COMMENT

RACE, PLACE, AND POLLUTION: THE DEEP ROOTS OF ENVIRONMENTAL RACISM

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INTRODUCTION

Pollution in America’s air is disproportionately created by white Americans and breathed by Americans of color.1 As for the land and water, race is the single most significant variable in determining whether a person lives near a toxic site—significantly more so than income and other socioeconomic indicators.2 This disparity is neither coincidental3 nor fleeting.4 Rather, it is the product of deeply entrenched environmental racism. Sociologist Robert Bullard defines environmental racism as the

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1. Christopher W. Tessum et al., Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure, 116 Proc. of the Nat’l Acad. of Sci. 6001, 6001 (2019) (“On average, non-Hispanic whites experience a ‘pollution advantage’: They experience ~17% less air pollution exposure than is caused by their consumption. Blacks and Hispanics on average bear a ‘pollution burden’ of 56% and 63% excess exposure, respectively, relative to the exposure caused by their consumption.”).


aligning of public environmental policy and industry practices “to provide benefits for whites while shifting industry costs to people of color.”

Such discriminatory misallocation can be seen across the United States. The North American Free Trade Agreement (NAFTA) incentivized the United States and Mexico to relocate heavy industry to the border region, but neither country has enforced NAFTA’s environmental regulations to protect the local Latinx population from highly toxic drinking water contamination. A similar misallocation took place when the Ford Motor Company dumped unthinkable amounts of paint sludge, lead, and arsenic near its plant in Mahwah, New Jersey, and then built homes on the contaminated land and sold them to local Native Americans. The pollution has caused the members of the Ramapough Mountain Indian Tribe who moved in to suffer from ailments ranging from persistent rashes to cancer at astounding rates, and the Environmental Protection Agency (EPA) opened and closed a cleanup operation without putting a dent in the danger.

This Comment seeks to demonstrate that such injustices form more than a mere pattern; instead they are the product of a veritable system of racial exploitation that has been centuries in the making. This Comment provides a broad overview of the systemic inequality’s creation and perpetuation with a focus on legal and extralegal contributing forces. Such environmental racism is systematized through a nationwide and often legally enforced process of: (1) limiting where communities of color can form and live, (2) siting environmental hazards near those communities, and (3) depriving them of sufficient means to challenge illegal or unconstitutional environmental practices.

I. HOW WE GOT HERE

Part I focuses on the Black American experience with environmental racism to illustrate how this system came about and what methods public and private actors used to erect it. As seen with the Latinx and Native American populations described above, the discrimination described in this Part is not limited to Black communities. In particular, Asian Americans are exposed to cancer-causing air pollution at rates far higher than the American average—with Chinese Americans and Korean Americans facing higher

10. See infra Part I.B.
11. See infra Part I.C.
12. See infra Parts II.A–B.
exposure levels than any other groups—but studies have paid little attention to anti-Asian environmental racism. However, the extensive historical information and statistical data available on anti-Black environmental racism—largely researched and published by Black scholars—makes it an apt lens through which to analyze this system.

A. Race and Place

The Black population in the Southeast is largely concentrated in a single, crescent-shaped strip of land that runs through the centers of the Carolinas, Georgia, and Alabama and then arches northwesterly into Mississippi. This area—especially the section in Alabama and Mississippi—is commonly known as the Black Belt for the uniquely dark color of its soil. During the Cretaceous Period between 129 million and 65 million B.C.E., before sea levels lowered significantly, this same area was the United States’s southeasternmost coastline. Millions of years of plankton dying and sinking near the shore created a fertile upper level of soil now known as Selma chalk. This high-quality soil made the area ideal for cotton farming and consequently attracted many slaveowners who opened plantations.

Since emancipation, many Black Americans have stayed in the Black Belt. However, environmental changes in the 1910s spurred a Black mass relocation, known as the Great Migration, that transformed the American social landscape.

14. Id. at 71–72 (suggesting that the “model minority” status of Asian Americans has caused researchers to overlook environmental injustice in their communities).
17. See Joe MacGown et al., The Black Belt Prairie in Mississippi and Alabama, MISS. ENTOMOLOGICAL MUSEUM (Sept. 6, 2018), https://mississippientomologicalmuseum.org.msstate.edu/habitats/black.belt.prairie/BlackBeltPrairie.htm [https://perma.cc/3XAG-8DBC].
18. Higgs, supra note 21, at 335.
inspired their travels to northern and western cities. Rather, an infestation of boll weevils and persistent flooding from 1910 to 1930 made it nearly impossible to earn a living off the southern land, so rural Black southerners vented to far-off cities mostly out of financial necessity. White Americans accepted and encouraged Black relocation in this singular instance only because restrictions on immigration had recently caused a dire shortage in industrial labor. Since then, Black communities have not been as free to relocate in response to changes in their local environments and instead are made to live with growing environmental threats.

B. Why Don’t They Just Leave?

It would seem logical for Black Americans to move away from the polluted urban communities in which they primarily reside and move to relatively cleaner outlying areas. However, that is often not a realistic option. Many rural and suburban towns were—and to some extent continue to be—strictly off-limits to Black Americans through a mix of official policy and extralegal threats of violence. These communities are known as “sundown towns” because they often had signs at their town limits that contained some variation of: “[Expletive], Don’t Let the Sun Go Down on You in [Town Name].” A Black person out after dark could expect to be attacked, so many sundown towns have stayed all-white or close to it. The leading scholar on sundown towns believes that a majority of the incorporated municipalities in America outside of the South were—and in some cases continue to be categorically off-limits to Black people, which severely

25. See id.
26. See id. at 337; see also ISABEL WILKerson, THE WARMTH OF OTHER SUNS 36 (2010) (“The North faced a labor shortage and, after centuries of indifference, cast its gaze at last on the servant class of the South. The North needed workers, and the workers needed an escape.”).
27. See generally JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2018) (discussing limits on minority racial and religious groups relocating into predominantly white, Christian towns).
29. See LOEWEN, supra note 27, at 4.
30. Id. at 3.
31. See id. at 10–12.
32. See id. at 379–85 (describing how traditional sundown towns are becoming less prevalent but have not gone extinct).
33. Id. at 12. A significant majority of sundown towns are in the North and West; Southern communities generally have not practiced the wholesale exclusion of Black people in this way. See id. at 4. But see MAYA ANGELOU, I KNOW WHY THE CAGED BIRD SINGS 49 (Ballantine Books 2015) (1969) (implying that sundown towns were not uncommon in Mississippi).
restricts their ability to move away from environmental hazards and other undesirable conditions.

There have also been institutional and legal restrictions on Black mobility. Financial institutions limited Black movement within cities through redlining: the practice of using red ink to outline the neighborhoods on maps where Black people could live and refusing Black mortgage applications for homes outside those blocks.\(^\text{34}\) Early state constitutions and laws explicitly forbade Black people from entering states or required Black residents to leave: an 1851 Indiana state constitutional provision read, “No negro or mulatto shall come into or settle in the State,”\(^\text{35}\) and an 1844 statute from the Oregon Territory made Black residents endure thirty-nine lashes every six months until they moved away.\(^\text{36}\) State courts enforced racist restrictive covenants in home sales, which barred homeowners from renting or selling to anyone but other white people.\(^\text{37}\)

At the local level, early twentieth-century zoning ordinances explicitly prohibited Black Americans from moving into certain neighborhoods or required that they receive the approval of the majority of their new white neighbors first.\(^\text{38}\) After the U.S. Supreme Court struck down housing segregation ordinances as unconstitutional on equal protection grounds in the 1917 case Buchanan v. Warley,\(^\text{39}\) local governments pivoted to using facially neutral exclusionary zoning practices to control Black movement.\(^\text{40}\) To keep out Black residents, municipalities began prohibiting developers from building high-density, low-income, or rental housing units,\(^\text{41}\) which are often


\(^{35}\) IND. CONST. of 1851, art. XIII, § 1.


\(^{38}\) Rothstein, supra note 37 at 44–47.

\(^{39}\) 245 U.S. 60, 81 (1917) (“It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.”).

\(^{40}\) Rothstein, supra note 37, at 48.

\(^{41}\) See id.; see also, e.g., Urb. League of Essex Cnty. v. Township of Mahwah, 370 A.2d 521 (N.J. Super. Ct. App. Div. 1977) (discussing standing for plaintiffs alleging exclusionary zoning). The Black and Latinx plaintiffs worked at the Ford Motor plant described above, see
the only types of housing poorer Black Americans can afford. These tactics—along with others like steering, blockbusting, and the construction of segregated public housing—have left Black Americans with relatively little control over where they live. When policymakers have had to make tough choices about where to site major industrial polluters and other public health hazards, they have routinely chosen predominantly Black areas where the vulnerable locals will have few choices other than to live with the resulting deplorable conditions.

C. Only in Their Backyard

This is not a “chicken or egg” dilemma: Black communities do not move into polluted places; polluters come to them. For example, freed slaves founded Mossville, Louisiana—which is still a Black community—in 1790. The former slaves chose the remote bayou area for its rich natural resources, as its waterways were ideal for fishing and transportation. A small Black community thrived there until after World War II, when the state created tax incentives to open industrial businesses in the area. Today, a cluster of fourteen major polluters, including an oil refinery, a coal-powered power plant, and various chemical plants and manufacturers, operates in and around Mossville, giving the sky a bright, eerie glow at night.

See notes

supra notes 8–9, but could not live in any of the surrounding white towns for this reason. Urb. League of Essex Cnty., 370 A.2d at 525. Instead, they were forced to make long commutes from Newark, the Bronx, and Philadelphia. Id. at 522–23.


43. See Monica C. Bell, Anti-segregation Policing, 95 N.Y.U. L. Rev. 650, 669–71 (2020) (describing these various tactics racist actors used to concentrate Black populations “into the most dispossessed and exploited communities”). Real estate agents “steer” when they push people of color to only look for homes in neighborhoods where people of the same race already have a presence. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982) (defining steering). “Blockbusting” is the practice of misrepresenting to white homeowners that people of color will soon be moving into a neighborhood, getting them to “panic sell.” Stacy E. Seicshnaydre, The Fair Housing Choice Myth, 33 Cardozo L. Rev. 967, 1003 (2012). Public housing was rigidly segregated for much of the twentieth century. See Rothstein, supra note 37, at 20–24.

44. See Rothstein, supra note 37, at 54 (stating that racist industrial and toxic waste zoning became increasingly common over the course of the twentieth century).

45. Robert D. Bullard et al., Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years, 38 Envt’l L. 371, 373 (2008) (“[R]ecent evidence shows that the disproportionately high percentages of minorities and low-income populations were present at the time executive orders or public health guidelines were issued.”).

46. See Mossville: When Great Trees Fall (Fire River Films 2019).


48. See id.


50. Sayre, supra note 47.
resultant pollution has been devastating to the locals’ health, leaving them with high cancer rates, respiratory illnesses, and three times higher levels of carcinogenic dioxin in their blood than the average American. The reproductive health of local women has been hit especially hard, with hysterectomies becoming commonplace and disturbingly frequent birth defects and miscarriages.

Mossville is no outlier. Further north in St. Louis, local officials rezoned the city to place a U-shaped industrial zone around an existing Black neighborhood, separating it from the local white population and leaving it to bear the brunt of the coming pollution. Between New Orleans and Baton Rouge lies a stretch of land known as “Cancer Alley” because of the extraordinary amount of pollution spewed by petrochemical plants and the locals’ consequent cancer diagnoses. The polluting plants are mostly in historically Black areas. Of the thirteen municipal landfills and trash incinerators built in Houston between the early 1920s and the late 1970s, the city placed eleven of them in Black neighborhoods.

Policymakers and private industry have practiced this selective poisoning of Black communities over and over and again. The result is a nationwide system of immobilized Black American communities singled out to live and die in some of America’s worst environmental conditions. Because the problem is national in scope, it is only logical that the solution should be, too. As the federal agency tasked with keeping the environment clean and protecting Americans from environmental hazards, however, the EPA has so far stumbled in its efforts to answer the call. Part II addresses some of these past shortcomings and points to some reasons for optimism.

52. Id. at 429–30.
53. ROTSTEIN, supra note 37, at 50.
55. See id.
58. See Mock & Montgomery, supra note 28 (describing environmental racism in Braddock, Pennsylvania).
60. See Mohai & Saha, supra note 3 (finding a statistically significant relationship between the siting of environmental hazards and the locations of preexisting Black communities in a nationwide analysis).
II. THE PATH FORWARD

Efforts to identify, investigate, and rectify instances of environmental racism began to gain momentum on the federal level during the environmental justice (EJ) movement in the late twentieth century. Though constituents may pursue state and local avenues for redress, this Part discusses the history and potential future of federal remedies available to address environmental injustice.

A. The Environmental Justice Movement

The EJ movement is a political and social movement that seeks to address and rectify the disproportionate environmental impacts of regulations and laws on minority communities. The present-day EJ movement is often described as having begun in the late 1970s, when citizens of rural Warren County, North Carolina—who were mostly Black and overwhelmingly poor—began to protest the siting of a toxic landfill for polychlorinated biphenyls (PCBs) in their community. Though the residents failed to block the creation of the landfill, the weeks of protest drew national attention. In 1987, the United Church of Christ released a groundbreaking, national study finding that race, more so than socioeconomic status or other factors, was the most significant variable associated with the location of a toxic waste facility.

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In the early 1990s, the federal government responded to these concerns through executive action. President Bill Clinton issued the Executive Order on Environmental Justice (EO 12,898) in 1994, which directed all federal agencies to “identify[] and address[] . . . [the] disproportionately high and adverse human health or environmental effects of [their actions] on minority populations and low-income populations,” “develop an agency-wide environmental justice strategy,” and conduct their federal programs in nondiscriminatory ways. EO 12,898 also established the Federal Interagency Working Group on Environmental Justice, which the EPA

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62. See id.
65. See Skelton & Miller, supra note 63.
68. Id. at 860.
69. Id. at 861.
administrator headed and which sponsored a number of initiatives to promote EJ.70

Despite having acknowledged the reality of environmental racism, the federal government’s initial efforts to address it were largely ineffective.71 A report issued by the EPA’s Office of the Inspector General in 2004 found that the agency had “yet to identify minority and low-income populations or develop criteria for determining disproportionate impact; [had] not developed a clear vision or comprehensive strategic plan to address environmental justice . . . [and had] not consistently implemented environmental justice in EPA’s regional offices.”72 In 2005, the Government Accountability Office found that the EPA failed to adequately consider EJ issues when promulgating rules under the Clean Air Act.73 Despite a clear need for change and a presidential mandate to take action, the EPA did not make constructive progress.

B. Federal Remedies

In response to the federal government’s initial, insufficient efforts to rectify instances of environmental discrimination, advocates sought to address environmental disparities through litigation and by compelling administrative action.74 In particular, plaintiffs have utilized Title VI of the Civil Rights Act of 196475 to either directly sue recipients of federal funds or file administrative complaints with the EPA and other agencies.76 Yet the courts’ high evidentiary threshold and the EPA’s slow rate of resolving Title VI complaints have limited the efficacy of both remedies.

Title VI prohibits discrimination on the basis of race, color, or national origin by any program or entity that receives federal funding.77 Though Title VI does not explicitly create a private cause of action, most federal courts have interpreted § 601 as providing such a right and allowed plaintiffs to seek declaratory or injunctive relief under it.78 Since actions brought under § 601 of Title VI require a difficult showing of discriminatory intent, EJ advocates have sought to establish a similar private cause of action under § 602, which

70. See GAUNA ET AL., supra note 66, at 3.
71. Though this Comment focuses on federal remedies, advocates and residents also look to state and local approaches for addressing environmental injustice. See id. at 4 n.18.
72. See id. at 3.
74. See GAUNA ET AL., supra note 66, at 3; see also PERCIVAL ET AL., supra note 61, at 23.
77. 42 U.S.C. § 2000d.
78. See PERCIVAL ET AL., supra note 61, at 23.
would only require a demonstration of discriminatory impact.79 However, the Supreme Court in Alexander v. Sandoval80 denied that an implied right of action existed to enforce disparate-impact regulations promulgated under Title VI, effectively barring environmental plaintiffs from bringing these claims.81

Consequently, filing administrative complaints with the EPA or other agencies is one of the few avenues for federal redress available to EJ advocates. Yet a large backlog of Title VI complaints at the EPA’s Office of Civil Rights (OCR) has created significant procedural delays and frustrated attempts to resolve such complaints.82 Despite receiving hundreds of complaints of environmental racism over several decades, the agency did not make a single formal finding of discrimination until President Barack Obama’s administration, and the majority of complaints were rejected without opening investigations.83 A Center for Public Integrity investigation in 2015 found that the OCR often rejected complaints due to procedural delays that were the direct result of the agency’s own inaction.84

In response to such criticism, the EPA sought to strengthen its compliance with federal discrimination laws and improve its complaint resolution procedures. Under the leadership of Administrator Lisa Jackson, the agency launched “Plan EJ 2014,” a framework to better integrate EJ concerns in the agency’s programs and policies.85 The initiative included the issuance of the new “Plan EJ Legal Tools” to provide guidance on utilizing existing environmental statutes to address environmental injustices.86 In 2017, the agency issued its “External Civil Rights and Compliance Office Case Resolution Manual and Strategic Plan” to improve its procedures for investigating and resolving discrimination complaints.87 The EPA also

79. Id.
81. Id. at 293 (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”). Similarly, courts have also been unwilling to grant disparate impact (§ 602) Title VI claims brought under § 1983 of the Civil Rights Act. There is a current circuit split regarding the ability to raise § 601 claims under § 1983. See Percival et al., supra note 61, at 24.
82. See Gauna et al., supra note 66, at 3.
84. See id.
reorganized its OCR and redirected external civil rights complaints to the External Civil Rights Compliance Office within the EPA’s Office of General Counsel.\textsuperscript{88}

C. Proposed Solutions

Administrative delays or judicial barriers have largely stymied attempts to address environmental racism at the federal level, particularly attempts to enforce Title VI of the Civil Rights Act. However, recent changes at the EPA, EJ initiatives undertaken by the Biden administration, and proposed federal legislation could signal a broader shift toward more serious attempts at identifying, investigating, and rectifying instances of environmental racism.

In addition to the recent changes implemented at the EPA—including the creation of a new mapping software, the “EJSCREEN,”\textsuperscript{89} to aid the agency in implementing aspects of its EJ programs—the Biden administration established a White House Environmental Justice Interagency Council and a White House Environmental Justice Advisory Council by executive order in January 2021.\textsuperscript{90} The order prioritizes addressing current and historical environmental injustices, updates President Clinton’s EO 12,898, and further develops the EPA’s screening tools to identify areas of environmental concern.\textsuperscript{91}

Federal legislation addressing environmental racism will also be critical in protecting residents targeted by discriminatory environmental practices. The Environmental Justice Act of 2017,\textsuperscript{92} introduced in October 2017 by Senator


\textsuperscript{89}See How Does EPA Use EJSCREEN?: Environmental Justice Mapping and Screening at EPA, U.S. Env’t Prot. Agency, https://www.epa.gov/ejscreen/how-does-epa-use-ejscreen [https://perma.cc/GZN9-QBQ2] (last visited Apr. 30, 2021). The EPA uses EJSCREEN to inform outreach and engagement practices, develop retrospective reports of EPA work, and enhance geographically based initiatives. The EPA does not use EJSCREEN to identify an area as an “EJ community,” quantify risk values for a given area, measure the cumulative impact of environmental factors, or make determinations regarding the existence or absence of EJ concerns. \textit{Id.}


\textsuperscript{92}S. 1996, 115th Cong. § 2 (2017); H.R. 270, 115th Cong.
Cory Booker and Representative Raul Ruiz, would override Sandoval and provide plaintiffs with a private right of action for discriminatory-impact suits under Title VI so they no longer must rely solely on agencies to bring such actions on their behalf. Should this Act be reintroduced and enacted, it would also codify EO 12,898, require a consideration of cumulative impacts in federal and state permitting decisions, and enable plaintiffs like those harmed by the water crisis in Flint, Michigan to seek damages for statutory and tort claims.

CONCLUSION

As in many facets of American society, the effects of racist or otherwise discriminatory laws, policies, and practices are evident in the physical environments in which many Americans of color reside. Discriminatory allocations of resources and liabilities, restrictions on mobility, zoning regulations, and industry practices have repeatedly left communities of color disproportionately exposed to environmental hazards. With polluters often either encouraged or explicitly directed to locate near communities of color, already vulnerable populations have been forced to endure unconscionable health consequences.

Environmental racism is pervasive and generational, but efforts by residents and advocates to call attention to such injustice have not been in vain. Recent administrative changes and legislative proposals on the federal level may be indicative of a meaningful recommitment to rectifying EJ issues. These developments are the result of—and point to the continued need for—consistent advocacy and agitation by and on the behalf of those who live with the effects of racism deeply embedded into their physical environments. Race cannot continue to dictate the safety of the air Americans breathe and the water they drink. Lawmakers and regulators—long aware of these unjust discrepancies—must work quickly to reverse the effects of systemic environmental racism.

94. See id.
95. See supra notes 1–4 and accompanying text.
96. See, e.g., DAVIS, supra note 7 (describing how NAFTA incentivized polluting at the border); Sayre, supra note 48 and accompanying text (describing how the Louisiana state government used tax breaks to encourage polluters to locate near Black communities).
97. See, e.g., ROTSTEIN, supra note 53 (describing how the St. Louis government targeted a Black neighborhood for future pollution); Bullard, supra note 56 (describing Houston’s decision to build landfills in Black neighborhoods).
98. See, e.g., KLEIN, supra note 51, at 429–30 (describing maladies suffered by a Black community in Louisiana); supra notes 8–9 (describing a New Jersey Native American population’s health struggles).
99. See supra Part II.C.