

## 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.<sup>1</sup> 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.<sup>2</sup> This disparity is neither coincidental<sup>3</sup> nor fleeting.<sup>4</sup> 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.”).

2. UNITED CHURCH OF CHRIST COMM’N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xiii (1987), <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf> [<https://perma.cc/NZ6L-A47P>].

3. See generally Paul Mohai & Robin Saha, *Which Came First, People or Pollution?: Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, ENV’T RSCH. LETTERS (Nov. 18, 2015), <https://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008> [<https://perma.cc/X4MN-72SM>] (finding a statistically significant relationship between the siting of environmental hazards and the locations of preexisting Black communities in a nationwide analysis).

4. Compare *id.* (providing recent statistics), with U.S. GEN. ACCT. OFF., RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), <https://www.gao.gov/assets/150/140159.pdf> [<https://perma.cc/9BXZ-XZRN>] (discussing how states selected predominantly Black areas for the sites of landfills).

aligning of public environmental policy and industry practices “to provide *benefits* for whites while shifting industry *costs* to people of color.”<sup>5</sup>

Such discriminatory misallocation can be seen across the United States. The North American Free Trade Agreement<sup>6</sup> (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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> (2) siting environmental hazards near those communities,<sup>11</sup> and (3) depriving them of sufficient means to challenge illegal or unconstitutional environmental practices.<sup>12</sup>

## 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

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5. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 98 (3d ed. 2000).

6. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended in scattered sections of the U.S.C.).

7. See MIKE DAVIS, *MAGICAL URBANISM: LATINOS REINVENT THE U.S.* CITY 32–35 (2008) (describing the contaminated conditions that extend from San Diego to the destitute *colonias* of El Paso).

8. See *Morgan v. Ford Motor Co.*, No. 06-1080JAP, 2007 WL 1456154, at \*1–2 (D.N.J. May 17, 2007) (providing facts for toxic tort class action suit).

9. See generally MANN V. FORD (HBO 2010); see also Ron Stodghill, *Decades After a Plant Closes, Waste Remains*, N.Y. TIMES (July 29, 2007), <https://www.nytimes.com/2007/07/29/business/yourmoney/29spill.html> [<https://perma.cc/F6M9-577Q>].

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<sup>13</sup>—but studies have paid little attention to anti-Asian environmental racism.<sup>14</sup> 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.<sup>15</sup> This area—especially the section in Alabama and Mississippi<sup>16</sup>—is commonly known as the Black Belt for the uniquely dark color of its soil.<sup>17</sup> 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.<sup>18</sup> Millions of years of plankton dying and sinking near the shore created a fertile upper level of soil now known as Selma chalk.<sup>19</sup> This high-quality soil made the area ideal for cotton farming and consequently attracted many slaveowners who opened plantations.<sup>20</sup>

Since emancipation, many Black Americans have stayed in the Black Belt. However, environmental changes in the 1910s spurred a Black mass relocation,<sup>21</sup> known as the Great Migration, that transformed the American social landscape.<sup>22</sup> By 1930, 1.3 million Black Americans had left the South in search of work and better lives.<sup>23</sup> Popular history often exaggerates how much Black Americans’ desire for more accepting, less racist communities

13. Sara E. Grineski et al., *Asian Americans and Disproportionate Exposure to Carcinogenic Hazardous Air Pollutants: A National Study*, 185 SOC. SCI. & MED. 71, 76 (2017).

14. *Id.* at 71–72 (suggesting that the “model minority” status of Asian Americans has caused researchers to overlook environmental injustice in their communities).

15. Robert Krulwich, *Obama’s Secret Weapon in the South: Small, Dead, but Still Kickin’*, WNYC (Oct. 10, 2012), <https://www.npr.org/sections/krulwich/2012/10/02/162163801/obama-s-secret-weapon-in-the-south-small-dead-but-still-kickin> [https://perma.cc/JDJ2-CN5C].

16. *See Black Belt*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Black-Belt> [https://perma.cc/9PLF-FWVG] (last visited Apr. 30, 2021).

17. *See* Krulwich, *supra* note 15; *see also Black Belt Prairie*, NAT’L AERONAUTICS & SPACE ADMIN., <https://earthobservatory.nasa.gov/images/92321/black-belt-prairie> [https://perma.cc/3TJV-CR XR] (last visited Apr. 30, 2021).

18. Krulwich, *supra* note 15.

19. *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].

20. Krulwich, *supra* note 15.

21. *See generally* Robert Higgs, *The Boll Weevil, the Cotton Economy, and Black Migration 1910–1930*, 50 AGRIC. HIST. 335 (1976).

22. *Great Migration*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Great-Migration> [https://perma.cc/BSA3-THZ4] (last visited Apr. 30, 2021).

23. Higgs, *supra* note 21, at 335.

inspired their travels to northern and western cities.<sup>24</sup> 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 ventured to far-off cities mostly out of financial necessity.<sup>25</sup> 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.<sup>26</sup> Since then, Black communities have not been as free to relocate<sup>27</sup> in response to changes in their local environments and instead are made to live with growing environmental threats.<sup>28</sup>

### 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.<sup>29</sup> 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].”<sup>30</sup> A Black person out after dark could expect to be attacked, so many sundown towns have stayed all-white or close to it.<sup>31</sup> 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<sup>32</sup>—categorically off-limits to Black people,<sup>33</sup> which severely

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24. *See id.* at 336–37.

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).

28. *See, e.g.,* Brentin Mock & David Montgomery, *Environmentalists by Necessity*, BLOOMBERG CITYLAB (Aug. 1, 2018), <https://www.bloomberg.com/news/articles/2018-08-01/the-cumulative-toxic-assault-on-braddock-pennsylvania> [<https://perma.cc/G9DN-S7MW>] (describing how while 88 percent of the population of Braddock, Pennsylvania, has left the polluted and struggling city since 1940, a majority-Black population remains and endures shocking health problems caused by lead and other pollutants—including an infant mortality rate nearly three times that of their white neighbors in Allegheny County).

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.<sup>34</sup> 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,”<sup>35</sup> and an 1844 statute from the Oregon Territory made Black residents endure thirty-nine lashes every six months until they moved away.<sup>36</sup> State courts enforced racist restrictive covenants in home sales, which barred homeowners from renting or selling to anyone but other white people.<sup>37</sup>

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.<sup>38</sup> After the U.S. Supreme Court struck down housing segregation ordinances as unconstitutional on equal protection grounds in the 1917 case *Buchanan v. Warley*,<sup>39</sup> local governments pivoted to using facially neutral exclusionary zoning practices to control Black movement.<sup>40</sup> To keep out Black residents, municipalities began prohibiting developers from building high-density, low-income, or rental housing units,<sup>41</sup> which are often

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34. See *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998) (defining redlining).

35. IND. CONST. of 1851, art. XIII, § 1.

36. Tiffany Camhi, *A Racist History Shows Why Oregon Is Still So White*, OR. PUB. BROAD. (June 9, 2020, 9:00 AM), <https://www.opb.org/news/article/oregon-white-history-racist-foundations-black-exclusion-laws/> [https://perma.cc/U8DJ-BPUM]. Oregon law also barred Asian Americans from entering the state. See *On This Day — Jun 26, 1844: Oregon Territory Bans Free Black People*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/jun/26> [https://perma.cc/M6VL-RZ2J] (last visited Apr. 30, 2021).

37. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 78–79 (2017). For a discussion of how restrictive covenants were supplemented by threats of extrajudicial violence, see Brando Simeo Starkey, *Jim Crow, Social Norms, and the Birth of Uncle Tom*, 3 ALA. C.R. & C.L. L. REV. 69, 82–83 (2013) (discussing the Ku Klux Klan’s fondness for restrictive covenants). The U.S. Supreme Court upheld the legality of race-restrictive covenants in *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926), but later found them unconstitutional under the Fourteenth Amendment in *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). See Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 149 n.33 (2020).

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.<sup>42</sup> These tactics—along with others like steering, blockbusting, and the construction of segregated public housing<sup>43</sup>—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<sup>44</sup> 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.<sup>45</sup> For example, freed slaves founded Mossville, Louisiana—which is still a Black community—in 1790.<sup>46</sup> The former slaves chose the remote bayou area for its rich natural resources, as its waterways were ideal for fishing and transportation.<sup>47</sup> A small Black community thrived there until after World War II, when the state created tax incentives to open industrial businesses in the area.<sup>48</sup> 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,<sup>49</sup> giving the sky a bright, eerie glow at night.<sup>50</sup> The

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*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.

42. John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 614 (2008).

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 ENV'T L. 371, 373 (2008) (“[R]ecent evidence shows that the disproportionately high percentages of minorities and low-income populations were present at the time [when] commercial hazardous waste facilities were sited.”).

46. See *MOSSVILLE: WHEN GREAT TREES FALL* (Fire River Films 2019).

47. Katherine Sayre, *Closing Costs: As a Chemical Plant Expands, Mossville, Louisiana, Vanishes*, TIMES-PICAYUNE/NEW ORLEANS ADVOC. (Jan. 14, 2015), [https://www.nola.com/news/business/article\\_f478381c-ff36-57b3-adc2-2116c35982d9.html](https://www.nola.com/news/business/article_f478381c-ff36-57b3-adc2-2116c35982d9.html) [https://perma.cc/XY7Y-BSLT].

48. See *id.*

49. David S. Martin, *Toxic Towns: People of Mossville 'Are Like an Experiment'*, CNN (Feb. 26, 2010, 8:49 AM), <https://www.cnn.com/2010/HEALTH/02/26/toxic.town.mossville.epa/index.html> [https://perma.cc/4FG4-ESEP].

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.<sup>51</sup> The reproductive health of local women has been hit especially hard, with hysterectomies becoming commonplace and disturbingly frequent birth defects and miscarriages.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> The polluting plants are mostly in historically Black areas.<sup>55</sup> 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.<sup>56</sup>

Policymakers and private industry have practiced this selective poisoning of Black communities over<sup>57</sup> and over<sup>58</sup> and over<sup>59</sup> 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.<sup>60</sup> 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.

51. NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE* 429 (2014).

52. *Id.* at 429–30.

53. ROTHSTEIN, *supra* note 37, at 50.

54. See Tristan Baurick et al., *Welcome to "Cancer Alley," Where Toxic Air Is About to Get Worse*, PROPUBLICA (Oct. 30, 2019), <https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse> [<https://perma.cc/FB7A-4TBF>].

55. See *id.*

56. Robert D. Bullard, *The Mountains of Houston: Environmental Justice and the Politics of Garbage*, 93 CITE 28, 28–29 (2014), [https://offcite.rice.edu/2014/02/Cite\\_93\\_Mountains\\_of\\_Houston\\_Bullard.pdf](https://offcite.rice.edu/2014/02/Cite_93_Mountains_of_Houston_Bullard.pdf) [<https://perma.cc/FL4H-M54N>].

57. See Harriet Washington, *Monsanto Poisoned This Alabama Town — and People Are Still Sick*, BUZZFEED NEWS (July 26, 2019, 10:14 AM), <https://www.buzzfeednews.com/article/harrietwashington/monsanto-anniston-harriet-washington-environmental-racism> [<https://perma.cc/BL2X-NCDZ>] (describing environmental racism in Anniston, Alabama).

58. See Mock & Montgomery, *supra* note 28 (describing environmental racism in Braddock, Pennsylvania).

59. See Thomas St. Myer, *Wedgewood Victim of Environmental Racism?*, PENSACOLA NEWS J. (Oct. 31, 2015), <https://www.pnj.com/story/news/2015/10/31/wedgewood-victim-environmental-racism/74640306/> [<https://perma.cc/5TVG-VPCY>] (describing environmental racism in Wedgewood, Florida, where a landfill pollutes a local Black community's air and water, causing breathing problems, headaches, and sleep apnea).

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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> Though the residents failed to block the creation of the landfill,<sup>64</sup> the weeks of protest drew national attention.<sup>65</sup> 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.<sup>66</sup>

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,”<sup>67</sup> “develop an agency-wide environmental justice strategy,”<sup>68</sup> and conduct their federal programs in nondiscriminatory ways.<sup>69</sup> EO 12,898 also established the Federal Interagency Working Group on Environmental Justice, which the EPA

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61. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 17 (8th ed. 2018).

62. See *id.*

63. See Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice—Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1075 (2014); see also Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NRDC (Mar. 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement> [https://perma.cc/G88H-SE5T].

64. *Warren Cnty. v. North Carolina*, 528 F. Supp. 276, 296 (E.D.N.C. 1981).

65. See Skelton & Miller, *supra* note 63.

66. See generally UNITED CHURCH OF CHRIST COMM’N FOR RACIAL JUST., *supra* note 2; see also EILEEN GAUNA ET AL., ENVIRONMENTAL JUSTICE 4 (2005), [https://cpr-assets.s3.amazonaws.com/documents/EJ\\_505.pdf](https://cpr-assets.s3.amazonaws.com/documents/EJ_505.pdf) [https://perma.cc/26LS-SGPW].

67. Exec. Order No. 12,898, 3 C.F.R. 859, 859 (1995).

68. *Id.* at 860.

69. *Id.* at 861.

administrator headed and which sponsored a number of initiatives to promote EJ.<sup>70</sup>

Despite having acknowledged the reality of environmental racism, the federal government's initial efforts to address it were largely ineffective.<sup>71</sup> 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."<sup>72</sup> In 2005, the Government Accountability Office found that the EPA failed to adequately consider EJ issues when promulgating rules under the Clean Air Act.<sup>73</sup> 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.<sup>74</sup> In particular, plaintiffs have utilized Title VI of the Civil Rights Act of 1964<sup>75</sup> to either directly sue recipients of federal funds or file administrative complaints with the EPA and other agencies.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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

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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.

73. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-289, ENVIRONMENTAL JUSTICE: EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES (2005), <https://www.gao.gov/products/GAO-05-289> [<https://perma.cc/W2X2-P5R5>]; PERCIVAL ET AL., *supra* note 61, at 21; see also Clean Air Act, 42 U.S.C. §§ 7401–7515.

74. See GAUNA ET AL., *supra* note 66, at 3; see also PERCIVAL ET AL., *supra* note 61, at 23.

75. 42 U.S.C. §§ 2000d, 2000d-7.

76. See GAUNA ET AL., *supra* note 66, at 3; see also Albert Huang, *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, AM. BAR ASS'N (Mar. 1, 2012), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2011\\_12/march\\_april/environmental\\_justice\\_title\\_vi\\_civil\\_rights\\_act/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/) [<https://perma.cc/PJT7-PHBB>].

77. 42 U.S.C. § 2000d.

78. See PERCIVAL ET AL., *supra* note 61, at 23.

would only require a demonstration of discriminatory *impact*.<sup>79</sup> However, the Supreme Court in *Alexander v. Sandoval*<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> The initiative included the issuance of the new "Plan EJ Legal Tools" to provide guidance on utilizing existing environmental statutes to address environmental injustices.<sup>86</sup> 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.<sup>87</sup> The EPA also

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79. *Id.*

80. 532 U.S. 275 (2001).

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.

83. *See* Kristen Lombardi et al., *Environmental Racism Persists, and the EPA Is One Reason Why*, CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), <https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-reason-why/> [https://perma.cc/8PJ3-RVFZ].

84. *See id.*

85. *See Plan EJ 2014: At-A-Glance*, U.S. ENV'T PROT. AGENCY, <https://nepis.epa.gov/Exec/ZyPDF.cgi/P100DFCO.PDF?Dockey=P100DFCO.PDF> [https://perma.cc/3BJT-3NGW] (last visited Apr. 30, 2021).

86. *See* U.S. ENV'T PROT. AGENCY, PLAN EJ 2014: LEGAL TOOLS (2011), <https://www.epa.gov/sites/production/files/2015-02/documents/ej-legal-tools.pdf> [https://perma.cc/W38U-ZGSP]; *see also Plan EJ 2014: Legal Tools Development*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/plan-ej-2014-legal-tools-development> [https://perma.cc/S72G-F7SQ] (last visited Apr. 30, 2021).

87. U.S. ENV'T PROT. AGENCY, EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE STRATEGIC PLAN: FISCAL YEAR 2015–2020 (2017), [https://www.epa.gov/sites/production/files/2017-01/documents/final\\_strategic\\_plan\\_ecrco\\_january\\_10\\_2017.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf) [https://perma.cc/3ZVQ-

reorganized its OCR and redirected external civil rights complaints to the External Civil Rights Compliance Office within the EPA's Office of General Counsel.<sup>88</sup>

### 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,”<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

Federal legislation addressing environmental racism will also be critical in protecting residents targeted by discriminatory environmental practices. The Environmental Justice Act of 2017,<sup>92</sup> introduced in October 2017 by Senator

SF2M]. The EPA's 2021 Case Resolution Manual updated and superseded the 2017 report. See generally U.S. ENV'T PROT. AGENCY, CASE RESOLUTION MANUAL JANUARY 2021 (2021), [https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5\\_final\\_case\\_resolution\\_manual.pdf](https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf) [<https://perma.cc/8AYJ-AAZH>].

88. See Memorandum from Gina McCarthy, Adm'r, U.S. Env't Prot. Agency, to Gen. Couns. et al., U.S. Env't Prot. Agency (Dec. 7, 2016), <https://www.documentcloud.org/documents/3386492-EPA-MEMO-on-REORG.html> [<https://perma.cc/K7K2-K2CQ?type=image>]; see also *External Civil Rights Office (Title VI)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi> [<https://perma.cc/ZJ2R-XSG8>] (last visited Apr. 30, 2021).

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. *Id.*

90. Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629–30 (2021).

91. Press Release, White House, FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/> [<https://perma.cc/KB9S-DYDU>].

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.<sup>93</sup> 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.<sup>94</sup>

#### 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.<sup>95</sup> With polluters often either encouraged<sup>96</sup> or explicitly directed<sup>97</sup> to locate near communities of color, already vulnerable populations have been forced to endure unconscionable health consequences.<sup>98</sup>

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.<sup>99</sup> 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.

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93. See *Booker Announces Landmark Environmental Justice Bill*, CORY BOOKER (Oct. 23, 2017), <https://www.booker.senate.gov/news/press/booker-announces-landmark-environmental-justice-bill> [<https://perma.cc/6SGT-DURL>].

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., ROTHSTEIN, *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.