Code § 1798.150(a)(1)(A) (West 2024); *see* Cal. Off. Of The Att'y Gen., California Consumer Privacy Act (CCPA) (2024), https://oag.ca.gov/privacy/ccpa.
21 Neil M. Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 Stan. Tech. L. Rev. 431, 460–64 (2020).
22 Zuboff, *supra* note 1, at 63–97.
23 Bamberger & Mulligan, *supra* note 4, at 220–26.
24 J. Sattizahn, *Testimony Before the U.S. Senate Judiciary Subcommittee on Privacy, Technology, and the Law* (2025), https://www.judiciary.senate.gov.
25 Cong. Rsch. Serv., *supra* note 3, at 12–14.
26 Kids Online Safety Act, S. 1409, 118th Cong. (2023).
27 Council Regulation 2016/679, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR]; Solove, *supra* note 4, at 121– 127.
28 Zuboff, *supra* note 1, at 376–80.

into law to address the protection of children from nonconsensual intimate imagery and digital deepfakes.[29] Together, this growing legislative activity signals a renewed window of opportunity to prioritize comprehensive children's privacy reform.

Yet, as this Article has argued, urgency alone is insufficient to produce comprehensive legislation. The same institutional conflicts that have stalled prior efforts continue to shape emerging AI-related proposals. As a result, even as new technologies intensify risks to children, policymaking remains constrained by underlying political-economy dynamics. The consequences of continued delay are significant: without comprehensive federal legislation, children remain exposed to evolving forms of data exploitation, while regulators lack clear and consistent authority to respond effectively.[30] These conditions allow harms to scale alongside technological innovation, reinforcing the need for more proactive and coordinated governance.

The European Union provides a useful comparison for understanding how institutional design can mitigate these barriers. The GDPR establishes a centralized baseline across member states, reducing federalism conflicts and clarifying enforcement authority through independent regulators. Simultaneously, the GDPR implements principles such as data minimization that limit industry influence over the substantive scope of regulation.[31] Although structural differences make direct policy transfer unlikely, elements of this approach could be adapted in the United States, including establishing a strong federal baseline with limited state flexibility, clarifying enforcement authority, and adopting clearer statutory standards. These changes would not eliminate political disagreement, but they could reduce the divided system that amplifies conflict.

Ultimately, this comparison reinforces the Article's central argument: the primary barrier to children's privacy reform in the United States is not a lack of consensus, but a governance structure that transforms agreement into conflict. Reform efforts that ignore this structural reality will continue to founder, regardless of how compelling their substantive provisions may be.

B. LIMITATIONS AND FUTURE RESEARCH

Several limitations of this analysis deserve acknowledgment. As a qualitative policy analysis grounded primarily in legislative documents and secondary scholarship, this Article does not measure the relative weight of preemption, enforcement, and industry-incentive disputes through quantitative methods such as roll-call analysis or interest-group spending modeling. The comparative dimension is also limited to the European Union and could fruitfully be extended to other jurisdictions, including the United Kingdom's Age Appropriate Design Code or emerging frameworks in Australia and Canada. Future research could pair the institutional account developed here with quantitative tests of lobbying expenditure effects on bill markup, or with interviews of congressional staff working on children's privacy legislation.

VI. CONCLUSION

The failure of children's online privacy legislation in the United States reflects deeper institutional and political-economic dynamics rather than a lack of consensus. Disputes over preemption, enforcement authority, liability, and data use transform shared goals into conflicts over power and resources, turning agreement in principle into gridlock in practice. Even as emerging technologies like artificial intelligence and deepfakes intensify risks and generate new bipartisan urgency, these same structural barriers continue to stall meaningful reform.

Understanding these dynamics shifts the focus from whether reform is needed to what conditions would make it possible. The European Union's more centralized approach demonstrates that reducing fragmentation and clarifying authority can help translate consensus into action, offering a useful reference point for U.S. policymakers. This Article has shown that, without addressing these underlying institutional conflicts, comprehensive legislation will remain out of reach. Ultimately, children's privacy reform reveals a broader pattern in U.S. technology policy: in a system where everyone agrees on the problem, the real battle is over who gets to solve it.

This piece was written by Lauren Le.

29 U.S. Senate Judiciary Subcomm. On Priv., Tech., & The Law, Hearing On Artificial Intelligence And Children's Online Safety (2025), https://www.judiciary.senate.gov; Akin Gump Strauss Hauer & Feld Llp, Akin Intelligence – March 2025 (2024), https://www.akingump.com/a/web/xeD4y3nK241yoxuFz3tE8o/aqjsUH/akin-intelligence-april-2025.pdf.

30 Solove, *supra* note 4, at 195–98

31 GDPR, *supra* note 27, arts. 5–6, 8.

UNITING THE DIVIDED ISLAND OF THE EASTERN MEDITERRANEAN:

A CONFEDERAL PROPOSAL FOR THE CYPRUS DISPUTE

INTRODUCTION

Following the start of the 2026 Iran War, debate emerged over whether or not the Republic of Cyprus could join the North Atlantic Treaty Organization (NATO). President Nikos Christodoulides stated that Cyprus would apply for membership "even tomorrow if it were possible," while acknowledging that current political conditions would make such a step unfeasible.[1] The comment reflected a growing discourse surrounding Cyprus's role within Western security institutions and the broader geopolitical situation in the Eastern Mediterranean. The proposal, however, immediately encountered the central obstacle that has defined the Cyprus Dispute for decades. NATO expansion requires the unanimous approval of all member states, and the Republic of Türkiye has consistently indicated that it would block Cypriot accession while the island remains divided.[2]

For this reason, observers describe Cypriot membership in NATO as "a mission impossible, for now."[3] The unresolved political structure of the island places Cyprus in a unique position within the international system. International law recognizes a single sovereign state on the island, yet political authority is divided between two administrations whose security arrangements and constitutional visions diverge sharply.[4] The debate over NATO membership shows a deeper legal and political paradox that has shaped the Cyprus Dispute for more than half a century.

Four months after the start of the war, the strategic premise underlying this article received a striking confirmation. On July 29, 2026, while making his first official visit to Cyprus as United Nations Secretary-General, António Guterres announced plans to convene another 5+1 meeting after further preparations concerning both procedure and substance.[5] He also situated the Cyprus Dispute directly within the increasingly volatile regional environment, describing a settlement as "a factor of stability in what is becoming a dangerously unstable region."[6] Guterres further emphasized the need for compromise, reporting that Cypriots wanted their leaders to "walk that last mile" toward settlement and sought a future defined "not by division, but by cooperation, opportunity and peace."[7] These remarks marked a renewed effort by the United Nations to treat the Cyprus Dispute not merely as an isolated frozen conflict but as a matter of wider regional stability. The proposed 5+1 meeting reflected the growing urgency of resolving the island's division amid a rapidly deteriorating geopolitical environment.

The Republic of Cyprus exercises internationally recognized sovereignty and represents the island within international institutions such as the United Nations and the European Union. At the same time, the northern part of the island operates under a separate political system supported by Turkish security guarantees and its own governing institutions.[8] The Turkish Republic of Northern Cyprus (TRNC) declared independence in 1983, but the United Nations declared the declaration legally invalid, and the entity remains recognized only by Türkiye.[9]

Cyprus occupies an interesting position in international law. The island is formally unified yet politically divided, internationally recognized but territorially contested, and embedded simultaneously within European institutions and unresolved regional rivalries.[10] Over the past several decades, negotiations have attempted to reconcile these contradictions through proposed federal constitutional frameworks. The most prominent efforts include the Annan Plan in 2004 and the negotiations at the Crans-Montana conference in 2017.[11] All of these initiatives ultimately failed.

Much of the existing scholarship approaches the Cyprus problem through the tension between sovereignty and political reality. While some emphasize the territorial integrity and international recognition of the Republic of Cyprus, others focus on the political and institutional consolidation that has taken place in Northern Cyprus since 1974. Though these perspectives highlight important dimensions of the issue, they often treat the conflict as politically frozen.

This article adopts a different approach. Rather than analyzing the Cyprus Dispute primarily through competing claims to sovereignty, it examines the legal framework that already governs the island. The conflict operates within a dense network of international agreements and legal doctrines that address its central bargaining problems. The constitutional framework established in 1960 created a system of external security guarantees and communal power sharing between Greek and Turkish Cypriots. Later legal developments, particularly the jurisprudence of the European Court of Human Rights, produced an extensive body of law governing property claims arising from displacement.

These legal structures shape the political constraints that have repeatedly prevented settlement, but they also provide the institutional foundations for a new solution. In this article, I argue that a fair and durable resolution to the Cyprus Dispute lies in a confederal arrangement composed of two constituent states. Such a framework would preserve the international legal personality of Cyprus while recognizing the island's de facto political division. Security guarantees would provide institutional protection for Turkish Cypriots, while a legally enforceable system of property restitution and eco-

1 Vassilis Nedos, *Cyprus Preparing Path Toward Nato*, Ekathimerini, Mar. 6, 2026, https://www.ekathimerini.com/politics/foreign-policy/1297163/cyprus-preparing-path-toward-nato.
2 Jan Gallemí Albás, *EU-NATO Cooperation on the Cyprus Conflict*, Universidad De Navarra, Jul. 31, 2023, https://en.unav.edu/web/global-affairs/eu-nato-cooperation-on-the-cyprus-conflict.
3 Sarantis Michalopoulos, *Cyprus in NATO? A Mission Impossible, for Now,* Euractiv, Mar. 12, 2026, https://www.euractiv.com/news/cyprus-in-nato-a-mission-impossible-for-now/.
4 Valeria Talbot, Turkey And The West In The Eastern Mediterranean (German Marshall Fund of the United States, Policy Paper No. 6, 2020).
5 UN News, *Cyprus: Guterres Calls for Renewed Trust and a New Meeting on the Way Forward*, United Nations (Aug. 7, 2026), https://news.un.org/en/story/2026/07/1168048.
6 *Id.*
7 *Id.*
8 Joseph O'Mahoney, *Turkey, Cyprus and the Turkish Republic of Northern Cyprus*, in Denying The Spoils Of War: The Politics Of Invasion And Non-Recognition 111-146 (2018).
9 James Ker-Lindsay, *The Cyprus Problem*, in "Frozen Conflicts" In Europe (2015).
10 Peter A. Zervakis, *Cyprus in Europe: Solving the Cyprus Problem by Europeanizing It?*, 3 Connections: The Quarterly Journal 107-132 (2004).
11 International Crisis Group, An Island Divided: Next Steps For Troubled Cyprus (2023).

nomic compensation would address rightful Greek Cypriot claims arising from displacement.

The remainder of my article develops this argument in four sections. Section I examines the historical foundations of the Cyprus Dispute. Section II analyzes diplomatic efforts since 1974 and the persistence of political division on the island. Section III identifies security guarantees and property claims as the two structural constraints that have repeatedly prevented settlement. Finally, Section IV presents a constitutional framework for a confederal solution.

I. HISTORICAL FOUNDATIONS OF THE CYPRUS DISPUTE

Cyprus occupies a uniquely strategic position in the Eastern Mediterranean, sitting at the intersection of Europe, West Asia, and North Africa.[12] Due to its geography, the island rarely developed in isolation and repeatedly came under the control of different empires before the Ottoman conquest of 1571.[13] The Ottoman period significantly shaped the social and institutional structure of the island. The first Turkish settlers arrived alongside the Ottoman administration, while Islam spread among parts of the local population.

At the same time, the Ottoman millet system reinforced the position of the Orthodox Church as the primary institution representing the island's Greek Christian population.[14] Under this system, religious communities enjoyed a degree of autonomy in matters of law, taxation, education, and local governance. Although these arrangements were not defined by modern nationalism, they institutionalized distinctions between Greek Orthodox and Turkish Muslim communities that would later become politically significant.[15] This structure changed after 1878, when Britain assumed administrative authority over Cyprus and ruled the island as a Crown Colony until independence in 1960.[16] Under British rule, modern nationalist movements developed more sharply, especially among Greek Cypriots who increasingly supported enosis, or political union with Greece.[17] These sentiments were reflected dramatically in the 1950 Cypriot plebiscite organized by the Orthodox Church, in which more than ninety-five percent of participating Greek Cypriots voted in favor of union with Greece, while the Turkish community was not invited to participate in the referendum.[18] Turkish Cypriots viewed these developments with increasing alarm. For them, enosis threatened to transform the Turkish community into a vulnerable minority within a Greek state. In response, Turkish Cypriot political leaders increasingly advocated for taksim, the partition of the island into separate Greek and Turkish zones.[19] By the middle of the twentieth century, the political future of Cyprus had become defined by two competing national visions.[20]

The conflict intensified during the final years of British rule. Beginning in 1955, the Greek Cypriot militant nationalist organization Ethniki Organosis Kyprion Agoniston (EOKA) launched an armed campaign against the British colonial administration with the aim of achieving *enosis*.[21] Political rhetoric during this period increasingly framed the struggle from an ethno-nationalist perspective, with Archbishop Makarios declaring that the conflict could not end "until this Turkish community forming part of the Turkish race [...] is expelled."[22] As violence escalated, Turkish Cypriots organized their own paramilitary groups, most notably the Türk Mukavemet Teşkilatı (TMT). By the late 1950s, the conflict had moved beyond anti-colonial struggle and threatened to escalate into a broader confrontation between Greece and Türkiye.

The constitutional settlement that ended British rule attempted to reconcile these competing national projects through institutional compromise. In 1960, Cyprus became an independent republic following the Zurich and London Agreements negotiated by Great Britain, Greece, and Türkiye with the participation of representatives from both communities.[23] The new state was designed as a bi-communal partnership rather than a majoritarian nation-state.

Yet even at the moment of independence, many political leaders viewed the settlement as a temporary compromise rather than a final solution.[24] Turkish Cypriot leader Rauf Denktaş later observed that the independent republic had not been the preferred outcome for either the Turkish Cypriot or Greek Cypriot leadership, arguing that independence became acceptable only because Turkish Cypriot resistance made enosis impossible without risking war between Greece and Türkiye.[25]

The constitutional framework of the new republic formally entrenched this bi-communal partnership. The 1960 Constitution provided that "the President of the Republic shall be a Greek elected by the Greek Community and the Vice-President of the Republic a Turk elected by the Turkish Community," giving each office an independent communal mandate.[26] It also fixed legislative representation by declaring that, in the fifty-member House of Representatives, "seventy per centum shall be elected by the Greek Community and thirty per centum by the Turkish Community."[27] The same 70:30 formula governed the public service, which "shall be composed as to seventy per centum of Greeks and as to thirty per centum of Turks."[28] At the executive level, Turkish Cypriots were guaranteed three of the ten ministerial posts, and one of the key ministries of Foreign Affairs, Defence, or Finance had to be entrusted to a Turkish minister. The constitutional design went even further in the coercive apparatus of the state. The proposed army was to consist "as to sixty per centum of Greeks and as to forty per centum of Turks."[29] These provisions made clear that the Republic of Cyprus was conceived as a partnership state in which communal balance, rather than simple demographic majority, structured political authority.

These arrangements were reinforced by the Treaty of Guarantee, signed by Cyprus, Greece, Türkiye, and the United Kingdom. Under the agreement, Greece, Türkiye, and the United

12 Robert Biddulph, *Cyprus*, 11 Proceedings Of The Royal Geographical Society And Monthly Record Of Geography 705-719 (1889).
13 Herman W. Goult, *HISTORY OF CYPRUS*, Britannica, https://www.britannica.com/place/Cyprus/History (last visited May 1, 2026).
14 *Id.*
15 Muzaffer Ercan Yılmaz, *Past Hurts and Relational Problems in the Cyprus Conflict*, 27 Int'l J. On World Peace 35-62 (2010).
16 *Id.*
17 Michael B. Bishku, *Turkey, Greece, and The Cyprus Conflict*, 8 Journal Of Third World Studies 165-179 (1991).
18 George A. Kourvetaris, *Greek and Turkish Inter-Ethnic Conflict and Polarization in Cyprus*, 16 J. Pol. & Mil. Soc.185-199 (1988).
19 19 James Edward Miller, The United States And The Making Of Modern Greece: History And Power, 1950-1974 (2009).
20 George Kaloudis, *Cyprus: The Enduring Conflict*, 16 Int'l J. On World Peace 3-18 (1999).
21 Neophytos G. Loizides, *Ethnic Nationalism and Adaptation in Cyprus*, 8 International Studies Perspectives 172-189 (2007).
22 Michael Stephen, *Select Committee on Foreign Affairs Written Evidence*, in House Of Commons (2004).
23 Glen D. Camp, *Greek-Turkish Conflict Over Cyprus*, 95 Political Science Quarterly 43-70 (1980).
24 *Id.*
25 Rauf R. Denktaş, *The Crux of the Cyprus Problem*, 4 Perceptions: Journal Of International Affairs 1-10 (1999).
26 Cyprus Const. Of 1960.
27 *Id.*
28 *Id.*
29 *Id.*

Kingdom undertook responsibility for protecting the "sovereignty, independence and territorial integrity" of Cyprus.[30] Article I of the Treaty of Guarantee required the Republic of Cyprus to maintain its independence and constitutional order and explicitly prohibited both union with another state and partition of the island.[31] Article IV further declared that if the constitutional status quo was threatened, the guarantor states would consult together and, if joint action proved impossible, "each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty."[32]

Despite these safeguards, the bi-communal constitutional system proved fragile. Political tensions quickly emerged over the functioning of the power-sharing arrangements and the distribution of authority within the state.[33] In 1963, President Makarios proposed thirteen constitutional amendments designed to reduce the veto powers of Turkish Cypriots and restructure communal representation within state institutions. Turkish Cypriots interpreted these proposals as an attempt to dismantle the bi-communal partnership established in 1960 and transform the republic into a unitary Greek-dominated state.

Inter-communal violence soon followed. In December 1963, clashes between Greek and Turkish Cypriot communities erupted in Nicosia and spread across the island in what became known as "Bloody Christmas."[34] Hundreds of people were killed, thousands were displaced, and Turkish Cypriots increasingly withdrew into fortified enclaves protected by local militias.[35] UN peacekeeping forces were deployed in 1964 in an attempt to stabilize the situation through the creation of the UN Peacekeeping Force in Cyprus (UNFICYP).[36] The constitutional partnership envisioned in 1960, however, had effectively collapsed, and Cyprus gradually evolved into a Greek Cypriot-administered state in which Turkish Cypriots no longer participated.

The decisive rupture occurred a decade later. On July 15, 1974, a coup d'état supported by the Greek military junta overthrew the Cypriot government with the aim of achieving enosis. The coup installed Nikos Sampson, a militant nationalist closely associated with EOKA-B, as president.[37] Türkiye responded by launching a military intervention under Prime Minister Bülent Ecevit, claiming to invoke its rights under the Treaty of Guarantee, and the first phase, Operation Attila I, began on July 20, 1974, establishing a Turkish bridgehead near Kyrenia.[38] Diplomatic negotiations then began in Geneva, where Britain, Greece, and Türkiye attempted to negotiate a political settlement between the two Cypriot communities, but these talks ultimately failed to produce a durable arrangement. During this period, the Greek military junta collapsed in Athens, democratic government was restored under Prime Minister Konstantinos Karamanlis, and European political sympathy increasingly shifted toward the Greek Cypriot position as Türkiye faced growing criticism for maintaining a military presence on the island.

In August 1974, Türkiye launched Operation Attila II, expanding its control to roughly one third of the island's territory, including the northern coastal corridor and the strategic city of Famagusta, while triggering large-scale population displacement as approximately 160,000 Greek Cypriots fled south and tens of thousands of Turkish Cypriots moved north.[39] For the first time in the island's modern history, Cyprus became territorially divided between two politically separate communities. The UN Security Council adopted several resolutions calling for ceasefire and negotiations while continuing to recognize the Republic of Cyprus as the island's legitimate government.[40] In the years that followed, Turkish Cypriot authorities established successive political administrations in the north, including the Autonomous Turkish Cypriot Administration in 1974 and the Turkish Federated State of Cyprus in 1975, which was presented as a constituent unit of a future federal settlement.[41]

II. POST-1974 DIPLOMATIC EFFORTS AND THE PERSISTENCE OF DIVISION

The diplomatic effort to resolve the dispute resumed soon after the events of 1974. In 1977 and 1979, the leaders of the two communities concluded the High-Level Agreements under the auspices of the UN Secretary-General Kurt Waldheim. These agreements committed both sides in principle to the creation of a bi-zonal, bi-communal federation, a framework that sought to reconcile the territorial division of the island with the preservation of Cyprus as a single sovereign state.[42] Although the agreements left many constitutional questions unresolved, they established the conceptual basis for nearly every major settlement proposal that would follow. From that point onward, UN mediation efforts consistently attempted to translate the realities that had emerged after 1974 into a federal constitutional structure capable of accommodating both communities.[43]

Despite this diplomatic framework, negotiations progressed slowly during the late 1970s and early 1980s. Turkish Cypriot leaders increasingly sought to consolidate political institutions in the northern part of the island, partly in response to concerns about political isolation and economic vulnerability.[44] In this context, Turkish Cypriot authorities moved toward a more formal declaration of statehood. In 1983, the Turkish Cypriot administration proclaimed the establishment of the Turkish Republic of Northern Cyprus (TRNC).[45]

The declaration of independence was recognized only by Türkiye and was flatly rejected by the broader international community. The Security Council responded with Resolution 541, declaring the proclamation legally invalid and calling upon all member states not to recognize the entity. From the perspective of international diplomacy, the decision by Turkish Cypriot leadership to declare independence complicated an already fragile negotiation process. While the declaration reflected Turkish Cypriot frustrations with the lack of progress toward a settlement, it also hardened the political

30 Treaty Of Guarantee (1960).
31 *Id.*
32 *Id.*
33 Paschalis M. Kitromilides, *Greek Irredentism in Asia Minor and Cyprus*, 26 Middle Eastern Studies 3-17 (1990).
34 John Saccas, *The Greek Military Regime and the Cyprus Question*, in The Greek Military Dictatorship: Revisiting A Troubled Past, 1967-1974 320-339 (2021).
35 *Id.*
36 *Id.*
37 Marios L. Evriviades, *The Problem of Cyprus*, 70 Current History 18-42 (1976).
38 Vassilis K. Fouskas, *Uncomfortable Questions: Cyprus, October 1973-August 1974*, 14 Contemporary European History 45-63 (2005).
39 *Id.*
40 Nancy Crawshaw, *Cyprus: A Failure in Western Diplomacy,* 40 The World Today 73-78 (1984).
41 *Id.*
42 Tozun Bahcheli & Sid Noel, *The Quest for a Political Settlement in Cyprus: Is a Dyadic Federation Viable*, 44 Publius: The Journal Of Federalism 659-680 (2013).
43 *Id.*
44 Andreas Theophanous, *The Cyprus Problem, The EU and the UN: An Overall Assessment and the Way Forward*, 23 Horizons: Journal Of International Relations And Sustainable Development 72-91 (2023).
45 *Id.*

positions of both sides and made it more difficult to pursue the federal framework that had been outlined in the High-Level Agreements only a few years earlier.[46] Continuing negotiations within the federative structure already endorsed by both communities would have preserved greater diplomatic flexibility at this early stage of the peace process.

Nevertheless, the institutional development of the northern administration continued in the decades that followed. Although lacking international recognition, the Turkish Cypriot political system developed many of the functional characteristics of a state, including its own governmental institutions, electoral system, and administrative structures.[47] At the same time, the Republic of Cyprus retained its status as the island's sole internationally recognized government, a legal reality that would shape the diplomatic environment of the conflict for decades to come.

Throughout the late twentieth century the UN continued to sponsor negotiations aimed at reunifying the island within the bi-zonal, bi-communal federal framework first articulated in the 1977 and 1979 agreements.[48] These discussions repeatedly addressed questions of territorial adjustment, property restitution, constitutional design, and the future of the security guarantees established in 1960. Despite occasional periods of optimism, the negotiations struggled to bridge the fundamental gap between the priorities of the two communities.[49] Greek Cypriot leaders generally emphasized territorial integrity and the return of displaced persons, while Turkish Cypriot leaders prioritized political equality, communal autonomy, and effective security guarantees.

A new dimension of the dispute arose in 1990 when the Republic of Cyprus applied for membership in the European Community, later known as the European Union.[50] The application fundamentally altered the diplomatic landscape of the conflict. For Greek Cypriots, European integration promised economic development and strengthened international legitimacy.[51] For Turkish Cypriots and Türkiye, however, the prospect of EU membership raised concerns that the Greek Cypriot government might consolidate its international position without first resolving the constitutional dispute on the island. Despite these objections, accession negotiations proceeded, and the EU maintained that the Republic of Cyprus could join even in the absence of a final political settlement.[52]

The most ambitious attempt to implement a federal solution emerged in the early 2000s under the leadership of UN Secretary-General Kofi Annan. After several years of negotiations, the UN presented the Annan Plan, which proposed the reunification of Cyprus as a bi-zonal, bi-communal federation composed of two constituent states under a common federal government.[53] The plan attempted to address the central disputes of the conflict, including territorial adjustments, power-sharing arrangements, property restitution and compensation mechanisms, and the gradual reduction of foreign troops stationed on the island.

In April 2004, the proposal was submitted to simultaneous referenda in both communities. Turkish Cypriots approved the plan by a significant majority, viewing it as an opportunity to end decades of international isolation. Greek Cypriots, however, rejected the proposal by a large margin, citing concerns over security guarantees, the continued presence of Turkish troops, and the scope of refugee return.[54] As a result, the proposed federal settlement did not enter into force.

In May 2004, only days after the referendum, the Republic of Cyprus joined the EU.[55] Legally, the entire island entered the Union, but the application of EU law was suspended in the northern part of Cyprus where the government of the Republic of Cyprus could not exercise effective control due to the Turkish military presence. This arrangement further institutionalized the asymmetry that had emerged in the dispute.[56] The Republic of Cyprus gained the economic and political benefits of EU membership, while the Turkish Cypriot north remained outside the Union's legal and economic framework.

Subsequent negotiations continued intermittently, culminating in the Crans-Montana talks of 2017, where discussions once again addressed the core issues of security guarantees, territorial adjustment, equitable governance, and property restitution claims.[57] Although the negotiations appeared at times to approach a possible breakthrough, disagreements over the future of the guarantor system and the distribution of authority within a federal structure ultimately prevented a final agreement. During the following nine years, the United Nations convened six meetings in Switzerland, Germany, and the United States as part of its effort to rebuild confidence after the disappearance of a formal settlement track.[58]

In July 2026, Secretary-General António Guterres's first official visit to Cyprus marked a more direct effort to revive the process. After meeting separately and jointly with the Greek Cypriot and Turkish Cypriot leaders, Guterres announced his intention to convene another 5+1 meeting involving the two Cypriot communities, the three guarantor states, and the UN.[59] Although this initiative has not yet produced a substantive settlement process, it demonstrates that Cyprus was again being treated as an urgent diplomatic and regional-security concern rather than merely as a frozen conflict.

More than six decades after decolonization, the Cyprus Dispute remains unresolved with the island divided along the Green Line, a UN-administered buffer zone that has separated the two sides since 1974. The Republic of Cyprus continues to function as the internationally recognized government of the island and as a member state of the EU, while the Turkish Cypriot administration governs the northern part of the island with the political, economic, and military support of Türkiye. Questions of security guarantees continue to shape Turkish Cypriot political concerns, while concerns about territorial adjustment and property restitution remain central to

46 Hasan A. Deveci, *Cyprus: A Federal or Two-State Solution?*, 19 Journal Of Cyprus Studies 15-36 (2017).
47 *Id.*
48 *Id.*
49 Tozun Bahcheli, *Searching for a Cyprus Settlement: Considering Options for Creating a Federation, a Confederation, or Two Independent States,* 30 Publius: The Journal Of Federalism 203-216 (2000).
50 Birgül Demirtaş, *Reconsidering Cyprus Issue: An Anatomy of Failure of European Catalyst* (1995-2002), 3 Usak Yearbook Of International Politics & Law 27-53 (2010).
51 *Id.*
52 George Christou, *The European Union, Borders and Conflict Transformation: The Case of Cyprus*, 45 Cooperation And Conflict 55-79 (2010).
53 Maria Hadjipavlou, *The Cyprus Conflict: Root Causes and Implications for Peacebuilding*, 44 J. Peace Research 349-365 (2007).
54 *Id.*
55 Joana Amaral, *The Annan Plan Experience in Cyprus*, in Making Peace With Referendums: Cyprus And Northern Ireland 50-77 (2019).
56 Andreas Theophanous, *Prospects for Solving the Cyprus Problem and the Role of the European Union*, 30 Publius: The Journal Of Federalism 217-241 (2000).
57 Ioannis N. Grigoriadis, *The Eastern Mediterranean as an Emerging Crisis Zone: Greece and Cyprus in a Volatile Regional Environment*, Eastern Mediterranean In Uncharted Waters: Perspectives On Emerging Geopolitical Realities 38-46 (2021).
58 UN News, *supra* note 5.
59 *Id.*

Greek Cypriot legal claims.[60] It is these two structural constraints of security and property that continue to define the limits of any future settlement of the Cyprus Dispute.

III. SECURITY GUARANTEES AND PROPERTY CLAIMS AS STRUCTURAL CONSTRAINTS

While negotiations have often made progress on governance structures and territorial arrangements, the two issues of security guarantees and property rights consistently emerge as the decisive obstacles to agreement.[61] As one analysis of the conflict observes, debates over reunification are inseparable from disputes over "property, security, and the economy," each of which complicates the search for a viable constitutional arrangement.[62]

The security dilemma surrounding Cyprus originates in the constitutional settlement negotiated at independence in 1960. The new republic was designed as a bi-communal partnership intended to reconcile the demographic predominance of Greek Cypriots with institutional safeguards for the Turkish Cypriot minority. The constitutional structure departed from majoritarian principles and incorporated fixed communal representation in key state institutions. Turkish Cypriots were granted 30% of parliamentary seats, 30% of civil service appointments and 40% of its proposed army, while the Turkish Cypriot vice president possessed veto authority over major decisions.[63] These arrangements were intended to establish a system in which the two communities functioned as co-founders of the republic rather than as majority and minority within a unitary state.

The collapse of the constitutional partnership created in 1960 reshaped security perceptions on both sides of the island.[64] Turkish Cypriots increasingly interpreted the breakdown of the system as evidence that minority protections could not be sustained without external guarantees. Greek Cypriots increasingly viewed the constitutional structure as an institutional framework that constrained their effective democratic governance. These diverging interpretations only hardened further after the events of 1974 when Türkiye militarily intervened by citing its rights under the Treaty of Guarantee following a *coup d'éta*t supported by the Greek military junta.

The future of the guarantee system has remained central to negotiations. Turkish Cypriot leaders generally argue that a continued security role for Türkiye remains necessary to ensure communal safety. Greek Cypriot leaders, on the other hand, maintain that external military guarantees are incompatible with the sovereignty of a reunified state. This disagreement has repeatedly stalled negotiations even when substantial progress has been achieved in other areas.[65] During the negotiations culminating in the 2017 Crans-Montana conference, participants reported that most substantive issues had already been addressed.[66] One member of the negotiating team later remarked that negotiators believed "there was little left for Crans-Montana," with the remaining disputes centered largely on guarantees and military presence.[67]

Alongside the security dilemma, property claims arising from the population movements of 1974 constitute the second major legal constraint shaping the Cyprus Dispute.[68] The territorial division of the island produced large-scale displacement as Greek Cypriots moved south while Turkish Cypriots relocated to the north. These movements generated extensive legal disputes concerning ownership of land and property. For many displaced persons, these claims remain central to the political realities that come with reunification.[69]

Greek Cypriot leaders frequently emphasize the right of displaced persons to reclaim their lawful property.[70] Turkish Cypriot leaders emphasize compensation mechanisms capable of preserving the demographic realities that have emerged on the island since the division. The interaction between these legal claims and political realities has shaped the negotiation process. Greek Cypriot actors often frame the dispute through international law, emphasizing the continuing validity of property rights despite displacement. Turkish Cypriots frequently stress the circumstances on the ground that have developed through decades of separate administration. Observers sometimes summarize this tension with the remark that the Cyprus Dispute resembles "thirty thousand Turkish troops faced off against thirty thousand Greek Cypriot lawyers."[71]

Despite these disagreements, decades of negotiations have clarified the range of possible legal solutions. Settlement proposals have explored property regimes combining financial compensation and territorial adjustment.[72] Such restitutory mechanisms attempt to reconcile the legal claims of displaced persons with the need to maintain political stability on the island.

Security guarantees and property rights define the legal structure within which any Cyprus settlement must operate. One concerns the institutional protection of communal security. The other concerns the resolution of competing property claims arising from displacement. A constitutional framework that fails to reassure Turkish Cypriots regarding security will struggle to command political support in the north. At the same time, a settlement that fails to address Greek Cypriot property claims will encounter legal and political resistance in the south.

The Cyprus Dispute reflects a broader challenge in post-conflict constitutional design: the need to reconcile demands for security with rightful claims of justice arising from displacement. The following section tries to develop a confederal framework that seeks to address these institutional constraints by integrating security guarantees and property settlement mechanisms within a single constitutional structure.

IV. CONSTITUTIONAL FRAMEWORK OF THE CONFEDERATION OF CYPRUS

A durable settlement of the Cyprus Dispute requires an institutional framework capable of reconciling two conditions that

60 Rebecca Bryant & Mete Hatay, *Suing for Sovereignty: Property, Territory, and the EU's Cyprus Problem*, Global Political Trends Center 1-12 (2009).
61 International Crisis Group, *Cyprus: Six Steps Toward a Settlement* 1-18 (2011).
62 *Id.*
63 T. W. Adams, *The First Republic of Cyprus: A Review of an Unworkable Constitution*, 19 The Western Political Quarterly 475-490 (1966).
64 Hubert Faustmann, *Can the Cyprus Problem be Solved*, 25 Cyprus Review 117-125 (2013).
65 International Crisis Group, *Divided Cyprus: Coming to Terms on an Imperfect Reality* (2014).
66 *Id.*
67 International Crisis Group, An Island Divided: Next Steps For Troubled Cyprus (2023).
68 *Id.*
69 *Id.*
70 Yiannis Papadakis, *Greek Cypriot Narratives of History and Collective Identity: Nationalism as a Contested Process*, 25 American Ethnologist 149-165 (1998).
71 Thomas De Waal, *Cyprus: In Europe, In Limbo*, in Uncertain Ground: Engaging With Europe's De Facto States And Breakaway Territories 49-60 (2018).
72 Suha Bölükbaşı, *The Cyprus Dispute and the United Nations: Peaceful Non-Settlement Between 1954 and 1996*, 30 International Journal Of Middle East Studies 411-434 (1998).

have shaped negotiations since 1974: the continued international legal personality of Cyprus as a single sovereign state and the existence of two self-governing political communities exercising authority over separate territories. The confederal framework proposed here seeks to address this tension by establishing a constitutional structure that preserves sovereignty at the international level while recognizing territorial self-government within two Constituent States. Rather than attempting to reconstruct a bi-zonal, bi-communal federal system immediately, the following proposal builds on principles already embedded in earlier negotiations, including political equality between the two communities and the need for institutional mechanisms capable of addressing security guarantees and property claims.

Article I: Foundational Principles and Constituent States
The Confederation of Cyprus would be founded on three core constitutional principles: political equality between the Greek Cypriot and Turkish Cypriot communities, territorial self-government within each Constituent State, and the preservation of a shared international personality for Cyprus. Within this framework, the island would consist of two Constituent States, the Greek Confederal Republic of Cyprus and the Turkish Confederal Republic of Cyprus. The right of self-determination would be exercised collectively through confederal institutions rather than individually by either Constituent State, ensuring that the Confederation preserves the legal continuity of Cyprus as a single sovereign subject of international law while allowing each community to maintain authority over its internal constitutional order.

Article II: Legal Continuity and International Personality
Legal continuity would represent a central feature of the confederal arrangement. The Confederation of Cyprus would continue the international legal personality of the Republic of Cyprus under a reconstituted confederal constitutional order. It would retain Cyprus's existing treaty obligations, international representation, and membership in international organizations, including the European Union.

Article III: Citizenship
Citizenship under the confederal framework would remain unified at the level of the Confederation. All persons recognized as citizens of Cyprus would hold citizenship of the Confederation of Cyprus while retaining official communal affiliation within one of the two Constituent States. Political participation would reflect this dual structure. Citizens would exercise national voting rights within their respective Constituent State while retaining the right of residence and municipal participation throughout the entire island.

Article IV: Guarantor Powers
The revised guarantee system would continue to play an important role within the confederal framework. The Treaties of Guarantee and Alliance would be updated so that the Republic of Türkiye, the Hellenic Republic, and the United Kingdom remain guarantor powers of the constitutional order of the Confederation. These guarantees would operate within the constitutional structure of the Confederation and in accordance with international law, thereby preserving a security architecture familiar to both communities while adapting it to the requirements of a new institutional arrangement.

Article V: Executive Authority
Executive authority within the Confederation would be exercised by a Council composed of equal numbers of representatives elected by each Constituent State. The Council would function as the collective executive authority of the Confederation, ensuring parity between the communities at the highest level of decision-making. The chair of the Council would rotate every eighteen months between representatives of the two communities. Executive authority within each Constituent State would remain vested in its own government, reflecting the principle of territorial self-government.

Article VI: Legislative Authority
Legislative authority at the confederal level would be vested in a Senate representing the two Constituent States on a seventy-five to twenty-five basis. Representation would reflect demographic realities while preserving institutional safeguards for communal participation in decision-making. No confederal legislation would enter into force unless it received a majority of all Senators, including at least one third of Greek Cypriot Senators and one third of Turkish Cypriot Senators voting in favor. This requirement would help ensure that confederal legislation reflects cooperation between the communities rather than unilateral decision-making by either side. Each Constituent State would maintain its own Chamber of Deputies responsible for legislating within its designated sphere of competence.

Article VII: Judicial Authority
Judicial authority within the Confederation would be exercised by a Supreme Court consisting of a Chief Justice and eight Associate Justices. Four Associate Justices would be drawn from each Constituent State. The Chief Justice would be a Greek Cypriot nominated by a simple majority of the Council and confirmed by two-thirds of all Senators, including at least one-third of the Senators from each Constituent State. The Chief Justice would preside over the Court and would vote only in the event of a tie. The Supreme Court would serve as the principal interpreter of confederal law. Each Constituent State would retain its own High Court exercising original and appellate jurisdiction within its territory. However, the Supreme Court of the Confederation would remain the final judicial authority on questions of confederal law, constitutional interpretation, and disputes between the Constituent States, and could review and overturn decisions of the High Courts in such matters. This arrangement would preserve judicial autonomy at the constituent level while ensuring constitutional coherence across the Confederation.

Article VIII: Constitutional Supremacy and Enumerated Powers
The Confederation would operate according to a system of enumerated powers. Confederal law would prevail only in matters explicitly assigned to confederal institutions, including foreign policy, customs, currency, defense coordination, and obligations arising from membership in the European Union and NATO. All other powers would remain vested in the Constituent States. This allocation of authority reflects the key principle that cooperation should occur where necessary for international representation and security coordination while preserving internal autonomy in matters such as education and domestic governance.

Article IX: Official Languages
The confederal constitution would recognize Turkish, Greek, and English as the official languages of the Confederation of Cyprus, reflecting the bi-communal character of the island and its continued engagement with international institutions.

Article X: Security Forces and Military Presence
Security arrangements would form a central component of the constitutional settlement. Confederal security forces would consist of 15,000 personnel drawn from both communities on a seventy-five to twenty-five basis, while each Constituent State would maintain its own internal security forces of 10,000 personnel. Oversight of all military contingents, including external contingents, would be entrusted to a Joint Security Commission composed equally of

Greek Cypriot and Turkish Cypriot generals, with a Turkish Cypriot Chief of Staff and a Greek Cypriot Deputy Chief of Staff. External military forces stationed on the island would initially consist only of 5,000 soldiers from the Republic of Türkiye, 5,000 soldiers from the Hellenic Republic, and up to a combined total of 5,000 soldiers from other European Union and NATO countries authorized to serve the peace and security of the island. These forces would be reduced gradually over a twenty-five-year period under international supervision and ultimately replaced by a limited NATO presence unless both Constituent States jointly agreed to retain symbolic Turkish and Greek detachments. United Nations peacekeeping forces would withdraw after a period of five years unless their continued presence were jointly deemed necessary.

Article XI: Emergency Deadlock Procedure
To prevent institutional paralysis within the confederal system, the constitutional framework would include a structured deadlock resolution procedure. If confederal institutions failed to act on matters within their competence for ninety days, the issue would be referred to a Conciliation Committee composed of equal representatives from both Constituent States and chaired by a neutral international member. The Conciliation Committee would propose a compromise text within thirty days. If the conciliation process failed, a temporary emergency override mechanism could be invoked only in narrowly defined circumstances involving external security threats, fiscal collapse of confederal institutions, compliance with binding EU or NATO obligations, natural disasters, pandemics, or humanitarian emergencies. Any such override would require two-thirds of all Council members, including a majority of the representatives from each Constituent State, together with approval by the Supreme Court and would automatically expire after six months unless renewed through the ordinary legislative procedure.

Article XII: External Relations
External relations would remain exclusively within the purview of the Confederation. The Constituent States would not establish diplomatic relations with foreign states or international organizations, although they could maintain cultural, economic, and representative offices with the Guarantor States. These offices would not possess diplomatic status and would not exercise sovereign foreign policy authority. The Constituent States would also be prohibited from entering into political or economic union with Greece or Türkiye.

Article XIII: European Union and NATO
Within the proposed framework, the Confederation of Cyprus would be a member of both the European Union and NATO, and European Union law would apply throughout the entire territory of the island. Until Türkiye becomes a member of the European Union, the Confederation would seek, subject to agreement with the European Union, a special arrangement providing for enhanced customs union cooperation, Turkish participation in European Union security frameworks relating to Cyprus, and an observer role for Türkiye in deliberations directly concerning the Confederation.

Article XIV: Confederal Economic Area
Economic cooperation would be strengthened through the establishment of a Confederal Economic Area guaranteeing the free movement of goods, capital, services, and persons throughout the island in accordance with European Union law.

Article XV: Energy and Natural Resources
The confederal constitution would establish a Joint Energy Authority responsible for regulating offshore hydrocarbon development and distributing revenues on a seventy-five to twenty-five basis between the Constituent States in accordance with the international obligations of the Confederation.

Article XVI: Property Restitution and Compensation
The constitutional framework would also address property disputes arising from displacement in 1974 through the creation of an Independent Property Commission composed of representatives from both communities together with international arbitrators. The Commission would provide restitution if feasible, compensation where restitution proved impracticable, and property exchange as appropriate. A compensation fund supported in substantial part by the Republic of Türkiye and the European Union would assist in implementing these decisions.

Article XVII: Electoral Procedures
Electoral procedures within the confederal framework would reflect the key principles of democratic representation and political equality between the two communities. Members of the Senate would be elected separately within each Constituent State by proportional representation. Greek Cypriot citizens would elect senators representing the Greek Confederal Republic, while Turkish Cypriot citizens would elect senators representing the Turkish Confederal Republic. Citizens would exercise national voting rights within each Constituent State corresponding to their communal affiliation, while citizens residing in the territory of the other Constituent State would retain municipal voting rights in their place of residence. An Independent Electoral Commission composed equally of members from both communities would supervise confederal elections and could invite international observers, especially from the European Union.

Article XVIII: Territorial Adjustment
Territorial adjustment would form part of the constitutional settlement through the return of specified areas, including Varosha and other parts of Famagusta, to the Greek Confederal Republic under United Nations-supervised transition. The final territorial boundaries of the Turkish Confederal Republic would reflect territorial frameworks developed in earlier international settlement proposals. This would necessarily require significant concessions from the Turkish Cypriot side to the Greek Cypriot side. The capital, Nicosia, would be re-administered as a Nicosia Capital Region jointly governed by its residents through proportional representation.

Article XIX: Constitutional Amendments
The constitutional framework would include safeguards protecting the institutional balance between the two communities. Amendments affecting territorial adjustment, security guarantees, voting rights, or the constitutional status of either Constituent State would require approval by both communities through their respective confederal representatives.

Article XX: Constitutional Evolution
After twenty-five years, the two Constituent States could jointly reconsider the institutional structure of the Confederation through a confederal referendum and could approve a transition to a more integrated federal structure, together with a renegotiation of the Treaties of Guarantee and Alliance, if such a transition were approved by both communities through their respective constitutional procedures.

CONCLUSION

The Cyprus Dispute remains one of the most persistent constitutional and geopolitical conflicts in the Eastern Mediterranean. More than six decades after independence and half a century after the island's territorial division, Cyprus continues to exist in a condition of de jure unity and de facto separation. International law recognizes a single sovereign state, yet the institutional and territorial realities of

the island reflect the existence of two self-governing communities whose political expectations, security concerns, economic systems, and constitutional visions remain sharply divergent.

The confederal framework advanced in this article offers a unique constitutional approach. Rather than attempting to deny the reality of division, it seeks to incorporate that reality into a shared constitutional order. By establishing two Constituent States within a single Confederation and preserving the international personality of Cyprus, the model aims to reconcile political equality with territorial self-government. The proposed structure further addresses the two central obstacles to settlement by preserving revised guarantees, gradually reducing foreign military contingents under international supervision, and creating an Independent Property Commission capable of adjudicating claims through restitution, compensation, and property exchange.

My proposal does not claim to solve all of the difficulties that have long defined the Cyprus Dispute. No constitutional arrangement can erase the historical memory of ethnic cleansing, displacement, segregation, and mutual distrust. Nor can any institutional design succeed without political will on both sides of the island, and among the guarantor states, to sustain it. Therefore, a confederal settlement would require not only legal innovation but also a readiness to accept that the island's future may depend less on restoring a lost constitutional unity than on building a new framework of co-existence from the political realities that now exist.

Yet the confederal model provides one important advantage over the alternatives that have dominated negotiations for decades. It does not require either community to surrender its core political narrative in advance of settlement. Greek Cypriots would retain the international continuity of Cyprus and the possibility of territorial and legal redress. Turkish Cypriots would secure constitutionally guaranteed political equality, territorial self-government, and a continued security framework.

Even if such a Confederation would not be perfect for either side, that is precisely because any durable settlement on Cyprus must take the form of a grand compromise rather than the complete triumph of one constitutional vision over the other. The framework proposed here is intended in that spirit. It offers Greek Cypriots territorial adjustment and legal remedies, while offering Turkish Cypriots political equality and credible security guarantees. Neither side would obtain everything it seeks, yet each side would obtain enough to make continued co-existence more plausible than continued deadlock.

The diplomatic developments of July 2026 give that compromise renewed urgency. The same regional instability that revived debate over Cyprus's possible NATO membership has made the island's constitutional future inseparable from the wider security of the Eastern Mediterranean. Guterres urged the two Cypriot leaders to "walk that last mile" toward settlement and described a solution in Cyprus as "a factor of stability in what is becoming a dangerously unstable region."[73] Yet his reminder that "the United Nations cannot impose peace" captures the deeper truth of the dispute.[74] International institutions can reopen negotiations and preserve the possibility of an agreement, but only the two communities themselves can accept that peace requires them both to share a constitutional order founded on political equality rather than the dominance of either community.

If the Cyprus Dispute is to move beyond the stalemate that has defined it since 1974, future negotiations may need to look beyond the exhausted options of federal reunification and permanent partition. A confederal arrangement, precisely because it preserves the island's political unity while recognizing its political duality, may offer a more realistic foundation for a just peace. Its greater promise is that an island long shackled by its history might at last cease to be its prisoner and become a shared homeland, one in which the inviolable human dignity of every Cypriot, whether of Turkish or Greek origin, is secured by law, and peace signifies not merely the absence of violent conflict, but the conscious creation of a free and reconciled commonwealth, bound together by equal citizenship and a shared sense of belonging, united by a destiny its people have always shared and must now choose to shape together. *Ex concordia pax*.

This piece was written by Utku Özgür and edited by Alec Kong.

73 UN News, *supra* note 5.
74 *Id.*

HOW POLLUTANT REDUCTION POLICIES FAIL TO BE EQUITABLE

INTRODUCTION

Environmental policy becomes increasingly relevant every day as pollutant emissions increase, and health outcomes worsen. According to the World Health Organization, 4.2 million early deaths in 2024 were due to air pollution in cities and rural areas.[1] To improve living standards and save lives, it is crucial to reduce pollutant emissions like greenhouse gases (GHG) and particulate matter (PM). Particulate matter, especially that smaller than 10 micrometers in diameter, is important to regulate because its size allows it to enter the lungs and bloodstream easily. It is highly correlated with health issues like cancer, strokes, and heart attacks.[2] Similarly, GHG emissions trap heat in the Earth, raising global temperatures, and catalyzing global warming. This entails more air pollution, disease, and extreme weather events.[3]

There is also an equity issue in environmental policies, which often prioritize reducing aggregate pollutant emissions at the expense of exacerbating inequalities for the communities experiencing their burdens. To improve living standards across the population, pollutant reduction policies must be equitable. Current policy tends to benefit more affluent groups naturally. This is different from simply being equal, which treats all population segments uniformly despite their varying needs. A change in approach requires policies that provide proportional benefits across the population based on varied circumstances. Approaches toward pollution reduction must recognize that different groups have varying needs to achieve the same outcome.[4]

Specific examples of equity failure can be analyzed to understand why policies currently fail some groups. This paper analyzes two policies from places that differ dramatically in size, urgency of change, and governance to identify commonalities between air pollution policies. It argues these policies need revision to fully attain the equity they claim to promote. The two examples used in this analysis are California's market-based Cap-and-Trade program and Delhi's reactive Graded Response Action Plan (GRAP) policy. Their significantly differing circumstances are particularly relevant because they highlight the need for prioritizing equity in pollutant reduction policies to maximize their holistic effectiveness. If equity issues arose only in GRAP, one could attribute them to a lack of funding, reactive governance, or PM-specific challenges. Similarly, if they only existed within the Cap-and-Trade mechanism, equity failures could be attributed to GHG-specific challenges or the nature of market-based mechanisms. When mutual equity failures exist despite variances in mechanism, pollutant type, and economic context, it becomes apparent equity de-prioritization is a structural issue. Governing bodies prioritize aggregate reduction targets with a flexible approach, meaning the heaviest pollutant burdens are often placed on communities lack the financial or political power to prevent it. Proportionate improvements to air quality in disadvantaged areas, compared to those with already healthier air quality, would significantly lower cumulative pollutant emissions. Section I presents Delhi's GRAP has been somewhat effective in reducing PM levels but is reactive and lacks fairness across the population. Section II is a case study of how California's Cap-and-Trade policy has effectively reduced GHG emissions and allocated significant funding to under-resourced communities, leading to measurable benefits. Section III details how two vastly different programs are inherently susceptible to exacerbating inequities unless this tendency is proactively addressed via policy design. Thus, three equity-focused policy changes are presented: facility-level caps, pre-legislated compensation, and distributional reporting. These are universally applicable solutions governments should apply to future policy design. The externalities of pollutant emissions have economic impacts far beyond the cost of more proactively equitable policies.

I. CASE STUDY OF GRADED RESPONSE ACTION PLAN (GRAP)

Delhi, India's capital, has historically experienced high levels of atmospheric pollutants. This negatively impacts the health of Delhi citizens. One example is that studies have shown exposure to particulate matter increases the risk of colorectal and prostate cancers and respiratory diseases while harming blood vessel function and lung function.[5] Across these effects, the pollutants, and specifically the high particulate matter concentrations, lead to approximately 10,000 premature deaths per year.[6] The deaths are largely due to long-term PM exposure rather than an immediate impact. Ischemic heart disease is responsible for approximately 64% of the related deaths, and 60% of them happen to individuals over 60 years old.[7] In November 2017,

1 *Ambient (outdoor) air pollution*, World Health Organization (2024), https://www.who.int/news-room/factsheets/detail/ambient-(outdoor)-air-quality-and-health.
2 *Health and Environmental Effects of Particulate Matter (PM)*, U.S. Environmental Protection Agency (2016), https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm
3 *Causes and Effects of Climate Change*, United Nations (2024), https://www.un.org/en/climatechange/science/causes-effects-climate-change.
4 *Equity vs. Equality: What's the Difference?*, GWU Milken Institute School of Public Health (2020), https://onlinepublichealth.gwu.edu/resources/equity-vs-equality/.
5 *Air Pollution and Your Health,* National Institute of Environmental Health Sciences (2024), https://www.niehs.nih.gov/health/topics/agents/air-pollution.
6 Ying Chen, *Air Pollution in New Delhi Is More Severe Than Observed Due to Hygroscopicity-Induced Bias in Aerosol Sampling*, at 1 (2025), https://pubmed.ncbi.nlm.nih.gov/40103598/.
7 Amrendra Kumar Singh et al., *Premature Mortality Risk and Associ-*

Delhi had the highest air pollution levels in India's history. The incident became known as "the Great Smog Month of Delhi."[8] Anything with such a severe influence on public health requires urgent investment.

In response to this crisis, the government was pressured to create a program to reduce Delhi's air pollution. They developed the Graded Response Action Plan (GRAP), a framework to respond to excessive atmospheric pollutants. In a city plagued by economic inequality, one would think the belated initiative would improve equity for those most influenced by excessive pollutants. However, a 2026 study led by Debajit Sarkar shows a lack of impact towards improved equity: "We observed no considerable changes in relative disparity among the wealth subgroups in the urban and rural regions of Delhi."[9] This reflects the policy's seemingly ambivalent approach towards inequality in the burdens of PM2.5 – it neither aims to improve it nor does it actively worsen it.

When evaluating GRAP's mechanisms, this outcome seems to be inevitable. GRAP follows a four-stage progression depending on how severe air pollution is. The severity of the protocol increases as micrograms per cubic meter of particulate matter rise:

(61-120 μg/m^3) - Air quality is tracked more thoroughly, and individuals and industries are encouraged to adopt certain more environmentally conscious procedures, such as not using fireworks and not tolerating visible emissions.

(121-250 μg/m^3) - When air quality definitively surpasses safe limits, alerts are sent out through social media, news outlets, and public announcements. Measures are taken to reduce traffic, limit industrial activity, and restrict construction work.

(250+ μg/m^3) - When air quality reaches hazardous levels, strict limits are placed on vehicle use, various industrial operations are forced to stop, and medical emergency stations are set up.

(300+ μg/m^3) - If air quality becomes life-threatening, transpor tation and industry are shut down. Other emergency plans, like shutting down schools, are also considered.[10]

Though it was proposed 8 years ago, the Indian government's reliance on GRAP is still evident. Most recently, stages 3 and 4 of the plan were activated in November 2025 and spanned sixteen days.[11] This entailed hybrid schooling, suspended construction activities, and significantly reduced mining.[12] This blanket set of protocols, while equal for the entire population, is not equitable for the lower-income groups that are disproportionately impacted by the economy slowing down. The government's support for its inequitable policies, when present, tends to be reactionary to public pressure. For example, they only provided a ₹10,000 compensation for construction workers impacted in November 2025 after pressure.[13] Although GRAP provides some clarity when the atmosphere is dangerous, it may permit governing bodies to stall on creating more proactive measures. Bharati Chaturvedi, director of the Chintan Environmental Research and Action Group, has noted GRAP "was introduced to give temporary relief while deeper reforms were being implemented," but no such reforms have followed. She also reported, "If authorities do not move beyond GRAP, Delhi will face the same crisis year after year."[14]

These quotes represent a larger trend of critics arguing for more proactive policies to support GRAP and accelerate its positive but limited impacts. In 2015 and 2016 (pre-GRAP), PM 2.5 concentrations (measured in μg/m^3) were 112.05 and 141.71, respectively, whereas they were 127 in 2017, 113.3 in 2018, and 108.7 in 2019.109 More recently, levels are reported at around 100 in 2023, 105 in 2024, and 97 in 2025.110 This is a significant improvement that may continue, but concentrations remain over double the national ambient air quality standard of 40 μg/m^3.[15] [16]Additionally, the cumulative burden on public health has not improved. In 2015, PM 2.5 attributable early deaths were estimated at 10,357, and they have steadily risen to 12,064 in 2019.

One may argue GRAP's reactive framework is all that is possible in a city as large as Delhi with scarce resources. Implementing a proactive, city-wide emissions reduction program would require funding and research Delhi likely lacks. Within this framework, some may consider GRAP successful as it has reduced PM2.5 concentrations. Yet, the 2026 Sarkar study demonstrates eight years of GRAP implementation produced no measurable improvement in wealth-based PM 2.5 disparities. Even with limited budgets, options like pre-legislated compensation for construction workers who lose pay during construction shutdowns would avoid exacerbating existing inequities. Furthermore, addressing pollutant concentrations inequitably entails an opportunity cost of increasing Delhi's PM 2.5-attributable economic burden from $20,073.44 million in 2015 to $41,571.56 million in 2019.[17]

During the emergency shutdowns, which GRAP relies

ated Economic Loss Assessment Due to PM2.5 Exposure in Delhi, India During 2015-2019, 17 Air Quality, Atmosphere & Health 1867 (2024), https://link.springer.com/article/10.1007/s11869-024-01550-1.

8 Anchal Garg & N.C. Gupta, *The Great Smog Month and Spatial and Monthly Variation in Air Quality in Ambient Air in Delhi, India* (2020), https://pubmed.ncbi.nlm.nih.gov/32874766/.

9 Debajit Sarkar et al., *Contrasting Patterns in Ambient PM2.5 Exposure Disparity Across Population Subgroups in Urban and Rural India*, 10 GeoHealth (2026), https://pubmed.ncbi.nlm.nih.gov/41583010/.

10 *Delhi govt announces Rs. 10,000 compensation for construction workers affected by GRAP curbs*, ANI News (2025), https://aninews.in/news/national/politics/delhi-govt-announces-rs-10000-compensation-for-construction-workersaffected-by-grap-curbs20251218051133/

11 Nikita Yadav, *Delhi Air Pollution: Schools Go Hybrid, Mining Banned as Air Quality Worsens*, BBC (2025), https://www.bbc.com/news/articles/c751yyz44d2o.

12 *Delhi govt announces Rs. 10,000 compensation for construction workers affected by GRAP curbs*, *supra* note 11.

13 NH Digital, *GRAP Tackles Symptoms, Not Root Causes of Delhi's Air Pollution: Experts*, National Herald (2026), https://www.nationalheraldindia.com/national/grap-tackles-symptoms-not-root-causes-of-delhis-air-pollutio nexperts.

14 Singh et al., *supra* note 7, at 1867.

15 *During the Period 2018–2025, Delhi Witnessed Its Lowest Average PM10 and PM2.5 Concentration Levels in the Current Year, Barring COVID Year 2020*, Press Information Bureau, Government of India (2026), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2210935&reg=3&lang=1.

16 National Ambient Air Quality Standards, Central Pollution Control Board (2009), https://scclmines.com/env/docs/naaqs-2009.pdf.

17 Singh et al., *supra* note 7.

upon, factory workers, taxi/rickshaw drivers, and construction workers may have their jobs stopped during emergency procedures, while those in the quaternary sector can be more flexible. Furthermore, income and wealth influence an individual's ability to purchase a household in less polluted areas, away from industrial zones. These disparities demonstrate how market forces price disadvantaged communities out of less polluted neighborhoods, essentially commodifying access to clean air.

Disadvantaged communities can often only afford cheaper living spaces with high particulate matter concentrations. If GRAP were a proactive program that involved the entire city to collectively reduce pollutant concentrations before they reached unsafe levels, then the burden could be split more equally. One study found that from 2015 to 2019, the 90th percentile in wealth across India experienced an 8.12% improvement in PM 2.5 averages, whereas the bottom 10% experienced only a 3.62% improvement.[18] This represents a nationwide trend where improvements are made disproportionately. Although GRAP's emergency protocols have reduced PM 2.5 concentrations, its associated economic burden has risen with the population, and a significant opportunity to save lives and boost economic output through targeted, equity-focused policies remains.

II. CASE STUDY OF CALIFORNIA'S CAP-AND-TRADE PROGRAM

California's Cap-and-Trade program offers a contrasting example: a well-funded, Western, market-based program. This program targets reductions in greenhouse gas (GHG) emissions and carbon dioxide concentrations rather than PM 2.5, with local air quality improvements being a co-benefit of this mechanism. Equity failures materializing from a policy not designed to address local air quality reveals that under resourced communities are structurally exposed regardless of a policy's targets. This is an example of how a completely different pollutant reduction scheme still experiences similar inequities and their compounding effects. It is worth examining why two widely varying pollutant-reduction policies are inefficient at minimizing equity failures, particularly to identify structural challenges.

Unlike Delhi's urgent PM crisis, California's Cap and Trade system was designed as a more proactive, long-term, and market-based approach to reducing GHG emissions from a more stable context. In 1990, GHG emissions were 437 million metric tons. The Cap-and-Trade program had promising impacts, contributing to lowering greenhouse gas emissions to 1990 levels (5.3% reduction) by 2016, before its goal of doing so by 2020. GHG emissions in 2023 were 360.4 million metric tons, which is 17.6% below 1990 levels.[19] However, inequities in exposure to air pollutants persist.[20] GHG reductions, if targeted equally across facilities, should reduce inequalities because neighborhoods within 2.5 miles of a regulated facility in California have an averaged 34% higher proportion of residents of color, 23% higher proportion of "poor" residents, and 64% higher proportion of residents with low educational attainment.[21] This would improve equity while creating the greatest impact for the greatest proportion of the population, as these areas have a 59% higher population density. However, after Cap-and-Trade was implemented, it was these neighborhoods that experienced increases in average GHG emissions from facilities, while the more privileged neighborhoods, which tend to be further away from regulated facilities, experienced a fall in emissions. This demonstrates a challenging issue with the Cap-and-Trade approach, which allows for a high cumulative reduction in emissions but arguably aggravates existing inequities.

Some defenders of the cap-and-trade model may argue aggregate emission reductions benefit all communities over time, and targeting reductions geographically would result in added costs translated to disadvantaged communities through lost jobs and higher energy costs. Yet, these studies demonstrate that disadvantaged communities have experienced net increases in pollutant emissions after the program's enactment. Furthermore, the RFF finding that facility caps would have reduced emissions by an additional 3.5% with only 0.7% supply effects demonstrates that this tradeoff is overstated, and existing program revenues can cover these effects.[22]

California's program limited fuel distributors, electric power plants, and industrial plants to emit 25,000 tons of carbon dioxide per year when first created, and this limit has gradually lowered over the years.[23] Emitters failing to meet this limit could buy carbon credits during auctions, making excessive pollution costly. Carbon credits are a tradable permit representing one ton of carbon dioxide emissions companies can buy or sell, governed under the cap-and-trade system, which limits the extent to which companies can pollute. This allowed the government to reinvest the earned revenue into the Greenhouse Gas Reduction Fund and the California Climate Investments program to improve energy efficiency, renewable energy use, and cleaner transportation.[24] Furthermore, the government enacted legal procedures to ensure all firms had to follow these guidelines, something less commonly seen in documentation associated with GRAP.

One key distinction this program has compared to GRAP is that just over a third of the over 5 billion dollars in revenue must be spent on low-income communities.[25] This represents nearly two billion dollars allocated toward improving air

18 Singh et al., *supra* note 7, at 1867.
19 Ayako Kawano et al., *Improved Daily PM2.5 Estimates in India Reveal Inequalities in Recent Enhancement of Air Quality*, 11 Science Advances (2025), https://www.science.org/doi/10.1126/sciadv.adq1071.
20 Manuel Pastor et al., *Up in the Air: Revisiting Equity Dimensions of California's Cap-and-Trade System* (2022), https://dornsife.usc.edu/eri/wp-content/uploads/sites/41/2023/01/CAP_and_TRADE_Updated_2020_v02152022_FINAL.pdf.
21 *Air Quality and Climate Change Research*, U.S. Environmental Protection Agency (2014), https://www.epa.gov/air-research/air-quality-and-climate-change-research.
22 Lara Cushing et al., *Carbon Trading, Co-Pollutants, and Environmental Equity: Evidence from California's Cap and-Trade Program* (2011–2015), 15 PLOS Medicine (2018), https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002604.
23 *How Would Facility-Specific Emissions Caps Affect the California Carbon Market?*, Resources for the Future (2025), https://www.rff.org/publications/reports/how-would-facility-specific-emissions-caps-affect-the-california-carbonmarket/.
24 Center for Climate and Energy Solutions, California Cap and Trade (2025), https://www.c2es.org/content/california-cap-and-trade/.
25 Berkeley Law, California Climate Policy Fact Sheet: Cap-and-Trade (2019), https://www.law.berkeley.edu/wp-content/uploads/2019/12/Fact-Sheet-Cap-and-Trade.pd

quality in disadvantaged communities.

Yet, the program prioritizes aggregate pollutant emission reductions, so the sizeable fiscal allocation does not even align with their primary goal and is therefore more susceptible to inefficient use. Spending requirements have limited effectiveness when facilities near disadvantaged communities still prefer to increase local emissions and use out-of-state offsets.

Although the fiscal allocation toward equity is a clear improvement from GRAP, it is important to evaluate whether the program has been equitable so far in its impacts. Firstly, the carbon dioxide-emitting facilities being targeted by the cap-and-trade policy tend to be geographically close to disadvantaged communities.[26] This suggests that, in theory, the cap-and-trade program's benefits would actually be targeted toward disadvantaged communities. The trade system permitted these facilities to continue their unsustainable practices by purchasing the extra credits they needed.

Carbon offsets, purchased by companies to meet compliance obligations, enable companies to reduce GHG emissions in cheaper sectors, assuming that a ton less of CO□ in the atmosphere has the same impact regardless of location. However, flaws in California's offset mechanisms enable companies to have 75.6% of the carbon offsets sourced out of state.[27] Although carbon offsets are only responsible for a small part of the system, structural loopholes like this are exploitable and not fixed by governing bodies. While initial statistics may show a reduction in GHG emissions, improvements are not made in areas that need them most. Carbon offsets to other locations allow companies to increase their emissions in overburdened areas.

Regulated factories experienced a net increase of mean local GHG emissions of 6.7 million t CO2e from 2011–2012 to 2013–2015, and these factories have been established to be within proximity to disadvantaged communities.[28] Just like in Delhi, this eventually affects more privileged communities, since ignoring regulated factory emissions will continue to slow progress. A study in 2023 by Resources for the Future (RFF) investigated the possible influence a facility-specific carbon cap would have on total emissions, concluding that it "would have reduced greenhouse gas emissions by 3.4 million tons in 2019 and by 28 million tons from 2013 to 2020 (about 3.5 percent), compared with what the program has achieved."[29]

While a facility cap may introduce a tradeoff of higher energy costs or reduced jobs at facilities as companies seek to reduce costs, researchers at the same organization have concluded that such a cap would only entail a 0.7% change in total supply and minimal price effects.[30] Even if the cap were to disproportionately impact disadvantaged groups, the government is obliged to spend over a third of its existing Cap-and-Trade revenues to support low-income groups, especially through a transition like this one. Substantial funds already exist to mitigate the immediate economic disruption associated with such a transition.

III. COMMON ISSUES ACROSS PROGRAMS AND SYSTEMIC CORRECTIONS

Despite differences in pollutant type, policy mechanism, funding level, and governance context, both programs have experienced structural equity failures. They share a significant similarity in targeting aggregate improvements, like reducing GHG emissions or PM 2.5 concentration, because they are politically sufficient to demonstrate improvement. Communities most burdened by the pollutant emissions are often underrepresented in government and are therefore susceptible to being overlooked when designing policies. After all, both policies have been somewhat successful in their pollutant reduction aims. Distributive improvements are harder to design systems for, harder to measure, and often require greater investment. Thus, any environmental policy, whether in South Asia or North America, is inherently susceptible to equity failures.

Governing bodies must factor in the disproportionate disadvantages a blanket policy places on less privileged demographics. The disadvantaged communities already suffer the most from emission pollutants receive limited to no benefit from the programs. These communities, which tend to have high population densities, thus suffer the greatest economic and health burdens, which eventually permeate throughout cumulative health and economic outcomes.

For Delhi's GRAP, simply resorting to suspending blue-collar work during periods of high pollution disproportionately impacts workers in the primary and secondary sectors, for example, by suspending their jobs for 16 days. If a policy is designed for this, the government should be required to compensate the workers, rather than only doing so after public pressure. Likewise, California's program allows for excessive carbon offsetting, which limits influence. A more equitable approach would include emission reduction targets in geographic zones rather than cumulatively. This would force companies to reduce emissions in pollution hotspots. However, the higher energy costs associated with this change could entail layoffs for factory workers and an increase in the cost of living for disadvantaged groups. A truly effective policy requires catalyzing systemic changes, for example, towards using existing government revenues from the Cap-and-Trade system to offset the economic disruptions from facility caps. This can be done through upgrading industrial processes in emission hotspots, for example. Targeting pollutant emissions in the most concentrated areas inherently improves overall outcomes.

Furthermore, both case studies demonstrate that equity improvements require proactive systemic changes. Otherwise, they default to supporting current unsustainable practices and maintaining existing socioeconomic inequity, particularly as shown through the data in California. Equitable policies often require greater funding to support more disruptive transitions when unsustainable practices stop, and California has already raised

26 Cushing et al., *supra* note 23.
27 Cushing et al., *supra* note 23.
28 Cushing et al., *supra* note 23.
29 *How Would Facility-Specific Emissions Caps Affect the California Carbon Market?*, *supra* note 24.
30 California's Cap-and-Trade Program and Improvements in Local Air Quality, Resources for the Future (2023),https://www.resources.org/archives/californias-cap-and-trade-program-and-improvements-in-local-air-quality/.

over $5 billion toward supporting low-income groups.[31] Addressing these underlying causes by supporting a shift in practices across entire economic sectors would be a more effective way to address excessive pollutant emissions. If budgets are allocated favorably for disadvantaged groups, inequities can be mitigated. For example, subsidies can be put in place when policies disproportionately impacting disadvantaged communities are carried out, which can reduce their burden. More informed policies would facilitate a much higher quality of life, which can support economic output, effectively recouping this investment, and more.

The common shortcomings in addressing equity in policy design can be reduced through three universally applicable changes:

- *Facility-level emission caps.* The previous RFF studies estimated this would have improved Cap-and-Trade's aggregate effectiveness by 3.5% with minimal price effects.[32] Even with price effects, existing budgets are in place to support such transitions. This prevents companies from worsening existing pollution hotspots to achieve aggregate reduction mandates. Enforcing this policy design going forward will prevent the net increase of mean local GHG emissions of 6.7 million t CO2e from 2011–2012 to 2013–2015 from repeating itself in other contexts.[33]
- *Distributional reporting requirements.* Programs should be made to publicly report emissions in neighborhoods by income percentiles, rather than just aggregate outcomes. This prevents them from permitting pollution hotspots to develop while claiming success. There is a lack of online information regarding GRAP equity changes because it simply is not tracked. Enforcing requirements is a necessary first step to elucidating the equity problem for policymakers.
- *Pre-legislated disruption compensation.* Policy designs must inherently provide income replacement for any workers temporarily impacted by their policies. This applies to the 16-day construction halt in GRAP, where construction workers were only paid ₹10,000 after public pressure.[34] The government uses the lack of pre-legislation as a chance to reduce spending and not support severely impacted communities. Alternatively, California's equity failures are not as severe, likely due to over $5 billion in revenues being mandated as spending.[35]

These two pollutant reduction programs vary in practically every way: governing bodies, continent, economic context, pollution context, budgets, and pollutant type. Yet they both have equity failures in both outcomes and program design. This shows that while equality is the norm, equity is the extra step that is structurally undervalued to truly improve aggregate outcomes. Prioritizing equity more strongly in policy designs, particularly through the three changes outlined, is a necessity to reduce the economic and mortality burdens in under resourced communities.

This piece was written by Jay Chinchankar and edited by Evan Samaro.

31 Center for Climate and Energy Solutions, *supra* note 25.
32 *How Would Facility-Specific Emissions Caps Affect the California Carbon Market?*, *supra* note 24.
33 Cushing et al., *supra* note 23.
34 Delhi govt announces Rs. 10,000 compensation for construction workers affected by GRAP curbs, *supra* note 11.
35 Center for Climate and Energy Solutions, *supra* note 25

BEYOND THE SHINING PATH:

REBRANDING, RESOURCE EXTRACTION, AND THE JURISDICTIONAL GAPS IN THE VRAEM

INTRODUCTION

On September 12, 1992, Peruvian police captured Abimael Guzmán Reinoso in Lima, apparently ending the insurgency that had left more than 69,000 dead.[1] Three decades later, a successor organization, the Militarized Communist Party of Peru (MPCP), currently controls substantial territory in the Valle de los Ríos Apurímac, Ene y Mantaro (VRAEM), finances itself through coca proceeds[2] and exploits the constitutional protections upheld to prevent the abuses of an earlier era.[3] The VRAEM crisis is not merely a security failure, but a juridical one.

The Shining Path, a militant Maoist guerrilla organization that launched a brutal insurgency in Peru during the 1980, emerged from the Latin American revolutionary tradition,[4] drawing on narratives of colonial subjugation and class exploitation that political sociologist Eric Selbin identifies as the common grammar of regional insurgencies.[5] Abimael Guzmán fused Maoist agrarianism with Peruvian indigenism into an absolutist ideology[6] that rejected negotiation and targeted civilians who failed to conform. When Guzmán's capture appeared to confirm the movement's structural fragility, the organization did not collapse. Following sociologist John Foran's model of failed revolutionary projects that reconstitute around resource extraction,[7] the Shining Path's VRAEM remnant shifted to coca financing, producing the less ideologically coherent but more organizationally durable structure with resource-driven rebellion.[8] Peru's legal response has been inadequate not for lack of will. After the Inter-American Court dismantled the faceless-judge system, the reconstructed framework protected defendants more robustly while severely constraining prosecutorial tools.[9] Sections II through VI trace how that tension has reached its most acute form in the VRAEM.

This paper's central argument is Peru's due process requirements in terrorism cases have paradoxically generated legal ambiguities, which the MPCP strategically exploits to evade prosecution.[10] Understanding this paradox requires tracing the Shining Path's ideological origins, its turn toward resource extraction, and the precedent-setting cases that defined Peru's prosecutorial constraints.

In Section II, I provide the historical and legal background of the Shining Path's evolution and Peru's counterterrorism legal architecture, tracing the construction and collapse of the Fujimori-era framework and the due process constraints that replaced it. In Section III, I examine two foundational case studies, the Artemio prosecution and *J. v. Peru*, together define the outer boundaries of Peru's prosecutorial capacity and reveal how the hybrid terrorism-narcotics structure first strained existing legal categories. In Section IV, I analyze the MPCP's rebranding strategy and the legal identity ambiguity it has created, arguing Peru's categorical distinction between terrorism and organized crime has been rendered obsolete by the group's hybrid structure. In Section V, I offer policy-relevant insights for jurists and practitioners working within Peru's existing constitutional constraints. And in Section VI, I conclude with a broader assessment of the VRAEM crisis and its implications for counterterrorism jurisprudence.

I. HISTORICAL AND LEGAL BACKGROUND

A. The Shining Path and the Architecture of Peruvian Counterterrorism

The Shining Path formally launched its armed struggle on May 17, 1980, burning ballot boxes in Chuschi to signal its rejection of electoral democracy.[11] Over the following decade it expanded from the rural Andes into Lima, deploying assassinations and peasant massacres to destabilize the state.[12] Peru's initial response, Legislative Decree No. 046 of 1981, was legally improvised: prosecutions proceeded in ordinary civilian courts where Shining Path cadres were trained to exploit habeas corpus petitions and evidence challenges to delay and dramatize state weakness.[13]

Former Peru President Alberto Fujimori's 1992 autogolpe produced an opposite extreme.[14] Legislative Decrees 25475 and 25659 created faceless judges, authorized fifteen-day incommunicado detention, permitted military trials of civilians, and mandated

1 Dan Collyns, *Former Shining Path Leader "Presidente Gonzalo" Faces Peru Court*, The Guardian, Jan. 20, 2014, https://www.theguardian.com/world/2014/jan/21/shining-path-leader-presidente-gonzalo-abimael-guzman

2 Steven T. Zech, *Drug Trafficking, Terrorism, and Civilian Self-Defense in Peru*, 7 Combating Terrorism Center, April 2014, https://ctc.westpoint.edu/drug-trafficking-terrorism-and-civilian-self-defense-in-peru/; Dan Collyns, *Former Shining Path Leader "Presidente Gonzalo" Faces Peru Court*, The Guardian, Jan. 20, 2014, https://www.theguardian.com/world/2014/jan/21/shining-path-leader-presidente-gonzalo-abimael-guzman.

3 *US Designates Peru's Shining Path "Drug Traffickers"*, BBC, June 2, 2015, https://www.bbc.com/news/world-latinamerica-32973483.

4 Billie Jean Isbell, *The Shining Path of Peru: Shining Path and Peasant Responses in Rural Ayacucho,* 1994, https://link.springer.com/chapter/10.1007/978-1-137-05210-0_4.

5 Eric Selbin, *Modern Latin American Revolutions*, Feb. 6, 2018, https://www.taylorfrancis.com/books/mono/10.4324/9780429494963/modern-latin-american-revolutions-ericselbin

6 Pierina Pighi Bel, *Abimael Guzman: What Is Maoism, the Ideology in Which the Shining Path Leader Was Inspired and for Which He Unleashed a Bloody War in Peru*, Duke Department Of Cultural Anthropology, Sept. 13, 2021, https://culturalanthropology.duke.edu/news/abimael-guzman-what-maoism-ideology-which-shiningpath-leader-was-inspired-and-which-he.

7 John Foran, *Taking Power On The Origins Of Third World Revolutions*, CAMBRIDGE UNIVERSITY PRESS, 2005, https://www.iicat.org/wp-content/uploads/2017/11/Taking-Power-by-John-Foran-2005-Cambridge-UniversityPress.pdf.

8 Jeremy M. Weinstein, I*nside Rebellion: The Politics of Insurgent Violence*, CAMBRIDGE UNIVERSITY PRESS, June 5, 2012, https://www.cambridge.org/core/books/inside-rebellion/FFABBC623483806EFE0A1C48073909F6.

9 Ralph Ruebner, *The War on Terrorism: Peru's Past and Present, a Legal Analysis*, UIC SCHOOL OF LAW, 2004, https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1005&context=whitepapers.

10 *Id.*

11 Eric Selbin, *supra* note 5.

12 Ralph Ruebner, *supra* note 9.

13 *Id.*

14 *Id.*

life sentences for "treason against the fatherland." Guzmán was convicted under this system in 1994.[15] The conviction was efficient and constitutionally indefensible in equal measures.

The Inter-American Court's decisions in Loayza Tamayo v. Peru (1997) and Castillo Petruzzi v. Peru (1999) found the emergency decrees incompatible with the American Convention, holding that faceless judges and military jurisdiction over civilians violated due process at its core.[16] Peru was directed to retry numerous defendants. Legislative Decree 922 (2003) established the framework for those retrials and created the Sala Penal Nacional to handle future terrorism cases; meaningful reform that simultaneously introduced procedural complexity exploitable by skilled defense counsel.[17]

B. The Guzmán Retrial and Its Due Process Legacy

The retrial of Abimael Guzmán under the reformed framework produced the Supreme Court's 2007 decision in Sentencia Corte Suprema En Caso Abimael Guzmán Reinoso y Otros, the constitutional baseline still governing terrorism prosecutions today.[18] The decision required confrontation of witnesses, reasoned judicial decisions, meaningful appeal, and exclusion of evidence obtained through coercion, all assessed by civilian judges applying a beyond-reasonable-doubt standard.[19]

As journalist Dan Collyns documented, the retrial exposed the practical costs of that baseline: decades-old evidence had to be re-authenticated, witnesses were elderly or missing, and defense counsel challenged provenance at every turn.[20] The proceedings confirmed that constitutionally compliant prosecution of defendants whose original trials were tainted is genuinely difficult.

The comparative dimension is reinforced by Castañeda-Castillo v. Holder, in which the First Circuit confirmed the Shining Path met the U.S. legal definition of a terrorist organization while acknowledging interpretive difficulties around membership, organizational continuity, and the line between ideological association and material support.[21] Foreign courts confronting the same organization have grappled with the same definitional ambiguities Peruvian law has not yet resolved.

C. *J. v. Peru* and the Human Rights Constraint on Detention

The Inter-American Court's 2013 decision in *J. v. Peru* extended due process requirements to the investigative and pretrial phases.[22] The case arose from the incommunicado detention and coercive interrogation of a suspected Shining Path affiliate denied counsel during the period most critical to her defense. The Court found violations of personal liberty, humane treatment, privacy, and judicial protection, and confirmed the gravity of a terrorism charge cannot justify suspension of these baseline guarantees.[23]

For VRAEM prosecutors, the decision's operational consequences are severe.[24] Surveillance without judicial authorization, confessions taken before counsel arrives, and evidence seized without proper chain-of-custody documentation are all excludable, and in a region where the MPCP systematically suppresses potential witnesses,[25] those exclusions can be case-dispositive.

D. Artemio and the Narco-Terrorism Transition

The prosecution of Florindo Eleuterio Flores Hala ("Artemio"), the Huallaga faction commander captured in February 2012, was the first moment Peru's legal system was forced to confront the hybrid terrorism-narcotics structure that now defines the MPCP. His faction financed operations through levies on coca growers, evolving from taxing the drug trade to becoming inseparable from it.[26]

The United States designated Artemio simultaneously under narcotics and terrorism authorities, a dual designation acknowledging neither category alone captured his organization's operational logic. Subsequent U.S. designations of the broader Shining Path network as drug traffickers confirmed this pattern was institutional, not individual.[27] Peru's own prosecution, however, treated the narcotics dimensions as aggravating factors rather than a distinct juridical category,[28] a choice that obscured the hybrid character and set a limiting precedent that would bind prosecutors confronting the MPCP in the VRAEM.[29]

The legal framework emerging from this history is caught between two imperatives: the constitutional obligation to prosecute with full procedural regularity,[30] and the operational reality of pursuing a hybrid organization in the world's most productive coca corridor. How the MPCP exploits the gap between those imperatives is the subject of the sections that follow.

II. THE MPCP: REBRANDING, LEGAL IDENTITY, AND THE FAILURE OF CLASSIFICATION

The most under-analyzed dimension of Peru's prosecutorial failure in the VRAEM is not a gap in legislation but a gap in legal identity. Since its formal rebranding in June 2018, the Militarized Communist Party of Peru has pursued a deliberate strategy of organizational distancing, generating profound ambiguity within Peru's counterterrorism framework. This ambiguity sits at the intersection of two statutory failures: a terrorism statute that cannot cleanly capture the MPCP's conduct, and an organized crime framework that cannot adequately reflect its political character. Understanding how the organization arrived at this position, and why existing legal categories fail to address it, is essential to grasp why prosecutors have struggled to apply either framework effectively.

A. Origins

The MPCP's lineage begins with the fragmentation of the Shining Path following Guzmán's capture in September 1992. His call for a ceasefire from prison divided the movement between those who accepted it and those who rejected it as ideological betrayal.[31] The latter faction, operating in the VRAEM under the Quispe Palomino brothers, consolidated control through internal purges and continued the armed conflict while the Peruvian government

15 Dan Collyns, *supra* note 1.
16 Ralph Ruebner, *supra* note 9.
17 *Id.*
18 *Sentencia Corte Suprema En Caso Abimael Guzmán Reinoso y Otros*, Corte Suprema De Justicia Segunda Sala Penal Trasitoria R.N. N° 5385-2006 Lima, Nov. 22, 2007, https://www.legal-tools.org/doc/9e85c2/pdf.
19 *Id.*
20 Dan Collyns, *supra* note 1.
21 *David Eduardo CASTAÑEDA-CASTILLO; Carmen Julia De La Cruz-Castañeda; Piera Dina Castañeda, Petitioners, v. Eric H. HOLDER, Jr., United States Attorney General, Respondent*, United States Court Of Appeals,First Circuit, Sept. 13, 2010, https://scholar.google.com/scholar_case?case=14938424611047620315&q=Abimael+Guzm%C3%A1n&hl=en&as_sdt=2006.
22 *J. v. Peru*, Loyola Law School, 2013, https://iachr.lls.edu/cases/j-v-peru.
23 *Id.*
24 *Id.*
25 *Id.*
26 Steven T. Zech, *supra* note 2.
27 US designates Peru's Shining Path "drug traffickers," *supra* note 3.
28 Ralph Ruebner, *supra* note 9.
29 Steven T. Zech, *supra* note 2
30 J. v. Peru, *supra* note 22.
31 InSight Crime, *Shining Path*, Insight Crime, May 28, 2024, https://insightcrime.org/peru-organized-crimenews/shining-path-profile/.

continued classifying them informally as "Shining Path remnants."[32] This informal ambiguity was not yet a legal crisis, prosecutors could rely on the broader Shining Path designation to pursue charges under Legislative Decree 25475.[33] The Shining Path of the 1980s had been ideologically coherent, hierarchically organized, and categorically distinguishable from the criminal enterprises it taxed, conditions under which the terrorism statute functioned as designed.[34] The MPCP's formal 2018 rebranding, and its accompanying transformation into a narco-territorial hybrid, fundamentally altered both of those conditions simultaneously.

B. Rebranding and Current Structure

On June 9, 2018, Víctor Quispe Palomino publicly announced the creation of the MPCP as a distinct political organization, simultaneously renouncing all ties to the Shining Path and denouncing Guzmán as a traitor.[35] The declaration represented a calculated attempt to sever the legal thread connecting the VRAEM group to the Shining Path's designated terrorist status, forcing prosecutors to re-establish that connection from scratch in every subsequent case. By distancing itself from Guzmán's ideology and presenting itself to VRAEM farmers as a protective force rather than a revolutionary vanguard, the MPCP constructed an identity designed to appear discontinuous with its predecessor.[36] Politically, the group has transitioned from the Maoist orthodoxy of the Shining Path toward a localized, "militarized" pragmatism. While they maintain a nominal commitment to Marxism-Leninism, they have largely discarded traditional revolutionary goals in favor of acting as a regional defense force for the Coca Economy. They frame their presence as a nationalist resistance against government-led coca eradication, effectively rebranding their "protracted people's war" as a struggle for peasant autonomy.[37]

This repositioning also reflected a structural economic transformation that preceded the formal rebranding by nearly two decades. Where the Shining Path once demanded protection payments from narcotics traffickers operating in areas it controlled, the VRAEM faction gradually became financially dependent on the coca economy, eventually involving itself in all logistical aspects of drug trafficking, collecting revolutionary taxes from those in the drug trade, and for a price, providing security and transporting narcotics for trafficking organizations.[38] The MPCP's current structure reflects this dual character directly. It maintains an armed force of between 250 and 300 members operating out of its Vizcatán stronghold, conducts ideologically framed attacks on security forces, and simultaneously controls the cocaine taxation and transportation infrastructure financing those operations.[39] The Peruvian government describes the VRAEM group as nothing more than a drug trafficking gang, but the situation is more complicated. The group continues to carry out propaganda activities and attacks against security forces in addition to providing protection services to drug traffickers.[40] Despite this criminal involvement, they are legally classified as a terrorist organization because their conduct extends far beyond standard organized crime. Under Peruvian Decree Law No. 25475, they are defined by their use of violence to maintain systemic fear and undermine state authority. Unlike a traditional cartel, the MPCP utilizes this violence to enforce a political manifesto, creating a hybrid threat that sits at the intersection of a political insurgency and a criminal enterprise.[41]

C. The Legal Identity Problem

While the United States and Peruvian governments have maintained the MPCP remains subject to the Shining Path's existing terrorist designation, this political consensus does not translate automatically into a prosecutorial tool.[42] Under Peru's civilian due process framework, as established by the Guzmán retrial, organizational designation cannot be assumed, it must be proven through evidence presented before a civilian court, subject to adversarial challenge.[43] Defense counsel have increasingly argued their clients belong to a distinct political party unconnected to the Shining Path, forcing prosecutors to reconstruct the evidentiary chain linking defendants to the original designated entity in every individual case.[44] Pre-trial detention periods lengthen as courts await resolution of these threshold questions, and those same lengthy detentions have attracted scrutiny from the Inter-American human rights system on due process grounds.[45]

The problem is compounded by the fact Guzmán himself never recognized the Quispe Palomino brothers as his successors.[46] If the founding leader of the designated organization did not acknowledge the MPCP as continuous with his movement, courts are left without statutory guidance on what standard of organizational continuity to apply; a question Peru's terrorism laws, drafted for a hierarchical insurgency with clear command lineage, were never designed to answer. This identity ambiguity cascades into the charging framework itself. Legislative Decree 25475 requires prosecutors to prove a defendant acted to provoke generalized alarm or coerce state authorities, a threshold the UN Special Rapporteur on counterterrorism has already identified as problematic in its formulation.[47] When applied to an MPCP operative whose primary documented conduct is taxing cocaine shipments and providing armed escort to traffickers, that political motivation element becomes genuinely contested; not because the defendant is innocent of serious criminal conduct,

32 Jacob Zenn, *Peruvian Communist Rebel Leader "Jose" Palomino on Brink of Capture in VRAEM*, 13 Jamestown, Oct. 5, 2022, https://jamestown.org/brief/peruvian-communist-rebel-leader-jose-palomino-on-brinkof-capture-in-vraem/.
33 Ralph Ruebner, *supra* note 9.
34 Timothy P. Wickham-Crowley, *Guerrillas & Revolutions in Latin America*, Princeton University Press, https://api.pageplace.de/preview/DT0400.9780691190204_A33954023/preview-9780691190204_A33954023.pdf
35 Jacob Zenn, *supra* note 32.
36 Jacob Zenn, *Comrade Jose (Victor Quispe Palomino): Leader of Peru's Shining Path*, 3 Jamestown, https://jamestown.org/comrade-jose-victor-quispe-palomino-leader-of-perus-shining-path/
37 *Instalan Comisiones Para Implementar Políticas Contra Crimen Organizado y Terrorismo*, Plataforma Del Estado Peruano, Sept. 11, 2020, https://www.gob.pe/institucion/mininter/noticias/302256-instalan-comisionespara-implementar-politicas-contra-crimen-organizado-y-terrorismo.
38 US Department of State, *Country Reports on Terrorism 2023: Peru,* https://www.state.gov/reports/countryreports-on-terrorism-2023/peru.
39 *Id.*
40 InSight Crime, *supra* note 31.
41 *Establecen La Penalidad Para Los Delitos de Terrorismo y Los Procedimientos Para La Investigación, La Instrucción y El Juicio - DECRETO LEY No 25475*, https://img.lpderecho.pe/wp-content/uploads/2021/03/DecretoLey-25475-Delitos-de-terrorismo-procedimientos-para-su-investigaci%C3%B3n-LP.pdf.
42 US Department of State, *Country Report on Terrorism 2022-Chapter 5 - Shining Path (SL)*, Nov. 30, 2023, https://www.ecoi.net/en/document/2101623.html.
43 Sentencia Corte Suprema en caso Abimael Guzmán Reinoso y Otros, *supra* note 18.
44 Mariya Y. Omelicheva & Lawrence P. Markowitz, *Rethinking Intersections of Crime and Terrorism: Insights from Political Economies of Violence*, International Studies Review, 2021,https://nwc.ndu.edu/Portals/71/Images/Publications/Rethinking%20Intersections%20of%20Crime.pdf.
45 J. v. Peru, *supra* note 22.
46 InSight Crime, *supra* note 31.
47 *United Nations Special Rapporteur on Human Rights and Counter-Terrorism Concludes Fact-Finding Mission to Peru,* Sept. 14, 2010, https://www.ohchr.org/en/press-releases/2010/09/united-nations-special-rapporteur-humanrights-and-counter-terrorism.

but because the conduct fits the narcotics statute more cleanly than it fits the terrorism one. Conversely, prosecuting MPCP operatives solely under narcotics and organized crime statutes understates the nature of the threat and forfeits the enhanced penalties and investigative tools the terrorism framework provides.[48]

D. Why the Classifications Fail

The deeper structural problem is Peru's legal order relies on a categorical distinction (between terrorism as a political offense and narco-trafficking as an economic one) the MPCP has rendered functionally obsolete. As Omelicheva and Markowitz argue, hybrid actors operating across the crime-terror spectrum generate political economies of violence conventional legal categories are not equipped to map.[49] The MPCP's territorial control in the VRAEM is neither purely political, in the sense terrorism law contemplates, nor purely criminal, in the sense organized crime law contemplates. It is a form of shadow sovereignty that generates both types of conduct simultaneously, and the gap between the two statutory frameworks is precisely where effective prosecution falls through.[50]

This governance dimension further complicates prosecution in concrete ways. Witnesses who might otherwise cooperate with prosecutors remain silent out of fear or economic dependency. Community leaders who interact with MPCP commanders in their capacity as local authorities occupy an ambiguous legal position under statutes that criminalize collaboration with terrorists without distinguishing between coerced accommodation and willing support.[51] Choosing the narcotics track means abandoning the reach of the terrorism statute's economic collaboration provision, treating what is functionally a terrorist financing network as an ordinary drug enterprise. Choosing the terrorism track means confronting the political motivation problem and the organizational continuity challenges in every proceeding. Attempting both simultaneously raises double jeopardy concerns defense counsel have been quick to raise.[52]

E. Consequences

The practical consequences of this classification failure are not abstract. The November 2023 capture of José Quispe Zúñiga and three other sons of senior MPCP commanders in Ayacucho brought these problems into sharp relief.[53] The defendants were between nineteen and twenty-four years old, born after the Shining Path's period of peak activity and raised entirely within the MPCP's rebranded structure. Proving terrorism charges against them required establishing not only their individual conduct but the institutional continuity of the organization itself, connecting it backward through the MPCP rebranding to the Shining Path's 1997 Foreign Terrorist Organization designation. As Schiele and Phillips observe, legal systems designed for ideologically stable insurgencies are systematically ill-equipped to address organizations that strategically manipulate their own identity.[54] The MPCP has successfully transferred the burden of organizational proof onto prosecutors, exploiting the evidentiary standards mandated by Peru's post-Fujimori due process reforms and creating conditions under which the current statutory framework is poorly positioned to respond. Prosecutors choosing the terrorism track face the political motivation problem. Those choosing the narcotics track face reduced investigative authority. Those attempting both face procedural complexity that extends proceedings, lengthens pre-trial detention, and generates the due process vulnerabilities the Inter-American system has already sanctioned Peru for in analogous contexts.[55] The MPCP has not created this problem, but it has learned to navigate it with considerable sophistication, and Peru's existing statutory architecture offers prosecutors no clean path through it.

III. POLICY IMPLICATIONS

The preceding analysis does not point toward a single legislative fix. The problems it has identified are structural rather than incidental. They cannot be resolved by amending a statute or issuing an executive decree. What the analysis does yield, however, is a set of diagnostic insights that practitioners, jurists, and policymakers can use to understand why the current approach fails and what a more coherent response would need to account for.

A. Evidentiary Architecture Must Reflect Organizational Reality

The most immediate practical insight is Peru's prosecutorial approach to MPCP cases continues to treat organizational identity as a predicate fact rather than a contested legal element requiring dedicated evidentiary infrastructure. As Sections III and IV demonstrated, the MPCP's rebranding has made organizational continuity the threshold question in every prosecution, yet the Dirección contra el terrorismo (DIRCOTE), which is the counterterrorism branch of the National Police of Peru,[56] and the Public Ministry have not developed standardized evidentiary protocols for establishing continuity in civilian court proceedings subject to adversarial challenge.[57] The Guzmán retrial itself established the baseline: under Peru's post-Fujimori framework, the state had to reject the authoritarian-era reliance on military courts and instead prove organizational affiliation through strict civilian evidentiary standards, rather than designation history alone.[58]

The Artemio prosecution of 2013 was successful in part because his organizational identity as a Shining Path commander was legally traceable and largely undisputed. That condition no longer holds for MPCP cases. Prosecutors successfully charged the Artemio faction under terrorism statutes by documenting its continued use of Maoist philosophy to justify illegal activities, its involvement in drug production and narcotics trafficking, and its extortion of communities in the form of revolutionary taxes.[59] What the lesson practitioners should draw is not that organizational continuity is unprovable, but proving it requires a documentary and intelligence

48 Ralph Ruebner, *supra* note 9

49 Mariya Y. Omelicheva and Lawrence P. Markowitz, *supra note* 44; Alexander Schiele & Brian J. Phillips, *Dogs and Cats Living Together? Explaining the Crime-Terror Nexus*, TAYLOR AND FRANCIS, Mar. 29, 2023, https://www.tandfonline.com/doi/full/10.1080/09546553.2023.2189968#abstract.

50 Eduardo Martín Cruz Chávez, *Sendero Luminoso y Su Alianza Con El Narcotráfico En El VRAEM,* Centro De Estudios Estratégicos Del Ejército Del Perú, Sept. 7, 2023, https://ceeep.mil.pe/2023/09/07/senderoluminoso-y-su-alianza-con-el-narcotrafico-en-el-vraem/.

51 Steven T. Zech, *supra* note 2.

52 Alexander Schiele and Brian J. Phillips, *supra* note 49; *Treasury Sanctions Peruvian Narco-Terrorist Group and Three Key Leaders*, Us Department Of The Treasury, June 1, 2015, https://home.treasury.gov/news/pressreleases/jl10066.

53 Gavin Voss, *What's Next for the Shining Path in Peru?*, Nov. 17, 2023, https://insightcrime.org/news/whats-nextfor-the-shining-path-in-peru/.

54 Alexander Schiele and Brian J. Phillips, *supra* note 49.

55 J. v. Peru, *supra* note 22; Mariya Y. Omelicheva and Lawrence P. Markowitz, *supra* note 44.

56 *Destacan Trabajo de La Dircote En Su 35° Aniversario*, https://www.gob.pe/institucion/mininter/noticias/15758-destacan-trabajo-de-la-dircote-en-su-35-aniversario.

57 *Country Reports on Terrorism 2012 - Peru*, Refworld Global Law And Policy Database, May 30, 2013, https://www.refworld.org/reference/annualreport/usdos/2013/en/52850.

58 Sentencia Corte Suprema en caso Abimael Guzmán Reinoso y Otros, *supra* note 18.

59 *Florindo Eleuterio Flores-Hala (Captured)*, U.s Department Of State, https://www.state.gov/narcoticsrewards-program-target-information-brought-to-justice/florindo-eleuterio-flores-hala-captured.

record assembled specifically for that purpose: one that traces membership, command structure, financing, and ideological continuity over time rather than relying on historical designation alone.[60]

B. The Financing Trail Is the Most Legally Durable Prosecutorial Path

A second insight follows the integrated nature of MPCP operations described in Section IV. Because the organization's political and criminal functions are inseparable, the most legally durable prosecution path is frequently not the most rhetorically satisfying one. Charging an MPCP operative with terrorism requires proving political motivation, a contested element the rebranding strategy has deliberately complicated. Charging the same operative with narcotics trafficking, money laundering, and terrorist financing under the economic collaboration provision of Legislative Decree 25475 requires proving conduct that is far more documentable and less vulnerable to identity-based defenses.[61] As the U.S. Treasury's 2015 Kingpin Act designation demonstrated, the financial infrastructure of the MPCP's coca taxation and transportation protection network is both extensively documented and legally actionable across multiple statutory frameworks simultaneously.[62]

Key Peruvian counternarcotics officials have recognized removing the economic incentives of illegal narcotics production is the most durable path to weakening the MPCP's operational capacity, noting security operations alone fail to reduce the coca cultivation that finances the organization's continued existence.[63] This insight applies with equal force to prosecutorial strategy. Convictions built on financial evidence (cocaine taxation records, money laundering transactions, asset seizures) are less likely to be overturned on due process grounds than convictions built on contested political motivation evidence.[64] Practitioners should treat financial prosecution not as a fallback but as the primary track in cases where the terrorism motivation element is likely to become the focal point of appellate challenge.

C. Due Process Compliance Is a Prosecutorial Asset, Not Only a Constraint

A third and perhaps counterintuitive insight concerns the relationship between Peru's constitutional due process requirements and prosecutorial effectiveness. The analysis in Sections II and III established the MPCP exploits due process protections as tools for evading conviction. It would be a mistake, however, to conclude due process is the problem. The Fujimori-era experience, characterized by radical economic shock therapy, authoritarian consolidation of power, and a brutal but successful crackdown on leftist insurgencies, demonstrated conclusively terrorism prosecutions stripped of due process protections produce mass wrongful convictions, destroy prosecutorial credibility, and generate the Inter-American human rights liability further constrains the state's enforcement capacity.[65] The *J. v. Peru* ruling is not an outlier, it is one instance of a systemic pattern in which procedural shortcuts in terrorism cases produce convictions the Inter-American system subsequently overturns or sanctions, leaving the state worse off than a properly conducted prosecution would have.[66]

The UN Special Rapporteur on Human Rights and Counter-Terrorism, following his fact-finding mission to Peru, recommended the country move away from executive-decree terrorism legislation and toward a parliamentary framework that better satisfies the requirement of legal precision, observing a properly drafted counterterrorism law would serve both rights protection and prosecutorial effectiveness by eliminating the definitional ambiguities the defense counsel currently exploit.[67] The practical implication for jurists is the constitutional due process framework, when properly implemented with precise statutory definitions and consistent evidentiary standards, is more likely to produce durable convictions than an enforcement approach that treats procedural protections as obstacles to be minimized.[68]

D. The VRAEM's Illicit Economy Determines the Organization's Prosecutorial Exposure

A fourth insight concerns the relationship between the VRAEM's coca economy and the MPCP's legal vulnerability. The organization's territorial control, governance functions, and political identity are all downstream effects of its control over coca production and trafficking routes. The VRAEM's centrality to the international cocaine supply chain means disrupting the financial architecture of that relationship creates prosecutorial exposure that purely terrorism-focused operations do not.[69] When financial intelligence operatives document protection payments, transportation contracts, and cocaine taxation arrangements, they produce evidence that is simultaneously useful in terrorism financing cases, organized crime prosecutions, and asset forfeiture proceedings, the three tracks together can produce the overlapping legal pressure single-track enforcement cannot.[70]

Peru's counterterrorism forces have historically prioritized terrorism operations over counternarcotics efforts in the VRAEM, maintaining far more counterterrorism bases than counternarcotics ones, a disproportion that reflects the categorical separation between terrorism and organized crime that this paper has argued is legally untenable.[71] The policy implication is counterterrorism operations shouldn't be reduced but the intelligence and evidentiary products of counternarcotics operations should be systematically integrated into terrorism prosecution files rather than treated as separate enforcement streams.[72]

E. The Jurisdictional Tension Between Civilian Courts and Military Operations Remains Unresolved

Finally, the analysis points to an unresolved structural tension no amount of prosecutorial sophistication can fully overcome within the current framework. The VRAEM remains a military emergency zone where security forces operate under rules of engagement and intelligence-gathering authorities that differ from those applicable in civilian criminal proceedings.[73] Evidence gathered through military operations is frequently inadmissible or contestable in civilian terrorism trials, a gap the Sentencia Guzmán

60 Mariya Y. Omelicheva and Lawrence P. Markowitz, *supra* note 44.
61 US Department of State, *supra* note 38.
62 Treasury Sanctions Peruvian Narco-Terrorist Group and Three Key Leaders, *supra* note 52.
63 Steven T. Zech, *supra* note 2
64 Alexander Schiele and Brian J. Phillips, *supra* note 49.
65 Ralph Ruebner, *supra* note 9.
66 J. v. Peru, *supra* note 22.
67 United Nations Special Rapporteur on human rights and counter-terrorism concludes fact-finding mission to Peru, *supra* note 47.
68 Sentencia Corte Suprema en caso Abimael Guzmán Reinoso y Otros, *supra* note 18.
69 R. Evan Ellis, *Narcotrafficking, the Shining Path, and the Strategic Importance of Peru*, War On The Rocks, Mar. 31, 2015, https://warontherocks.com/2015/03/narcotrafficking-the-shining-path-and-the-strategic-importanceof-peru/.
70 Treasury Sanctions Peruvian Narco-Terrorist Group and Three Key Leaders, *supra* note 52.
71 Steven T. Zech, *supra* note 2.
72 InSight Crime, *supra* note 31.
73 *Country Reports on Terrorism 2021: Peru*, U.s Department Of State, https://www.state.gov/reports/countryreports-on-terrorism-2021/peru/.

and the Inter-American Court's jurisprudence have reinforced rather than closed.[74] The 2023 establishment of a Transnational Criminal Investigative Unit through DHS and the State Department's Bureau of International Narcotics and Law Enforcement represents one practical attempt to bridge this gap through joint intelligence and prosecutorial infrastructure, but its effectiveness depends on whether evidence gathered through that framework can survive the civilian evidentiary standards Peru's due process architecture requires.[75]Practitioners working within Peru's existing constitutional constraints should understand that closing this gap requires not military expansion into civilian judicial space, but the deliberate construction of evidentiary pipelines from military intelligence operations to civilian prosecutorial files that can survive the due process scrutiny the post-Fujimori framework demands.[76]

CONCLUSION

The Shining Path's transformation from a Maoist insurgency into the narco-territorial hybrid now operating as the MPCP is, on its surface, a story about organizational adaptation. Stripped of its ideological infrastructure by Guzmán's capture, the VRAEM faction did what insurgencies in resource-rich environments frequently do: it found an alternative economy, reorganized around it, and rebuilt the operational capacity state suppression had dismantled.[77] What this paper has argued, however, is this transformation cannot be understood in isolation from the legal environment in which it occurred. The MPCP did not simply adapt to the VRAEM's coca economy. It adapted, with considerable sophistication, to the specific vulnerabilities of Peru's post-Fujimori judicial framework, and the result is a hybrid actor whose legal illegibility is as deliberate as its military strategy.[78]

The central paradox this paper set out to examine holds on examination. Peru's constitutional due process requirements, cemented by the 2006 Guzmán retrial and affirmed through the Inter-American human rights system, represent a genuine and necessary corrective to the mass wrongful convictions of the Fujimori era.[79] Those protections are not the problem. The problem is they operate within a statutory architecture that was designed for a different kind of threat.[80] The Shining Path of the 1980s was ideologically coherent, hierarchically organized, and categorically distinguishable from the criminal enterprises it taxed. The MPCP is none of these things. It is simultaneously a political actor, a criminal enterprise, and a governing authority, and it has learned to navigate the gap between Peru's charging frameworks with the same tactical intelligence it applies to military operations in the VRAEM jungle.[81]

The three case studies at the center of this analysis each illuminate a different dimension of this failure. The Guzmán retrial established due process protections in terrorism cases are constitutionally non-negotiable, but also this condition of traceability was contingent, not permanent.[82] *J. v. Peru* confirmed the Inter-American human rights system will sanction Peru for procedural violations in terrorism cases, adding an external constraint on enforcement practices the MPCP's legal strategy has proven adept at triggering.[83] Together, these cases do not describe a system that has failed. They describe a system designed for a threat that no longer exists in its original form and has not yet been redesigned for the threat that replaced it.

The MPCP's 2018 rebranding made this design failure acute. Byformally severing its organizational identity from the Shining Path's designated terrorist status, the MPCP transformed what had been a predicate fact in terrorism prosecutions into a contested evidentiary question, one that forces prosecutors to reconstruct organizational continuity from scratch in every individual case, generating the due process vulnerabilities the Inter-American system monitors.[84] Even when prosecutors successfully establish that continuity, Peru's bifurcated charging framework offers no coherent path for prosecuting an actor whose political and criminal functions are a single integrated system. The Peruvian government's own counterterrorism reporting acknowledges this directly, documenting the MPCP simultaneously collects revolutionary taxes from drug trafficking organizations, provides armed security for cocaine shipments, and conducts ideologically framed attacks on security forces, conduct no single charging framework captures in full.[85] Section V drew from these structural failures the diagnostic conclusion that the most durable prosecutorial path runs through financial evidence and organizational documentation rather than contested political motivation claims, and the intelligence products of counternarcotics operations must be integrated into terrorism prosecution files rather than treated as separate enforcement streams.[86]

The broader implications of this analysis extend beyond Peru. The MPCP's trajectory represents an increasingly documented pattern among armed groups operating in resource-rich, state-weak environments.[87] What distinguishes the MPCP is the degree to which it has operationalized this transition as a legal strategy, using its own organizational ambiguity as a shield against the prosecutorial tools Peru's democratic reforms were designed to sharpen. For counterterrorism jurisprudence more broadly, the VRAEM case study offers a cautionary lesson about the relationship between rights-protective legal reform and the adaptive capacity of hybrid actors. Due process reforms in post-authoritarian states are not optional; they are the condition of legitimacy without which counterterrorism enforcement loses the public trust it depends on.[88] But those reforms cannot be implemented in isolation from the statutory infrastructure they operate within. Peru's experience demonstrates the question for post-authoritarian democracies grappling with hybrid threats is not whether to protect civil liberties or prosecute terrorists effectively, it is whether the legal architecture that protects civil liberties has been designed with sufficient precision to do both at once.[89] The MPCP has thrived precisely in the space where precision is absent. Closing that space is the juridical challenge that Peru's VRAEM crisis ultimately poses.

This piece was written by Priscilla Matthews and edited by Daphne Coplon.

74 Sentencia Corte Suprema en caso Abimael Guzmán Reinoso y Otros, *supra* note 18.
75 US Department of State, *supra* note 38.
76 Ralph Ruebner, *supra* note 9.
77 Jeremy M. Weinstein, *supra* note 8.
78 InSight Crime, *supra* note 31.
79 Sentencia Corte Suprema en caso Abimael Guzmán Reinoso y Otros, *supra* note 18.
80 Ralph Ruebner, *supra* note 9.
81 Mariya Y. Omelicheva and Lawrence P. Markowitz, *supra* note 44.
82 Florindo Eleuterio Flores-Hala (Captured), *supra* note 59.
83 J. v. Peru, *supra* note 22.
84 Jacob Zenn, *supra* note 32.
85 US Department of State, *supra* note 38.
86 Steven T. Zech, supra note 2.
87 Alexander Schiele and Brian J. Phillips, *supra* note 49.
88 United Nations Special Rapporteur on human rights and counter-terrorism concludes fact-finding mission to Peru, *supra* note 47.
89 Mariya Y. Omelicheva and Lawrence P. Markowitz, *supra* note 44

THE EPA'S REGULATORY REASONING DEFEATS ITSELF

INTRODUCTION

Must the federal government regulate carbon dioxide? The EPA final rule titled "Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act" reverses the legal obligation to regulate greenhouse gas emissions– a major blow to climate regulation.[1] The rescission overturns the Obama era "Endangerment Finding", which enables carbon dioxide to be regulated under the Clean Air Act.[2] The EPA boasts this as "one of the largest deregulatory acts in U.S history."[3] Indeed, the Clean Air Act's reach is crucial to federal climate protections. Its adoption in 1970 was a watershed moment of "statutory and institutional transformation" for environmentalism in the U.S.[4] Today, environmental rules and regulation are built upon the foundation established by the Clean Air Act. For example, national ambient air quality standards provide a fundamental regulatory mechanism.[5] As a cornerstone of environmental protection, interpretation of the Clean Air Act's meaning and scope has significant implications for the future of climate policy.

In this article, I argue that EPA Administrator Lee Zeldin's legal rationale for the rescission is self-defeating. Zeldin does not provide sound reasoning showing how U.S. law supports a departure from *Massachusetts v. EPA*, the case permitting greenhouse regulation. Zeldin's usage of *Loper-Bright v. Raimondo* is self-defeating because Loper's core principle of nondelegation cuts against the very legal interpretation Zeldin asserts.

This paper will proceed as follows: In Section II, I outline the legal history culminating in the rescission of the Endangerment Finding, in Section III, I describe the *Massachusetts* precedent that Zeldin sets out to overturn. In Section IV, I delve into the legal rationale of the Rescission Rule, emphasizing two fundamental issues, and in Section V, I suggest that the issues identified indicate a significant contradiction in Trump-era legal reasoning.

I. BACKGROUND

The legal dispute centers on section §202(a)(1) of the CAA which states that the EPA Administrator will create and revise, "... standards applicable to the emission of any air pollutant from … new motor vehicles … which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[6] EPA Administrators have vacillated, in step with political affiliation, on whether carbon dioxide emissions and resulting climate change are under the jurisdiction of the CAA according to the text of §202(a)(1).[7] The consequences of this debate are profound; interpretation of §202(a)(1) determines if carbon dioxide is legally a pollutant, and in turn, if the Clean Air Act obligates the U.S. government to address climate change.[8]

Interpretive disagreement stretches back to 1999, when a group of lawyers calling themselves the "Carbon Dioxide Warriors" petitioned the Environmental Protection Agency to begin regulating motor vehicle emissions of CO2 under §202(a)(1).[9] President George W. Bush's EPA denied the petition in 2003, arguing that the CAA does not apply to the issue of global climate change, and thus, that the CAA does not authorize regulation to address global climate change.[10] The dispute culminated in the 2007 Supreme Court Case, *Massachusetts et al. v. Environmental Protection Agency* in which the Court struck down the Bush denial, ordering the EPA to "properly engage" with the statutory text to make an endangerment finding.[11] Bush's reasons for refusal were roundly rejected as the Court set the bounds of future greenhouse decisions to be grounded in the text of the CAA rather than policy concerns.[12]

In response to *Massachusetts*, the Obama Administration's EPA published the 2009 endangerment finding titled "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section §202(a)(1) of the Clean Air Act".[13] This rule found "...elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare" and that "...greenhouse gases from new motor vehicles contribute to the air pollution that may reasonably be anticipated to endanger public health and welfare."[14] As such, the Endangerment Finding established the EPA's ability to regulate greenhouse gasses from motor vehicles in accordance with *Massachusetts*.[15] Then, in February 2026, the EPA under Trump published Rescission wherein Zeldin argued that the EPA does not have the statutory authority to regulate Greenhouse gas emissions from vehicles under the CAA afterall, undoing the U.S government's legal obligation to address climate change.[16]

Federal carbon dioxide regulation largely rests upon the

1 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act*, (2026).
2 *Id.*
3 OAR US EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, EPA (May 11, 2021), https://www.epa.gov/climate-change/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a.
4 Richard J. Lazarus, *The Making of Environmental Law*, 70 (2nd ed. (2023).
5 *See* Clean Air Act of 1963, CAA (42 U.S.C. 7401 et seq.)
6 Clean Air Act, 42 U.S.C §§ 7401-7671q
7 *See* Richard J. Lazarus, *The Rule of Five: Making Climate History at the Supreme Court* (2020).
8 *See* Carrie Jenks, Sara Dewey, *The Legal Reasoning Behind the Endangerment Rescission, Harvard Climate Brief*, The Salata Institute for Climate and Sustainability at Harvard University (Feb. 17, 2026), https://salatainstitute.harvard.edu/the-legal-reasoning-behind-the-endangerment-rescission/.
9 Richard J. Lazarus, *supra* note 7.
10 *See Control of Emissions from New Highway Vehicles and Engines*, § 68.173 (2003) at 52925.
11 Massachusetts et al. v. Environmental Protection Agency, 549 U.S 497, 534 (2007).
12 Massachusetts et al. v. Environmental Protection Agency, 549 U.S 497, 534 (2007).; *See also*, Carrie Jenks, Sara Dewey, *supra* note 8.
13 OAR US EPA, *supra* note 3.
14 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 66516, 66538 § 74.239 (2009).
15 Richard J. Lazarus, *supra* note 7.
16 *See* Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, *supra* note 1.; *see also*, Carrie Jenks, Sara Dewey, supra note 12.

CAA, a law with no express purpose of dealing with Climate.[17] The back and forth conflict in the Executive and Judiciary over interpretation of §202(a)(1) reveals how –in the absence of fresh legislation– interpreting aging laws like the CAA privileges the jurisprudence of a handful of Supreme Court Justices and EPA lawyers with enormous influence in casting the fate of climate protection.

Legal Timeline
(Figure One)

	Events
1999	Petition to regulate Greenhouse gases under Clean Air Act introduced.
2003	Bush EPA denies petition
2007	Massachusetts v. EPA. Supreme Court rejects EPA legal rationale for denying petition, ordering the EPA to ground decision on the statutory text.
2009	Obama Endangerment Finding published establishing the EPA's legal authority to regulate greenhouse gasses from motor vehicles.
2024	Loper-Bright v. Raimondo reforms congressional delegation. Courts must no longer defer to an agency's statutory interpretation.
2026	Rescission Ruling. Trump EPA revokes its legal authority to regulate motor vehicle greenhouse gasses under the CAA.

II. UNDERSTANDING MASSACHUSETTS

Richard Lazarus, a Harvard professor of environmental law, characterized *Massachusetts v. EPA* as "the most important environmental law case ever decided by the Court."[18] The Court examines the legal rationale provided in the 2003 EPA decision to deny the 1999 petition.[19] In the majority opinion, Chief Justice Stevens reviews the Bush EPA rationale for rejecting the petition, where the bulk of the argument focused on statutory language regarding whether carbon dioxide "contributes" to global climate change. The Bush EPA reasons that the CAA only meant to give the EPA authority to regulate local or regional exposure to pollution, not the indirect effects of greenhouse gasses as they warm the planet.[20]

Justice Stevens dismisses this logic in a clear ruling: "The Clean Air Act's sweeping definition of 'air pollutant' includes 'any' air pollution … The statute is unambiguous."[21] Thus *Massachusetts* forecloses Bush interpretive argument of §202(a)(1).

Stevens also provides guidance on the legal implications of a future endangerment finding: "On … whether §202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a judgment that such emissions contribute to climate change. We have little trouble concluding that it does".[22] *Massachusetts* is an emphatic reversal of EPAs initial rejection, delivering a clear victory to the Carbon Dioxide Warriors in the interpretive battle over §202(a)(1).

In the subsequent sections, I investigate Zeldin's legal rationale in the Rescission Rule. Since the Court evaluates and dismisses the Bush interpretation in *Massachusetts*, Zeldin calls upon a landmark ruling that radically reformed how agencies must read and enforce statutes, *Loper Bright v. Raimondo Enterprises* (2023), to differentiate his case from Bush. I argue that the *Loper* Doctrine does not aid Zeldin's case but in fact prohibits the administrative action he takes in the Rescission Rule.

III. THE RESCISSION RULE

The fundamental claim of the Rescission Rule is that "... the EPA lacks statutory authority to regulate carbon dioxide under §202(a)(1)". This claim is familiar as it was litigated in *Massachusetts*.[23] Zeldin says *Loper* "provide[s] new guidance on how Federal agencies should interpret the statutory provisions" giving him license to take a fresh look at the reach of §202(a)(1) and ultimately conclude that the Endangerment Finding (EF) contains statutory interpretation exceeding the authority delegated by the Clean Air Act.[24] But Zeldin's project of statutory interpretation finds no support in the *Loper* Doctrine. Since *Loper* is the primary element in Zeldin's argument setting it apart from Bush, his case lacks legal reasoning sufficient to escape *Massachusetts*.

A. Overcoming Massachusetts

Massachusetts deems that the CAA authorizes the EPA to regulate emissions from motor vehicles "in the event that it forms a judgment that such emissions contribute to climate change." *Massachusetts* requires a finding on the impact of human activity on earth's atmosphere, not an argument on law or policy. The distinction between legal interpretation and scientific incredulity is important. If Zeldin seeks to undo the legal obligations formed by EF, it appears that he must show that emissions do not contribute to climate change.[25]

Unlike Obama's Endangerment Finding, the Rescission rule forms no such empirical judgment demanded by *Massachusetts*.[26] Zeldin explains that the EPA is, "...*not* basing [The Rescission Rule] on a new finding under CAA section §202(a)(1)"(emphasis added).[27] Zeldin admits that, among his arguments, only those regarding statutory interpretation, not scientific findings provide legal basis for the Rescission Rule. He maintains only the statutory-authority aspect of his argument as an active legal argument, reserving the other as a dormant "harbor[ed]" concern.[28] Zeldin's attack on the EF blends legal reasoning with climate science grievances. In fact, there are abundant portions of the Rescission Rule text questioning the effects of climate change and the futility of regulating greenhouse gas emissions, but by his own admission, these portions are legally dormant.[29]

This admission is of crucial importance to the legal strength of Zeldin's case. If Zeldin does not formally contest the scientific finding in the EF, only arguing over statutory interpretation, it is mysterious how the Rescission Rule challenges the legal

17 OAR US EPA, *Evolution of the Clean Air Act*, EPA (May 29, 2015), https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act.
18 Richard J. Lazarus, *supra* note 7.
19 Massachusetts et al. v. Environmental Protection Agency, 549 U.S 497 (2007).
20 Jeffrey R. Holmstead, *Control of Emissions From New Highway Vehicles and Engines*, (2003).
21 *Id.* at 529.
22 Massachusetts et al. v. Environmental Protection Agency, 549 U.S 497 (2007).
23 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act* § 91.32 (2026).
24 *Id.*
25 Massachusetts et al. v. Environmental Protection Agency, 549 U.S 497 (2007).
26 *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, (2009).
27 *Id.* at 7688.
28 *Id.* at 7696.
29 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act*, *supra* note 3 at 7714.

precedent in *Massachusetts*. Is the EPA simply, as Arizona Attorney General Kris Mayes claimed, "reviving an argument the Supreme Court has already rejected"?[30] To clear this hurdle, Zeldin employs new methodology, utilizing the *Loper Bright v. Raimondo* doctrine to argue that *Massachusetts* no longer applies.

B. *Loper-Bright*

In 2024, *Loper-Bright Enterprises v. Raimondo* overturned *Chevron v. NRDC* (1984), discarding the Chevron Doctrine, a requirement that courts defer to agency interpretation in most cases. Under *Loper*, interpretive authority previously commanded by the executive branch is now yielded to the judicial. Loper-Bright knocks-down the *Chevron* assertion that "judges are not experts in the field", rebutting, "That depends … on what the 'field' is. If it is legal interpretation, that has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years".[31] *Loper* decreased the discretion agency policymakers could exercise when administering statutes by recasting agencies administration of law as an exercise of legal interpretation rather than technical or policy expertise.[32] If Loper does in fact reign in agencies this way, then the Rescission Rule's novel legal interpretation – especially given that it is asserted over the court's reasoning in *Massachusetts* – seems to violate the *Loper* doctrine.

In the recession, Zeldin makes explicit how he intends to leverage *Loper* saying, "...the Endangerment Finding and the Supreme Court decision in Massachusetts straddled a transitional period regarding the standards for statutory interpretation and understanding agency authority. The breadth of agency discretion…[was] sharply disputed".[33] By locating *Massachusetts* in a jurisprudential "transition", Zeldin argues that the judiciary's reformed protocols of statutory interpretation since *Massachusetts* effectively suspend Justice Stevens' reading of §202(a)(1).

Taking advantage of *Loper*, Zeldin argues that the EF contains statutory interpretation that violates Congress's intended meaning of §202(a)(1), saying that the issue of climate change is too structurally different from the pollution that legislators had in mind when writing the Clean Air Act. Greenhouse gasses operate differently than local pollutants like arsenic or lead, for example. Zeldin says that connecting climate change with its negative impacts on human health invokes "…causal relationships that are too uncertain, conjectural, remote, and convoluted by intervening and confounding factors to fit within the terms "cause," "contribute," and "reasonably be anticipated to endanger" as used in CAA section §202(a)(1)."[34] It follows that CAA's text cannot treat carbon dioxide as a pollutant, saying it poses too great a leap. Zeldin concludes that the EF is more than just a scientific determination that carbon dioxide is a pollutant and problem to human health but an overreaching agency interpretation, an undemocratic act of agency action out of line with Congressional will, hence violating the boundaries set by *Loper Bright*.[35]

However, there are several issues with Zeldin's analysis. The first is that it is odd to characterize the Endangerment Finding as a work of statutory interpretation. The EF is focused on the impact of elevated greenhouse gasses – a scientific question – rather than the scope of the CAA. For example, the Endangerment Finding states that, "changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens…provides strong and clear support for an endangerment finding."[36] While the EF is not void of language referencing legal interpretation, this is strictly to demonstrate adherence to the *Massachusetts* decision, rather than to "assert authority" or "break new ground" as Zeldin accuses.[37] The EF even cites *Massachusetts*' own language, reiterating, "...judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, … to global warming."[38] The Obama EPA voices the Court's conclusion in *Massachusetts* that the criteria which trigger legal obligation to regulate greenhouse gasses are met not by generating a novel statutory interpretation of its own but merely reporting scientific evidence.

If the EF is primarily reporting science, why does Zeldin present it as a legal argument? *Massachusetts* provides one valid legal mechanism for discovering the obligations of §202(a)(1): scientifically determined endangerment.[39] Before the Rescission Rule, the Trump administration eyed this path. Leading climate skeptics authored a report for Trump's Department of Energy concluding that the Endangerment Finding's analysis failed to account for the "positive impacts" of climate change, and that there are "significant uncertainties in predicted warming rates and their effects."[40] But this groundwork for a legal effort striking science rather than law was expeditiously scrapped. Andrew Dessler, a climate scientist at Texas A&M University and author of a rebuttal to the DOE report says, "They would have been obliterated in court. [The DOE report] is the gold standard of climate skepticism and if this is the best they can do, then they've proven how robust climate science actually is."[41] The EPA may have realized that targeting the science reported in the EF was a legal dead end. The EPA now pursues a strategy of upheaving the statutory interpretation decided in *Massachusetts* rather than the climate science it requires.

Loper restricts agency deference, but that doesn't necessarily translate to reduced legal obligation for EPA. In fact, the Loper Bright doctrine works in opposition to the very legal effort Zeldin mounts in the Recession Rule. The Rescission Rule claims to "effectuate the best reading of the Clean Air Act" which acts to override the Massachusetts decision with the support of "judicial decisions [that] have significantly clarified" law regarding "the breadth

30 *Attorney General Mayes Condemns the Illegal Rescission of EPA's Landmark 2009 Greenhouse Gas Endangerment Finding*, Arizona Attorney General's Office (Feb. 12, 2026), https://www.azag.gov/press-release/attorney-general-mayes-condemns-illegal-rescission-epas-landmark-2009-greenhouse-gas.

31 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

32 *See Loper Bright's Impact: Evidence from Interviews with Agency Rule Drafters*, Yale J. Reg., https://www.yalejreg.com/nc/loper-brights-impact-evidence-from-interviews-with-agency-rule-drafters/ (last visited June 14, 2026).

33 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act*, *supra* note 1 at 7711.

34 *Id.* at 7714.

35 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, supra* note 1.

36 *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule*, 66497 (2009).

37 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act*, *supra* note 1 at 7688.

38 *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule*, *supra* note 36.

39 Massachusetts et al. v. Environmental Protection Agency, 549 U.S 497 (2007).

40 Carrie Jenks, Sara Dewey, *supra* note 8.

41 Scott Waldman, *Trump Sidelines Climate Contrarians in Science Rollback*, POLITICO (Feb. 13, 2026), https://www.politico.com/news/2026/02/13/trump-sidelines-climate-contrarians-science-rollback-00779098.

of agency discretion."[42] In The Rescission Rule, Zeldin seeks to override the judiciary's interpretation of CAA with a reading of its own– his own deference. This contradicts what *Loper Bright* says: "*Courts* must exercise their independent judgment in deciding whether an agency has acted within its statutory authority"(emphasis added).[43] According to *Massachusetts*, the Clean Air Act "unambiguously" authorizes greenhouse standards.[44] The courts have spoken here, dispensing the very legal interpretation which, as Zeldin quotes from *Loper*, is "emphatically the province and duty of the judicial department".[45] This suggests that *Loper Bright* cuts against Zeldin's exercises of agency deference.

Environmentalists have worried that *Loper* poses a radical threat to environmental law because it is part of a strain of jurisprudence – beginning with the Major Questions Doctrine in 2022 – targeting the administrative state, a part of government fundamentally connected to the strength of environmental regulation. Sanne Knudsen notes the field relies on "comprehensive and broad" congressional delegations that gives agencies the reins to interpret and administer the law with flexibility and discretion as issues like climate change emerge and evolve.[46] Due to the relationship between agency discretion and environmental law, Knudsen's view that *Loper* presents a "deregulatory impulse" that will prey on environmental regulation follows.[47] I claim that the Rescission Rule's contradiction with the reasoning in *Loper* flips Knudsen's hypothesis by showing how *Loper*'s bias against the role of agencies in statutory interpretation can conversely serve environmental law. In the §202(a)(1) controversy, *Loper*'s insistence that "agencies have no special competence in resolving statutory ambiguities" certainly buffers against Zeldin's exercise of agency discretion in statutory interpretation as a means to dismantle environmental protection.[48] Invoking *Loper* as a justification to alter agency policy by asserting legal interpretation requires the very legal interpretation that *Loper* commands to be the exclusive province of the judicial.[49] As such, EPA usage of *Loper* to assert new interpretation is stuck in a bind, contradicting administrative action with the legal theory it depends upon.

Environmental regulation has been aided in the past by similar judicial logic. In the 1978 case *Tennessee Valley Authority v. Hill*, a near-complete dam was brought to suit for violating the Endangered Species Act's clause that the government "ensure that the actions authorized, funded, or carried out … do not jeopardize the continued existence of such species".[50] Lawyers argued over whether these words should be applied to stop a project already so close to completion at the massive cost to the taxpayer for the sake of the Snail Darter fish. In the majority opinion ordering the dam be halted, Chief Justice Burger wrote, "It is not for us to speculate, much less act, on whether congress would have altered its stance had the specific events of this case been anticipated".[51] This parallels *Massachusetts* ruling to ground EPA action in the text of the CAA. *Tennessee* is similar to *Loper* in its form of non-delagatory legal philosophy. Instead of deferring to the discretion of the U.S. Fish and Wildlife Service, Chief Justice Warren employed his judicial expertise to interpret the meaning of the ESA. Warren assumes interpretive sovereignty over agencies, deferring only when "it can be shown that the legislature actually intended the opposite result".[52] *Tennessee Valley Authority v. Hill* exemplifies how environmental law is not necessarily weakened by a tightening of agency discretion but can be fortified by rigid non-delegation. Understood in this light, *Loper* counters any administration hostile toward existing environmental regulation by restraining agency power.

Lastly, *Loper* is not a premise for agencies to nullify past decisions. Roberts stipulates, "...we do not call into question prior cases…The holdings of those cases that specific agency actions are lawful … [and] subject to statutory stare decisis despite our change in interpretive methodology."[53]

CONCLUSION

On the very first day of his second term in office, Trump released an executive order titled, "Unleashing Energy Dominance". In section 2(d), he ordered that it is the policy of the United States to "ensure that all regulatory requirements related to energy are grounded in clearly applicable law."[54] In this article I have shown one clear way that the Rescission Rule fails to meet the requirements of that policy. The Rescission Rule does not coherently ground itself in law. Its methods clash with the justification for limited valid agency practice handed down in *Loper* while ironically appealing to *Loper*.

A parallel trend of the divergence from the law is the targeting of the scientific facts inconvenient to Trump's policy goals. The Federal Judicial Center removed the climate science chapter from the *Fourth Edition Reference Manual on Scientific Evidence*, a guide judges rely on to ground opinions in solid fact.[55] *Massachusetts*' strongest guard is how its insistence of the CAA's textual unambiguity centers the role of scientific evidence in future litigation. The repeal of the climate science chapter from the Judicial Reference Manual matches Zeldin's prior attempt to destabilize this legal landscape by siloing climate science away from jurisprudential debate. As much as any legal debate, environmental regulation is threatened by the effort to erode knowledge of scientific problems that environmental law exists to address.

If the Court, in future litigation, upholds the Rescission Rule, it will only deepen jurisprudential incoherence. During the Biden era, the Supreme Court greatly clamped down on executive power and agency discredtion. Now, they must uphold their legal reasoning of non-delegation, particularly toward agency statutory construction contradicting judicial precedent, which they argued against forcefully in 2024.[56] *Loper Bright*'s non-delegatory doctrine now acts to legally counter Trump's habit of disregarding the law with far-reaching executive justification for controversial actions.

42 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act*, *supra* note 1 at 7686, 7711.
43 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)
44 Massachusetts et al. v. Environmental Protection Agency, 549 U.S 497 (2007).
45 *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act*, *supra* note 1.
46 Sanne H. Knudsen, *Predicating (and Protecting) the Future of Environmental Law After Loper Bright*, 85 Ohio State Law J., 1062 (2024).
47 *Id.*
48 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) at 7711.
49 *Id.* at 56.
50 Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
51 *Id.* at 53, 54.
52 *Id.*
53 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
54 Executive Orders, *Unleashing American Energy*, The White House (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-american-energy/.
55 *See* Abrahm Lustgarten, *Under GOP Pressure, Federal Agency Pulls Climate Change Chapter From Official Manual for U.S. Judges*, ProPublica (Feb. 10, 2026), https://www.propublica.org/article/federal-judicial-center-climate-change-republican-pressure.
56 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

The Rescission Rule presents this jurisprudence with intense political pressure. The question of whether to ensure executive power is restrained by the legislature's statutory 'instructions' professed during Biden's term, or to empower a unitary executive to command law, professed during Trump's second term, has brought Trump-Era legal philosophy to an impasse. By attempting to dismantle environmental protection while occupying both sides of this jurisprudential reasoning, the Court adopts an incohesive framework.

This piece was written by Luca Davis and edited by Evan Samaro.

THE CASE FOR PERMANENCE:

CONVERTING ENHANCED ACA PREMIUM TAX CREDITS INTO A DURABLE ENTITLEMENT

INTRODUCTION

In September 2025, the Kaiser Family Foundation projected that Affordable Care Act Marketplace premiums would more than double on average for roughly twenty-two million Americans receiving enhanced premium tax credits if those subsidies were allowed to expire at year's end.[1] For those enrollees, that figure represented a direct cost imposed by legislative inaction, not by any underlying change in their health or financial circumstances. The enhanced subsidies, first enacted as a temporary measure in 2021 and extended once through the Inflation Reduction Act, have never been made permanent. They are political leverage, not permanent law.

The Affordable Care Act (ACA) established a framework of premium tax credits designed to make health insurance accessible and affordable for low and middle-income Americans.[2] The American Rescue Plan Act of 2021 significantly expanded that framework, extending subsidy eligibility to households above 400% of the federal poverty level and reducing premium contributions for everyone in the eligible pool.[3] Congress allowed those enhancements to expire at the end of 2025. The result was immediate premium increases, a failed Senate vote, and a House-passed three-year extension that the Senate declared dead on arrival.[4]

This paper argues that this cycle is structurally unsound and undermines democratic accountability. The temporary extension of enhanced premium tax credits (PTC) under the Affordable Care Act reflects politically renewable entitlements that sacrifice durability for short-term partisan electoral advantages. To protect the reliance interests of the millions of Americans enrolled in Marketplace coverage, Congress should convert the enhanced subsidies into a permanent entitlement insulated from partisan bargaining.

Section I provides an overview of how the ACA originally structured premium tax credits and health insurance markets. Section II traces the political evolution of enhanced subsidies from their creation through repeated temporary extensions. Section III analyzes the concrete costs of that temporary structure, including premium instability, administrative disruption, and disproportionate harm to communities of color. Section IV examines the academic literature on legislative entrenchment and why the enhanced subsidy structure falls short of the durability that programs like Social Security and Medicare have achieved. Section V proposes converting the enhanced subsidies into a permanent entitlement and responds to the democratic accountability objection.

I. THE FRAMEWORK OF ACA SUBSIDIES

The Affordable Care Act, enacted in 2010, was the most significant restructuring of the American health insurance market in decades.[5] It expanded insurance coverage by creating regulated Marketplaces where individuals and families could purchase standardized private plans, and it subsidized the cost of those plans for people who could not afford them on their own. The ACA also introduced consumer protections including guaranteed issue, community rating, and essential health benefit requirements, changes that collectively made it impossible for insurers to simply exclude sick or low-income people from the individual market.

The mechanism through which the ACA addressed affordability was the premium tax credit. As the Congressional Research Service (CRS) explains, the credit "is refundable, allowing individuals to claim the full credit amount when filing their income taxes even if they have little or no federal income tax liability" and "is also advanceable, so individuals may choose to receive advanced payments" paid directly to insurers on a monthly basis.[6] In practice, this meant that eligible enrollees never had to pay the full sticker price of a Marketplace plan. The credit was calculated on a sliding scale tied to income, with the largest subsidies going to the lowest earners and the subsidy phasing out as income rose toward 400% of the federal poverty level.

That 400% cap was the framework's central structural flaw. Under the original statute, a household earning one dollar above the threshold received no subsidy at all, a cliff that had no policy justification and that cut off assistance arbitrarily.[7] When the COVID-19 pandemic caused mass unemployment and sudden income loss, millions of people turned to the Marketplace for coverage the original framework was never designed to provide at scale. The subsidy cliff meant that many of them could not get meaningful assistance. Congress responded with the American Rescue Plan, but only on a temporary basis.

II. POLITICAL EVOLUTION OF ENHANCED PREMIUM TAX CREDITS

A. The Creation of Enhanced Subsidies

The American Rescue Plan Act of 2021 fixed the two most significant problems in the original framework. It eliminated the 400% federal poverty level cap entirely and capped required premium contributions at 8.5% of household income regardless of earnings. It also increased subsidy generosity across all income levels, making coverage cheaper for people who were already eligible. The Congressional Research Service confirmed that the Act "expanded eligibility for and the amount of the PTC for tax years 2021 and 2022" and that "the enhanced PTC provision allowed more house-

1 Justin Lo, Larry Levitt, Jared Ortaliza & Cynthia Cox, *ACA Marketplace Premium Payments Would More than Double on Average Next Year if Enhanced Premium Tax Credits Expire,* Kaiser Fam. Found. (Sept. 30, 2025).
2 Affordable Care Act, 42 U.S.C. § 18001 (2010).
3 U.S. Dep't of the Treasury, *Fact Sheet: The Impact of the American Rescue Plan After One Year* (Mar. 9, 2022), https://home.treasury.gov/news/press-releases/jy0645.
4 Ctr. On Budget & Pol'y Priorities, Setting The Record Straight On Premium Tax Credit Enhancements (Jan. 20, 2026).
5 *See generally* Affordable Care Act, 42 U.S.C. § 18001 (2010).
6 Cong. Rsch.serv., Enhanced Premium Tax Credit And 2026 Exchange Premiums: Frequently Asked Questions 1–2 (2025).
7 *Id.*

holds to become eligible for the credit and provided larger subsidies to all eligible households, compared with ACA-only rules."[8]

The coverage effects were substantial. The Center on Budget and Policy Priorities (CBPP) documented that the enhancements cut out-of-pocket premiums by more than half on average for over twenty million marketplace enrollees, making health care more affordable and doubling overall enrollment.[9] A record 93% of marketplace enrollees received premium tax credits, with total enrollment climbing from 11.2 million in February 2021 to 23.4 million by February 2025.[10] The enhanced subsidies brought in millions of Americans who had previously been priced out of the Marketplace, making them the largest coverage expansion since the ACA's original Medicaid provisions.

These enhancements were written as temporary provisions with a built-in expiration date. The CRS confirms that the sunset date was January 1, 2026, and that without an extension, "the maximum income limit of 400% of the FPL would be reinstated and the applicable percentages would revert to higher levels resulting in lower subsidy amounts."[11] Congress made a deliberate choice to write the enhancements this way. The consequences of that choice have played out every year since.

B. Political Bargaining and Temporary Extensions

The Inflation Reduction Act of 2022 extended the enhanced subsidies through 2025, but the core problem remained: the subsidies still had an expiration date. As December 2025 approached, the Senate failed to advance either a Democratic extension bill or a Republican health savings account alternative, and the subsidies lapsed on January 1, 2026.[12] Millions of enrollees saw their premiums spike immediately at the start of the new plan year.

Republican opposition to extension centered heavily on fraud. Party leadership argued that the enhanced subsidies had enabled widespread broker fraud, with unscrupulous agents signing consumers up for plans without their knowledge to collect subsidy-linked commissions. Broker fraud in the Marketplace was a real enforcement problem, but using it as grounds to let the entire enhanced subsidy program expire conflated a specific regulatory failure with the program itself. The CBPP documented that the fraud claims deployed against extension were "wildly inflated" and that "targeted and direct solutions, not cutting coverage, are how to curtail bad actors and protect consumers."[13] The fact that Republican leadership chose to deploy the fraud argument as an all-or-nothing rationale for letting coverage lapse, rather than pushing for targeted enforcement reform, illustrates exactly the kind of partisan conditioning that temporary benefit design makes possible. When subsidies are permanent, opponents have to vote to cut them. When subsidies expire by default, opponents only have to block a vote.

Seventeen House Republicans joined all Democrats on January 8, 2026, to pass a three-year extension by a vote of 230-196, using a discharge petition that bypassed Speaker Mike Johnson.[14] Most of the Republicans who voted for the extension represented competitive swing districts. Democrats framed the credits as central to addressing the broader affordability crisis, while Johnson argued the credits enabled fraud and said Republicans would produce a separate health care cost proposal.[15] When Johnson refused to allow a floor vote, four Republicans used the discharge petition to force one.[16]

The petition succeeded because the electoral math made defiance too costly for members in close districts, not because of any agreement about the long-term policy merits of the subsidies. That is the pattern this paper identifies as the defining problem: coverage for twenty-two million Americans was preserved through a procedural workaround driven by midterm self-interest, not through a durable legislative commitment. Unlike Social Security or Medicare, where the default is continuation and any reduction requires a visible vote, the enhanced ACA subsidies require a visible vote just to keep going. That asymmetry means the political burden always falls on those who want to protect coverage, not on those who want to cut it.

III. THE COSTS OF TEMPORARY BENEFITS

A. Consumer Reliance and Economic Instability

The most direct cost of the temporary subsidy structure is the financial harm imposed on enrollees when Congress fails to act. The Kaiser Family Foundation estimated that expiration would produce "a 114% increase from an average of $888 in 2025 to $1,904 in 2026" in annual premium payments for subsidized enrollees.[17] For a 60-year-old couple earning roughly $85,000 annually, the increase would be over $22,600 per year, pushing their benchmark plan cost to approximately a quarter of their annual income rather than the 8.5% cap the enhanced credits had established.[18] These increases had nothing to do with rising medical costs or changes in enrollee health status; they were the automatic result of the benefit legal structure, which makes a premium spike the default outcome of inaction.

The CBPP documented through focus groups how these projected increases translated into real decisions. A 57-year-old customer service representative from Georgia said she did not know what she would do if her plan increased by $103 a month. A 35-year-old restaurant manager from North Carolina, facing a 185% premium increase, said he would consider dropping coverage altogether and avoiding medical attention unless it became an emergency. A 45-year-old IT consultant from Illinois with Type 1 diabetes said he would have to make sacrifices in other areas of his life to cover the increased cost. Each of these people made a coverage decision based on the availability of a subsidy that Congress chose to make temporary. The disruption they faced when it lapsed was a foreseeable consequence of that legislative choice.

Health insurance is not the only context where temporary legal frameworks generate reliance problems. Randy J. Kozel, writing about constitutional precedent, identifies a principle that translates directly here: considerations such as the disruptiveness of overruling a settled rule "are independent of constitutional method," meaning the harm caused by disrupting established legal frameworks can be evaluated on its own terms without resolving any

8 *Id.*
9 Ctr. On Budget & Pol'y Priorities, Setting The Record Straight On Premium Tax Credit Enhancements, *supra* note 4.
10 Ctr. On Budget & Pol'y Priorities, Premium Tax Credit Improvements Must Be Extended To Prevent Steep Rise In Health Care Costs (Nov. 14, 2024); *see also* Ctr. On Budget & Pol'y Priorities, Setting The Record Straight On Premium Tax Credit Enhancements, *supra* note 4.
11 Cong. Rsch.serv., *supra* note 6.
12 Ctr. On Budget & Pol'y Priorities, Setting The Record Straight On Premium Tax Credit Enhancements, *supra* note 4.
13 Lauren Gambino, *US House Breaks with Trump to Revive Affordable Care Act Subsidies*, The Guardian (Jul. 19, 2017).
14 Ctr. On Budget & Pol'y Priorities, Setting The Record Straight On Premium Tax Credit Enhancements, *supra* note 4.
15 Lauren Gambino, *supra* note 13.
16 *Id.*
17 Lo et al., *supra* note 1.
18 *Id.*

deeper theoretical dispute about whether the underlying rule was correctly decided.[19] Congress faces the same calculus when it considers allowing benefits to lapse that millions of enrollees have relied on in making real decisions about their coverage, employment, and finances. Whether the enhanced subsidies represent optimal policy is a separate question from whether people reasonably organized their lives around them. As Kozel explains, "[t]he determinants of precedential durability include the relevant costs of perpetuating" or abandoning an established rule, and those costs exist regardless of whether the rule itself was wise.[20] The Georgia customer service representative and the North Carolina restaurant manager did not need to understand ACA policy to rely on it. They needed to be able to count on it from year to year.

The market-level consequences of subsidy uncertainty reinforce this point. When insurers cannot predict whether enhanced subsidies will continue into the following plan year, they price that uncertainty into their premiums. The enrollees most likely to drop coverage when premiums rise are the healthiest ones, because they have the least immediate need for care. Their departure degrades the risk pool and drives premiums higher for the sicker enrollees who stay. The Congressional Budget Office estimated that gross benchmark premiums would increase by 4.3% in 2026, 7.7% in 2027, and an average of 7.9% for the 2026-2034 period as a direct consequence of enhanced subsidy expiration.[21] Subsidy uncertainty does not only push some enrollees out of coverage; it raises costs for everyone who stays, because the people most likely to leave are the healthiest ones.

B. Administrative and Institutional Instability

Temporary benefits impose administrative costs that compound with each expiration cycle. The CRS documented that expiration creates a two-tier system with different subsidy formulas for 2025 versus 2026, requiring insurers to recalculate premiums, resubmit filings, and update all consumer-facing materials, a process that cannot easily be reversed if Congress later acts retroactively.[22] The CBPP observed that each day without an extension pushes more people away from Marketplace coverage in ways that are hard to reverse: consumers who see unaffordable premiums during open enrollment simply decide not to enroll, and getting them back once premiums are corrected is not straightforward.[23]

Cass R. Sunstein's work on administrative law explains why this structural failure was predictable. Sunstein argues that regulatory programs fail most often not because of bad actors but because of "the creation of poor incentives" and strategies that produce "unanticipated systemic consequences, that deal with the symptoms rather than the causes of social problems."[24] The more fundamental problem, he argues, is that government often fails to ask the right question: "in many areas the question is not whether the level of government regulation is appropriate, but whether the government has chosen the suitable strategies to accomplish its goals."[25] A subsidy that expires by default is a strategy that cannot accomplish its goal. Instead of asking whether coverage levels are adequate, Congress is forced to ask whether the political conditions for renewal exist. Instead of administrators planning for continuity, insurers plan for disruption. The ACA was designed to expand coverage. A temporary subsidy structure systematically undermines that goal by making coverage contraction the legal default.[26]

C. Equity Effects

These costs fall hardest on the communities least able to absorb them. The Economic Policy Institute (EPI) found that the enhanced ACA premium tax credits "have led to the largest increase in health insurance coverage since the ACA's Medicaid expansion, and saved enrollees on average $705 annually in 2024," but that "Black families, who face higher rates of poverty and uninsurance even under 'normal' circumstances, are positioned to be hit especially hard by the loss of the enhanced subsidies."[27] EPI documented that allowing the credits to expire would produce more than 200 preventable deaths among Black Americans annually, $740 million in additional annual premium costs for Black families, and more than $1.9 billion in annual economic losses in major metropolitan areas with large Black populations.[28]

These disparities are rooted in structural gaps in the health insurance system that the enhanced subsidies had partially closed. As EPI explained, "Black families are more likely to live in states that did not accept the ACA's Medicaid expansion, and they are less likely to work for employers that provide insurance coverage," meaning that "losing access to the enhanced tax credits will result in increased health costs, loss of coverage, diminished health, and excess deaths, concentrated amongst the most disadvantaged."[29] The Medicaid expansion gap is particularly significant here. In the thirty-nine states that did expand Medicaid, low-income adults gained coverage through Medicaid rather than the Marketplace. In the states that refused expansion, the Marketplace and its subsidies are often the only available coverage option for low-income adults. When enhanced subsidies expire, those states do not have a backstop.

The CBPP further documented that "people of color made up 54 percent of marketplace enrollees in 2024, up from 46 percent in 2021," a shift directly attributable to the enhanced subsidies' removal of the income cap and reduction of premium costs.[30] That shift represents real coverage gains for communities that have historically faced the highest uninsurance rates. A temporary benefit structure means those gains are always provisional. The communities that benefited most from the enhanced subsidies are the ones most exposed when they lapse, because they are the least likely to have employer-sponsored insurance to fall back on and the most likely to be priced out by the premium increases that follow expiration.

IV. DURABILITY AND THE ENTRENCHMENT OF SOCIAL WELFARE PROGRAMS

The contrast between the enhanced ACA subsidies and programs like Social Security and Medicare comes down to one thing: how each program was designed. Social Security and Medicare do not need to be renewed. They do not expire by default. Any member of Congress who wants to reduce them has to cast a vote that constit-

19 Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 Tex. L. Rev. 1843, 1847 (2013).
20 *Id.*
21 Cong. Rsch.serv., *supra* note 6.
22 *Id.*
23 Ctr. On Budget & Pol'y Priorities, Setting The Record Straight On Premium Tax Credit Enhancements, *supra* note 4.
24 Cass R. Sunstein, *Administrative Substance*, 1991 Duke L.J. 607, 622 (1991).
25 *Id.* at 621.
26 *Id.* at 622.
27 Josh Bivens et al., *Failing to Extend the Enhanced ACA Premium Tax Credits Is an Attack on Working-Class Black Families and Major Metro Areas,* Econ. Pol'y Inst. (Feb. 9, 2026).
28 *Id.*
29 *Id.*
30 Ctr. On Budget & Pol'y Priorities, Premium Tax Credit Improvements Must Be Extended To Prevent Steep Rise In Health Care Costs, *supra* note 10.

uents can see, identify, and respond to at the ballot box. That design choice is the reason those programs have lasted. The enhanced ACA subsidies were designed the opposite way. Their continuation requires a visible vote, and their reduction requires only inaction.

Posner and Vermeule define legislative entrenchment as "the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form."[31] In Legislative Entrenchment: A Reappraisal, they argue that the conventional objection to legislative entrenchment has no foundation. The rule against binding future Congresses, they contend, "has no deep justification in constitutional text and structure, political norms of representation and deliberation, efficiency, or any other source."[32] Entrenchment is not inherently anti-democratic. It is a design choice about which policy outcomes are stable enough to be protected from the ordinary turbulence of political bargaining.

The ACA is itself a permanent statute. Its Marketplace structure, its consumer protections, its Medicaid expansion provisions all remain in place unless Congress affirmatively repeals them. The income cap in the original subsidy formula was also permanent, which is why it took the American Rescue Plan to remove it. The question this paper raises is not whether Congress has the power to make the enhanced subsidies permanent, because it plainly does. The question is whether the temporary design serves any legitimate purpose, and the answer is no. Structuring the subsidies as expiring provisions does not make Congress more accountable. It makes beneficiaries more vulnerable.

Posner and Vermeule identify predictability as one of the primary affirmative justifications for durable legislative design, noting that stable institutions "make it easier for individuals to arrange their affairs."[33] They draw on Madison's warning that expiring statutes produce situations where "all the rights depending on positive laws . . . would become absolutely defunct, and the most violent struggles ensue between the parties interested in reviving, and those interested in reforming the antecedent state of property."[34] The 2025 subsidy expiration played out exactly this way. Rather than debating whether coverage levels were appropriate, Congress spent the final months of 2025 haggling over broker fraud enforcement rules, abortion funding riders, and health savings account provisions. The debate was structured entirely by the expiration clock, not by any substantive policy question about whether twenty-two million people should have affordable health insurance. Posner and Vermeule also note that expiring statutes give future majorities "the opportunity to challenge earlier legislative agreements that would otherwise be off the table," generating conflict that serves no rational policy purpose.[35] Congress can avoid that cycle by making the enhanced subsidies permanent, which would allow future legislators to "incorporate in law fine-grained judgments about the correct balance between flexibility and stability" rather than relitigating the existence of the benefit every few years.[36]

The legal scholarship that could explain why the expiration date is the actual problem, Posner and Vermeule's work on entrenchment and Sunstein's work on regulatory stability[37] have mostly been applied to other areas, like budget rules and environmental regulation. As far as I can tell, nobody has really put these two things together for the ACA subsidies specifically. That is what this paper tries to do: take the numbers everyone already agrees on and use them to make a legal argument about how the program should be built.

V. PROPOSAL: CONVERTING ENHANCED ACA SUBSIDIES INTO A PERMANENT ENTITLEMENT

A. The Case for Permanence

Congress should eliminate the sunset provisions in the enhanced premium tax credit structure and replace them with ongoing appropriations authority tied to the income eligibility thresholds and contribution percentage schedules established by the American Rescue Plan and extended by the Inflation Reduction Act. This requires no constitutional innovation. It is the same structural choice Congress made when it enacted Social Security and Medicare: a judgment that a benefit is valuable enough to protect from the cycle of expiration, threat, and partisan negotiation that has characterized the enhanced subsidies since 2021.

Three arguments support this conclusion. First, the reliance interests of over twenty-two million enrollees are real and substantial. KFF documented that these enrollees have built their coverage decisions, financial planning, and in some cases their employment arrangements around the expectation of continued subsidy availability.[38] A temporary benefit structure makes the legal default one of harm, not protection, and it does so predictably. Second, the administrative costs of the expiration cycle are cumulative. Each round of uncertainty forces insurers to build lapse risk into their premiums, degrades the risk pool as healthy enrollees drop coverage, and imposes transaction costs on agencies and state Marketplaces that have to recalibrate repeatedly.[39] Third, the equity harm of temporariness falls hardest on low-income workers, people of color, and people in states that refused Medicaid expansion, exactly the communities the enhanced subsidies were designed to reach.[40]

B. Design Considerations

Making the enhanced subsidies permanent does not mean freezing the current formula. Congress can always adjust benefit levels through ordinary majority legislation, just as it adjusts Social Security cost-of-living increases and Medicare reimbursement rates. What permanence eliminates is the default of lapse, the structural feature that turns legislative inaction into automatic premium increases for millions of enrollees. A permanent entitlement would maintain the 8.5% income cap for households above 400% of the federal poverty level and the zero-premium benchmark for households at or below 150% of the federal poverty level, with adjustments available through ordinary legislation but the underlying entitlement secured as a matter of permanent federal law.

Posner and Vermeule identify this kind of design as a legitimate and valuable legislative tool. They argue that entrenchment "enables a government to make a credible commitment" to those who rely on it, making it "easier and cheaper for the government to control its relations with other entities."[41] A permanent subsidy entitlement produces exactly that credibility: insurers can price pre-

31 Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1667 (2002).
32 *Id.* at 1666.
33 *Id.* at 1671–72.
34 *Id.*
35 *Id.*
36 *Id.* at 1672
37 Sunstein, *supra* note 24; Posner & Vermeule, *supra* note 31.
38 Lo et al., *supra* note 1.
39 Cong. Rsch.serv., supra note 6.
40 Bivens et al., *supra* note 27.
41 Posner & Vermeule, *supra* note 31, at 1670; Sunstein, *supra* note 24, at 621.

miums based on stable enrollment projections, enrollees can make coverage decisions without annual uncertainty about whether the subsidy will exist next year, and state Marketplaces can plan operations without budgeting for disruption. Sunstein's work on regulatory design reinforces this point: programs that force administrators to focus on procedural survival rather than substantive outcomes are structurally set up to fail. The temporary subsidy structure does exactly that, redirecting the energy of Congress, agencies, and insurers away from the question of whether coverage is adequate and toward the question of whether the political calendar allows renewal.[42]

C. The Democratic Accountability Argument

The most common objection to permanent entitlement design is that it reduces democratic accountability, that requiring periodic renewal forces Congress to affirmatively choose to continue a benefit and remain answerable to voters for that choice. This argument is unpersuasive. Accountability only works when voters can trace a policy outcome back to a specific decision by a specific representative. The 2025 subsidy lapse resulted from a Senate procedural failure, inter-party disputes over abortion funding riders and health savings account provisions, and a House Speaker's refusal to schedule a floor vote. None of that gives voters anything to hold a representative accountable for. Instead, it is noise that obscures who made which choice and why.[43]

The fraud debate illustrates this problem concretely. Instead of a direct vote on whether twenty-two million people should have affordable health insurance, Congress spent the final weeks of 2025 arguing about broker enforcement rules that had nothing to do with the merits of the subsidy program. The CBPP documented that the fraud estimates deployed to justify letting coverage lapse were wildly inflated and that targeted enforcement was the appropriate response.[44] Because the subsidies expired by default, opponents of the program did not need to vote to cut coverage. They simply needed to prevent a vote from happening. That is evasion and the temporary structure of the benefit is what makes the evasion possible.

Permanent entitlements produce more accountability, not less. When a benefit is permanent, reducing it requires a visible vote that representatives have to defend to their constituents. As Posner and Vermeule's analysis confirms, there is no constitutional or normative reason to privilege temporary benefit design over permanent design.[45] Making the enhanced subsidies permanent would require Congress to cast a visible vote on the merits of health coverage rather than allowing procedural expiration to do the political work that accountability should require.

CONCLUSION

The enhanced premium tax credits enacted in 2021 more than doubled Marketplace enrollment, reduced average premiums by over 44%, and extended coverage to millions of Americans who had previously been priced out of the individual insurance market.[46] Structuring those credits as temporary provisions was a choice, and it was a bad one. It turned a coverage guarantee into a political commodity, renewable on partisan terms rather than on the merits of the coverage it provided. Twenty-two million people's access to health insurance has depended not on their eligibility or need, but on whether the political arithmetic of a given congressional session happened to favor extension.

These costs fall hardest on communities that already face the greatest barriers to coverage. Black families, who are more likely to live in non-expansion states and less likely to have employer-sponsored insurance, would absorb more than 200 preventable deaths annually, $740 million in additional premium costs, and $1.9 billion in economic losses if the enhanced credits lapse.[47] The administrative costs of repeated uncertainty, the market distortions created by insurer risk-pricing of potential lapse, and the reliance interests of millions of enrollees who organized their finances around continued subsidy availability compound those harms. As Posner and Vermeule establish, nothing in constitutional text, democratic theory, or efficiency analysis requires Congress to design benefits this way. The rule against legislative entrenchment, they argue, "has no deep justification in constitutional text and structure, political norms of representation and deliberation, efficiency, or any other source."[48]

Congress should convert the enhanced premium tax credits into a permanent statutory entitlement structured on the model of Social Security and Medicare, with income-graduated subsidies continuing as a matter of permanent federal law rather than as temporary provisions requiring periodic renewal. The reform would not eliminate legislative flexibility. Congress could always adjust benefit levels through ordinary majority action. What it would eliminate is the structural default of harm, the design that makes coverage contraction the automatic outcome of inaction. A Congress serious about health coverage should be willing to say so in the text of a permanent statute.

This piece was written by Chloe Eshagh and edited by Daphne Coplon.

42 Ctr. On Budget & Pol'y Priorities, Setting The Record Straight On Premium Tax Credit Enhancements, *supra* note 4.
43 *Id.*
44 *Id.*
45 Posner & Vermeule, *supra* note 31, at 1666.
46 Ctr. On Budget & Pol'y Priorities, Premium Tax Credit Improvements Must Be Extended To Prevent Steep Rise In Health Care Costs, *supra* note 10.
47 Bivens et al., *supra* note 27.
48 Posner & Vermeule, *supra* note 31, at 1666.

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