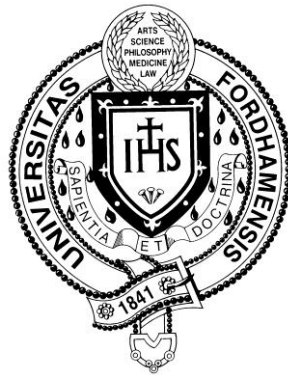


# FORDHAM ENVIRONMENTAL LAW REVIEW



ENVIRONMENTAL RACISM: USING ENVIRONMENTAL PLANNING TO LIFT  
PEOPLE OUT OF POVERTY, AND RE-SHAPE THE EFFECTS OF CLIMATE  
CHANGE & POLLUTION IN COMMUNITIES OF COLOR

*William C.C. Kemp-Neal J.D.*

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*“Long before the phrase I can’t breathe became a rallying cry for Black Lives Matter activists protesting the deaths of Black people at the hands of police, environmental-justice activists warned that pollution was choking and killing people of color in the U.S.”<sup>1</sup>*

ABSTRACT

*In the mid-1900s the United States began to see a rise in concern for environmental awareness issues. In the early days the movement focused on things like clean air, water and pollution but by the 1970s-1990s many prominent environmental awareness groups began to form focused on the idea that in order to avert climate change the principal goal needed to be to reduce global greenhouse gas emissions. In 1987 a report was released called Toxic Waste and Race, which outlined an intimate link between the placement of environmental hazardous waste sites in communities of color, and greater instances of polluted air, with contaminated water and soil in those communities as well. The concept of “Environmental Justice” soon formed with advocates labelling the above trend to disproportionately burden minority communities with environmentally harmful industries or practices “Environmental Racism.”*

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<sup>1</sup> Justin Worland, *Justice For All*, TIME MAG. 68, 70 (July 20, 2020), <https://time.com/5864704/environmental-racism-climate-change/>.

*Environmental justice advocates argued that in order to meaningfully fight climate change and environmental destruction the conversation must include policy changes to address the disparate impact climate change and environmental abuse has on low-income communities of color. Initially, the broader environmental awareness movement was slow to adopt environmental justice initiatives out of fear it would impede their emissions reduction goals, however, slowly the movement has grown. This Article argues that the best way to overcome environmental racism and ultimately climate change is to; incorporate environmental justice concepts into national policy, create a right of action for private actors so that low-income minority groups can hold polluters accountable, and to create federal preclearance criteria that prevent environmentally damaging projects from being clustered in low-income minority neighborhoods in the first place.*

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## INTRODUCTION

With the rise of prominent climate activists such as Greta Thunberg, who won Time Magazine’s person of the year in 2019 for a speech she gave at the United Nations (“U.N.”) Climate Conference, on the dangers of rising greenhouse gas emissions,<sup>2</sup> global attention to the issues of climate change and environmental protection has been steadily on the rise globally over the past few decades. Here in the United States (“U.S.”) specifically, we have also experienced a massive cultural shift, where beginning in the 1960s after a few prominent natural disasters, the importance of fighting back against climate change and environmental pollution and destruction, began to be adopted into the central policy goals of mainstream American ideology.<sup>3</sup> Currently, the importance of environmental preservation has expanded deeper into the American political realm, especially on the Democratic left, with both progressive politicians like Congresswoman Alexandria Ocasio-Cortez (“A.O.C.”)<sup>4</sup> and even more moderate political leaders like the current sitting President, at the time of writing this paper in 2021, Joseph R. Biden.<sup>5</sup> Biden in particular, who upon being elected, declared his dedication to fighting

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<sup>2</sup> See Charlotte Alter, Suyin Haynes & Justin Worland, *2019 Person of the Year | Greta Thunberg*, TIME MAG. (Dec. 11, 2019), <https://time.com/person-of-the-year-2019-greta-thunberg/>.

<sup>3</sup> See generally Erin L. Gordon, *History of the Modern Environmental Movement in America*, AM. CTR. (June 2012), [https://photos.state.gov/libraries/mumbai/498320/fernandesma/June\\_2012\\_001.pdf](https://photos.state.gov/libraries/mumbai/498320/fernandesma/June_2012_001.pdf).

<sup>4</sup> See generally, Marianne Lavelle, *Biden Names Ocasio-Cortez, Kerry to Lead His Climate Task Force, Bridging Democrats’ Divide*, INSIDE CLIMATE NEWS (May 13, 2020), <https://insideclimatenews.org/news/13052020/biden-ocasio-cortez-kerry-climate-task-force/>.

<sup>5</sup> See *id.*

the climate crisis,<sup>6</sup> and created among other things, a task force to tackle the climate change issue.<sup>7</sup>

On its face this seems like entirely good news, however, many of the broader aims of the environmental awareness movement have come to overshadow the more focused ways in which environmental destruction and pollution disproportionately impacts low-income regions, regions with large populations of minorities<sup>8</sup> in particular.<sup>9</sup> Many of the national environmental groups that formed throughout the 1970s-1990s feared that overlapping environmental concerns with the issue of racial justice would distract the larger public from the group's main goal which was to reduce emissions from the burning of fossil fuels, so the activists calling attention to the racial aspect of the problem in this period were largely ignored.<sup>10</sup> People of color in American continued to choke to death on polluted air, while the broader environmental awareness movement remained principally concerned with the various national metrics surrounding levels of greenhouse gas emissions.<sup>11</sup> It of course comes as no surprise that it is poor communities that are often the most polluted,<sup>12</sup> and with communities of color being the most poor, in the 1980s, activists and academics alike began to push for the concept of environmental justice.<sup>13</sup> "Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."<sup>14</sup>

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<sup>6</sup> Briefing Room – Statements and Releases, *FACT SHEET: President Biden's Leaders Summit on Climate*, THE WHITE HOUSE (Apr. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/> [hereinafter *FACT SHEET: President Biden*].

<sup>7</sup> See Lavelle, *supra* note 4.

<sup>8</sup> Author's Note, For the purposes of this paper by minority I mean person of color (black, brown, Asian, etc.), or people of non-western decent.

<sup>9</sup> See Worland, *supra* note 1, at 70.

<sup>10</sup> See generally *id.* at 71.

<sup>11</sup> See *id.*

<sup>12</sup> See Acumen Academy, What's the Relationship between Poverty & the Environment? | Designing for Sustainability, YOUTUBE (Sept. 26, 2018), <https://www.youtube.com/watch?v=bD-TIRvZNOY>.

<sup>13</sup> See Worland, *supra* note 1, at 70; see also *Environmental Justice*, U.S. ENVTL. PROTECTION AGENCY [EPA] (last updated May 3, 2021), <https://www.epa.gov/environmentaljustice>.

<sup>14</sup> *Environmental Justice*, *supra* note 13.

Environmental justice advocates argue that not only has it been a mistake to ignore the disparate impact climate change and habitat destruction has had on different racial, or low-income groups, seen through this lens, disassociating the environmental awareness movements goals from racial concerns have helped lead to the perpetuation of environmental racism.<sup>15</sup> Robert D. Bullard, then Professor of Sociology at the University of California at Riverside, defined environmental racism broadly. In his view, “[e]nvironmental racism refers to any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color.”<sup>16</sup> This paper adopts this definition and further argues that substantive policy cannot ever hope to meaningfully solve the looming environmental crisis upon us until we address systemic environmental racism.<sup>17</sup> Part I of this Article will discuss in detail the background of many of the different ways that low-income and minority groups have been oppressed with environmentally racist practices and policies both globally and domestically. Part II will discuss the various ways in which we can work to overcome environmental racism against those groups through incorporating more environmental justices concepts into national policy, as well as, a discussion how litigation can be used to advance environmental justice goals. Then there will be a brief conclusion where what lawyers can do to assist in the movement individually will be discussed.

I. BACKGROUND: HOW MINORITY GROUPS HAVE BEEN AFFECT BY ENVIRONMENTAL RACISM BOTH GLOBALLY AND DOMESTICALLY

Under a conventional wisdom, there exists multiple sets of different macro level issues within our society.<sup>18</sup> There are explicitly environmental issues such as climate change, pollution, and extreme

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<sup>15</sup> Worland, *supra* note 1.

<sup>16</sup> *Environmental Racism: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. On the Judiciary*, 103d Cong., 1st Sess. (1993) [hereinafter *Hearings*].

<sup>17</sup> See Worland, *supra* note 1, at 72.

<sup>18</sup> See Melanie Lefkowitz, *Minorities Have Broader View of Environmental Issues*, CORNELL CHRON. (Mar. 12, 2020), <https://news.cornell.edu/stories/2020/03/minorities-have-broader-view-environmental-issues>.

weather events such as forest fires and hurricanes,<sup>19</sup> then there are issues of inequality like racism and poverty.<sup>20</sup> At first glance these different types of issues seem to sit in different buckets, however, this is not the reality.<sup>21</sup> Environmental and inequality issues sit at a nexus to one another and are intimately intertwined.<sup>22</sup> As mentioned above and also noted by Cornell researchers Neil Lewis Jr. and Jonathon Schuldt, to the broader mainstream community, “[y]ou could go out and talk about climate change and invasive species, but those might not be what really counts as the leading environmental issues for [every] communit[y] you want to reach.”<sup>23</sup>

According to tLewis and Schuldt’s findings, minorities and low-income groups reach different conclusions about what counts as an environmental issue when compared to whiter and wealthier people.<sup>24</sup> For some communities the most urgent environmental concern could be a range of issues from the flooding in their local region, or industrial pollution, to contaminated drinking water, or even to health issues, like obesity, diabetes, and food shortages.<sup>25</sup> As a whole “members of marginalized communities [are] more likely to view human-oriented factors, like drug use and unemployment, as environmental, and to have broader views of what constitutes an environmental issue.”<sup>26</sup>

#### A. *The Disparate Impact of Environmentally Racist Policy’s and Effects Globally*

Around the world, “[e]thnic minorities face discrimination in the labour market[s] and limited access to education and health care

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<sup>19</sup> See Vivian D. Wesson, Environmental Racism: How Lawyer Can Help Close the Climate Gap, NYSBA (Dec. 7, 2020), <https://nysba.org/environmental-racism-how-lawyers-can-help-close-the-climate-gap/>.

<sup>20</sup> Lefkowitz, *supra* note 18.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> Neil Lewis Jr. & Jonathan Schuldt, Interview Discussing their findings on poverty, inequality and environmental issues, 2017, <https://news.cornell.edu/stories/2020/03/minorities-have-broader-view-environmental-issues> [hereinafter Lewis & Schuldt Interview].

<sup>24</sup> Lefkowitz, *supra* note 18 (referencing Lewis & Schuldt Interview, *supra* note 23).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

even when the economy is going well.”<sup>27</sup> This leads to a situation where minorities, and minority nations globally become vulnerable to scapegoating and numerous other types of abuses.<sup>28</sup> Environmental racism being chief among the abuses, as low-income nations tend to have more lax environmental regulations set, due mainly to the desperation of either the people as a whole or the extreme poverty of a subset of the population, most often a subset of people who are either Black, Brown, or Asian.

In South Africa, during Apartheid, mineral mining companies were placed near predominantly Black local communities where they were allowed to operate without any legal regulations or restraints.<sup>29</sup> This compromised the regions ecology, and led to health issues both in the impoverished workers,<sup>30</sup> and the members of the nearby town.<sup>31</sup> Desperation has led many predominantly minority, cash-strapped nations, to offer up, for a fee, their countries territory as dumping grounds for dilapidated and dangerous materials such as large out of commission shipping vessels/wrecks.<sup>32</sup> These abandoned boats then make the coastal waters of these countries unnavigable as well as polluted with the toxic particles that leak out from the deteriorating

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<sup>27</sup> *Id.* (quoting Lisa Wong, Senior Declaration Officer, ILO Programme of Promoting the Declaration on Fundamental Principles and Rights at Work).

<sup>28</sup> *Id.*

<sup>29</sup> Llewellyn Leonard, *Mining Corporations, Democratic Meddling, and Environmental Justice in South Africa*, MDPI (Dec. 7, 2018), <https://www.mdpi.com/2076-0760/7/12/259/htm> (Introduction).

<sup>30</sup> JP Casey, *History of Mining in South Africa*, MINING TECH. (May 20, 2019), <https://www.mining-technology.com/features/history-of-mining-in-south-africa/> ([T]he number of . . . miners employed in “cheap black labour” jumped from 14,000 in 1890 to 534,000 in 1986. . . [During] [a]partheid, the government[’s] policy of racial segregation, influenced and encouraged this reliance on “cheap black labour”, legitimising the division between a small group of white owners responsible for managing mining companies, and larger numbers of black workers involved in the day-to-day running of operations.).

<sup>31</sup> Leonard, *supra* note 29.

<sup>32</sup> See Ishtiaque Ahmed, *Safe & Environmentally Sound Recycling of Ships: A Stocktaking of the Current State of International Law*, 31 *Fordham Envtl. L. Rev.* 60, 89 (2020), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1825&context=elr>; see also David Goran, *The port of Nouadhibou: World’s largest ship graveyard with over 300 rotting ships*, THE VINTAGE NEWS (Aug. 16, 2016), <https://www.thevintagenews.com/2016/08/16/priority-11/> (last visited April 18, 2020).



painted hulls.<sup>33</sup> Or alternatively many of these countries agree to process and/or manufacture hazardous and toxic chemicals and plastics, materials that in wealthy western countries are either not processed at all or are regulated at much greater scrutiny.

The city of Bhopal, within Madhya Pradesh, India's 4<sup>th</sup> poorest state,<sup>34</sup> back in 1984, experienced what still remains the world's worst industrial-environmental disaster when 30 tons of a toxic gas called Methyl was released into the air exposing 600,000 people to the chemical, where as many as 16,000 of them died.<sup>35</sup> Union Carbide Corporation ("UCC"), the company that owned the Bhopal factory, also ran a sister factory in the West Virginia, U.S., which of course did not experience a disastrously deadly leak.<sup>36</sup> This is likely because the UCC implemented almost none of the safety procedures in their Bhopal plant, that they followed for their West Virginian one.<sup>37</sup> Western plastic waste was sold to China and other south east Asian countries for decades, where it was processed in extremely poor regions generating miniscule amounts of profit.<sup>38</sup> Saddling areas that use to be renowned for their "streams, peach trees and simple, rolling landscape[s]," with polluted lakes, and an excess of plastic trash, along with the numerous health effects that began to arise in the poor factory workers as the cities grew dirtier.<sup>39</sup>

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<sup>33</sup> See Ahmed, *supra* note 32 (By the 1970s, most ocean-going vessels had tributyltin ("TBT") painted on their hulls. . . TBT has been found to be the most toxic substance ever deliberately introduced into the marine environment by human beings.).

<sup>34</sup> Ankur Sirothia, *Madhya Pradesh is 4th Poorest State in Country: Global Study*, TOI (Sept. 30, 2018), <https://timesofindia.indiatimes.com/city/bhopal/madhya-pradesh-is-4th-poorest-state-in-country-global-study/articleshow/66014164.cms>.

<sup>35</sup> See Alan Taylor, *Bhopal: The World's Worst Industrial Disaster, 30 Years Later*, THE ATLANTIC (Dec. 2, 2014), <https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/>; see also Apoorva Mandavilli, *The World's Worst Industrial Disaster Is Still Unfolding*, THE ATLANTIC (July 10, 2018), <https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/>.

<sup>36</sup> Mandavilli, *supra* note 35.

<sup>37</sup> *Id.*

<sup>38</sup> Adam Minter, *Plastic, Poverty and Pollution in China's Recycling Dead Zone*, THE GUARDIAN (July 16, 2014), <https://www.theguardian.com/lifeandstyle/2014/jul/16/plastic-poverty-pollution-china-recycling-dead-zone>.

<sup>39</sup> *Id.*

Many of these nations were literally drowning in western trash when in 2018 China decided that it would stop importing plastic waste that was often unrecyclable and toxic plastics, a move that put recycling processes in both the U.S. and Canada in jeopardy.<sup>40</sup> The Philippines and Canada were involved in a year's long international incident over a similar matter when back in 2013, Canada declared 69 containers it was exporting to the Philippines to be recyclable materials, however, upon inspection at a Philippine port, the containers were discovered to be mostly rotting household waste.<sup>41</sup> Philippine Environmental Activist groups protested Canada's actions by sailing boats that carried banners reading "Philippines: not a garbage dumping ground!"<sup>42</sup> The containers sat at the Philippine port for nearly 5 years, before Canada did eventually agree to take them back, in 2019.<sup>43</sup>

*B. Environmental Racism Domestically in the U.S.*

On an individual level "[p]overty is exhausting,"<sup>44</sup> it is despair and it is desperation-inducing.<sup>45</sup> "Poverty is soul, dream and hope crushing,"<sup>46</sup> leaving a person with very few options and life becomes little more than survival.<sup>47</sup> What determines whether a person can escape poverty is their access to resources, to networks of support and the choices that are available to them.<sup>48</sup> Looking closely at America, Blacks and Hispanics have the least access to opportunity and resources, and therefore according to the Current Population Survey Annual Social and Economic Supplement ("CPS ASEC"), "continue to be over-represented in the population in poverty relative

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<sup>40</sup> Kenneth Rapoza, *China Quits Recycling U.S. Trash As Sustainable Stat-Up Makes Strides*, FORBES (Jan. 10, 2021), <https://www.forbes.com/sites/kenrapoza/2021/01/10/china-quits-recycling-us-trash-as-sustainable-start-up-makes-strides/?sh=42044c1f5a56>.

<sup>41</sup> Hanna Ellis-Petersen, *Philippines ships 69 containers of rubbish back to Canada*, THE GUARDIAN (May 30, 2019), <https://www.theguardian.com/world/2019/may/31/philippines-puts-69-containers-of-rubbish-on-boat-back-to-canada>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

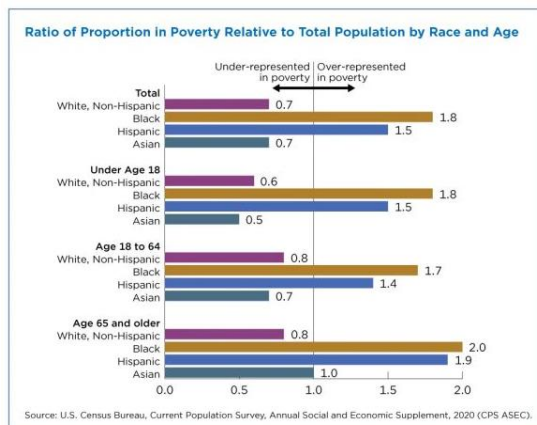
<sup>44</sup> Andrea Fuller, *Life Amidst Poverty*, TALK POVERTY (May 11, 2015), <https://talkpoverty.org/2015/05/11/losing-finding-life-amidst-poverty/>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



to their representation in the overall population.”<sup>49</sup> This is demonstrated on the adjacent chart provided by the U.S. Census Bureau. Following this, it comes as no surprise that in the U.S., race is the biggest factor in determining the likelihood of whether a person lives near polluted water, air or contaminated soil.<sup>50</sup>

In 2019 a fire erupted at an industrial factory in Philadelphia Pennsylvania.<sup>51</sup> A single elbow joint failed, one of thousands within the sites complex plumbing layout, and this resulted in several fire ball explosions pluming up into the air, illuminating the night sky in a fiery blindness, and raining down industrial debris on to the hundreds of nearby homes.<sup>52</sup> It took several hours to get the catastrophe under control, however, when it was all said and done it was estimated over 5,200 pounds of deadly hydrochloric acid was released in the explosion, much of it dispensing right into the atmosphere.<sup>53</sup> The factory which was located in the low-income majority-minority South Philadelphia neighborhood, had been long considered a nuisance, with many complaining about the pollution the plant emitted long before the 2019 explosion; it’s estimated that toxic emissions released into the air from the plant have been responsible for more than half of the cancer related deaths in the Philadelphia.<sup>54</sup>

<sup>49</sup> John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>.

<sup>50</sup> Bryce Covert, *Race Best Predicts Whether You Live Near Pollution*, THE NATION (Feb. 18, 2016), <https://www.thenation.com/article/archive/race-best-predicts-whether-you-live-near-pollution/>.

<sup>51</sup> Worland, *supra* note 1.

<sup>52</sup> Pipa Stevens, *We Finally Know What Caused the Refinery Blast that Rocked Philadelphia*, CNBC (Oct. 16, 2019), <https://www.cnbc.com/2019/10/16/we-finally-know-what-caused-the-refinery-blast-that-rocked-philadelphia.html>.

<sup>53</sup> *Id.*

<sup>54</sup> Worland, *supra* note 1.

Deals are sometimes even struck between domestic government actors and marginalized minority communities creating agreements similar to the ship dumping situation discussed above, where a locality will be paid to house toxic materials. Native American reservations for example, were already subjected to significant amounts of radioactive and otherwise hazardous waste as a result of being placed near nuclear test sites, uranium mines, and toxic waste dumps, when some tribes decided to invite the government to dump hazardous waste on their sovereign reservations.<sup>55</sup> Reservations are not subject to the same environmental and health standards as traditional U.S. land, so this became a good way for some tribes to generate revenues. In terms of direct governmental actions, the still ongoing water contamination situation in Flint Michigan must also be mentioned. In 2014 local officials, in an effort to save money, switched the city's main water supply route, leading to poisonous lead contamination of the town's drinking water, that caused skin rashes, hair loss, and a number of other health issues for what was a predominantly low-income minority populace.<sup>56</sup>

As stated in the opening quote pollution has long choked the lungs of Black and Brown people in the U.S., however, the damage from living near polluted lands and water has been just as great. Fifty-six percent of the people living near toxic waste facilities in the U.S. are people of color, people of color have increased rates of cancer, and they are two times as likely to have reduced access to potable water.<sup>57</sup> These statistics are not new figures and the effects that environmentally racist policies have had on black and brown communities were discussed as far back as 1987, when a report called the "Toxic Waste and Race" by Charles Lee crystalized the link between race and proximity to environmental pollution.<sup>58</sup> This of

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<sup>55</sup> EarthTalk, *Reservations about Toxic Waste: Native American Tribes Encouraged to Turn Down Lucrative Hazardous Disposal Deals*, SCIENTIFIC AM. (Mar. 31, 2010), <https://www.scientificamerican.com/article/earth-talk-reservations-about-toxic-waste/>.

<sup>56</sup> Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NRDC (Nov. 8, 2012), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know>.

<sup>57</sup> Covert, *supra* note 50.

<sup>58</sup> *Toxic Waste and Race in the United States*, COMM. FOR RACIAL JUST. UNITED CHURCH OF CHRIST (1987), [http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy\\_url/13567/toxw-race87.pdf?1418439935](http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/13567/toxw-race87.pdf?1418439935).

course, then snowballs into the situation we see today in 2021 dealing with COVID-19. COVID-19, a disease that effects the respiratory system, is killing Black Americans at twice the rate of their white counterparts.<sup>59</sup> This is in large part because of environmental issues like pollution-caused asthma and heart disease are so much higher in black communities that tend to be located near pollution emitting facilities.<sup>60</sup>

## II. ADDRESSING THE SYSTEMIC ISSUES THAT CONTRIBUTE TO ENVIRONMENTAL RACISM, AND STAND IN THE WAY OF ENVIRONMENTAL JUSTICE

Environmental racism is a multifaceted systemic issue and therefore the solutions need to be equally robust. Much of the framework that environmental justice legislation has been built off of in America began in 1994 when then President William J. Clinton signed Executive Order 12898 (“EO 12898”). EO 12898 instructed federal agencies to pursue environmental justice policies that would limit the “disproportionately high and adverse” effects of environmental harms on low-income communities and people of color, as well as empowered the federal Environmental Justice Advisory Council (“EJAC”), only two years old at the time, to influence the priorities of the Environmental Protection Agency (“EPA”).<sup>61</sup> EO 12898 was the culmination of decades of work by hundreds of environmental justice advocacy groups, civil rights groups and grassroots organizations that all came together to draft the text of the order.<sup>62</sup> It’s signing brought national attention to the issue of environmental justice and spurred the creation of several regulations and policies aimed at curtailing environmental racism.<sup>63</sup> In 1994 only

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<sup>59</sup> Worland, *supra* note 1.

<sup>60</sup> *Id.*

<sup>61</sup> See generally Exec. Order No. 12898, 59.32 Fed. Reg. 7629, (Feb. 11, 1994), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>; see also *Summary of Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA (last updated on July 23, 2020), <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>.

<sup>62</sup> Adam Mahoney, *What Biden Could Learn From Bill Clinton’s Unfinished Work on Environmental Justice*, GRIST (Feb 24, 2021), <https://grist.org/politics/joe-biden-environmental-justice-executive-order-bill-clinton/>.

<sup>63</sup> *Id.*

four U.S. states had regulations that promoted environmental justice considerations, 20 years later and there were at least a few regulations in place in all 50 states.<sup>64</sup>

EO 12898 was, however, not a perfect solution and often “[t]he boogeyman when you are fighting systemic racism is implementation.”<sup>65</sup> On the federal level the order was never really enforced because it lacked any concrete factors that made environmental justice concerns deciding factors for things like industrial superfund project sitings<sup>66</sup> or any other federal project that could impact the environmental landscape.<sup>67</sup> Essentially, EO 12898 allowed the EPA to rely on state and local governments to deal with the environmental justice concerns of an upcoming project, even though the executive order does not apply to state or local governments.<sup>68</sup> Absent any specific state or local laws, there was no obligation for any actor or organization to consider environmental justice at all.<sup>69</sup> Ultimately, EO 12898 was probably aptly described by Dr. Beverly Wright, an environmental advocate that worked to get the order signed, as “ground breaking” but also “limited.”<sup>70</sup> Under the Trump Administration the U.S. saw a weakening of its protections for air and water,<sup>71</sup> threats to community health and safety by undoing climate and community protections under the National Environmental Policy Act (“NEPA”),<sup>72</sup> and a refusal of the government to take on any meaningful actions to fight climate change.<sup>73</sup> With the election of Joe Biden in 2020, it is perhaps time for the U.S. to begin a new era of

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<sup>64</sup> *Id.*

<sup>65</sup> Mahoney, *supra* note 62 (quoting Dr. Beverly Wright).

<sup>66</sup> Sandra G. O’Neil, *Superfund: Evaluating the Impact of Executive Order 12898*, 115.7 ENVTL. HEALTH PERSPECTIVES 1087, 1089 (July 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1913562/> (Superfund sites are government regulated abandoned dumping grounds for hazardous waste. Many of these sites are often located in or near low-income minority neighborhoods and effect the environment and health of the community.).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Mahoney, *supra* note 62.

<sup>71</sup> Amy Patronella & Saharra Griffin, *Communities of Color Bear the Brunt of Trump’s Anti-Environmental Agenda*, CTR. FOR AM. PROGRESS (Feb. 27, 2020), <https://www.americanprogress.org/issues/green/news/2020/02/27/480820/communities-color-bear-brunt-trumps-anti-environmental-agenda/>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

environmental justice based advocacy where the holes and shortcomings of Clinton's Executive Order can be addressed by reorganizing a national commitment to fighting against environmental racism, allowing civil rights groups and minority communities to judicially hold the EPA and polluting entities accountable, and individually practicing law in ways that promote environmental justice.

*A. Establishing a National Commitment to Fight Environmental Racism in the U.S.*

From an international perspective, one of the best things the U.S. can do to address the climate crisis and fight back against environmental racism globally is to lead by example and promote environmental justice within the national framework of their environmental policy goals. President Biden for his part made one of his Administration's first actions to rejoin the international Paris Climate Agreement with the statement saying that: "We can no longer delay or do the bare minimum to address climate change . . . This is a global, existential crisis. And we'll all suffer the consequences if we fail."<sup>74</sup> The Paris Agreement is a legally binding international treaty with the goal of reducing greenhouse gas emissions, to avert climate change by limiting global warming to preferably less than 1.5 degrees Celsius, compared to pre-industrial levels.<sup>75</sup> It was adopted by 196 Parties at the "Conference of the Parties ("COP") 21" in Paris, on December 12, 2015 and entered into force on November 4, 2016.<sup>76</sup> Trump pulled the U.S. out of the Paris Agreement on November 4, 2020, however, with Biden's reversal of course he demonstrated a sharp repudiation of his predecessors policy direction and sent a strong national message that the U.S. was recommitting itself to environmental protection and awareness.<sup>77</sup>

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<sup>74</sup> Elian Peltier & Somini Sengupta, *The U.S. Formally Rejoins Paris Climate Accord*, THE N.Y. TIMES (Feb. 19, 2021), <https://www.nytimes.com/2021/02/19/world/us-rejoins-paris-climate-agreement.html>.

<sup>75</sup> See *The Paris Agreement*, United Nations [U.N.] Climate Change (2021), <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

<sup>76</sup> See Peltier, *supra* note 74; see also Jonathan Ellis & Douglas Alteen, *The Paris Climate Agreement: What You Need to Know*, THE N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/climate/biden-paris-climate-agreement.html>.

<sup>77</sup> See Peltier, *supra* note 74.

The goals of the Paris Agreement, are centered principally around the narrow goals of reducing emissions and promoting the use of clean energy,<sup>78</sup> which are similar to the goals espoused by the last generation of environmental activists, before the environmental justice movement really developed as a dominant voice.<sup>79</sup> So while rejoining the Paris Agreement was a powerful first step, it represents only the beginning of what the Biden Administration needs to do if they want to meaningfully combat environmental racism. Perhaps realizing this, on January 27, 2021 the Biden Administration signed and Executive Order that was designed in part to “secur[e] environmental justice and spur[ ] economic opportunity.”<sup>80</sup> “Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.”<sup>81</sup>

In specific, among other things, the Executive Order would (1) create a White House Environmental Justice Interagency Council, chaired by the head of the Council on Environmental Quality (“CEQ”); (2) direct the CEQ chair to “create a geospatial Climate and Economic Justice Screening Tool” and to “annually publish interactive maps highlighting disadvantaged communities.”<sup>82</sup> And (3) create a Justice40 Initiative, to deliver 40 percent of the overall benefits of relevant federal investments to disadvantaged communities, with a focus on investments in clean energy, energy efficiency, transit, affordable housing, workforce development, remediation of legacy pollution, and the development of clean water infrastructure, and tracks performance towards that goal through the establishment of an Environmental Justice Scorecard.<sup>83</sup> Biden’s plans are ambitious, but according to Dr.

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<sup>78</sup> See generally *The Paris Agreement*, *supra* note 75.

<sup>79</sup> Worland, *supra* note 1.

<sup>80</sup> Exec. Order No. 14,008, 86.19 Fed. Reg. 7619, 7629 (Jan. 27, 2021), <https://www.energy.gov/sites/default/files/2021/02/f83/eo-14008-tackling-climate-crisis-home-abroad.pdf>;

<sup>81</sup> *Id.*

<sup>82</sup> See Aimee Barnes, Angela Luh, & Matthew Gobin, *Mapping Environmental Justice in the Biden-Harris Administration*, THE CTR. FOR AM. PROGRESS (Feb. 4, 2021), <https://www.americanprogress.org/issues/green/reports/2021/02/04/495397/mapping-environmental-justice-biden-harris-administration/>.

<sup>83</sup> See Barnes, *supra* note 82; see also *FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create*



Wright while the Executive Order was amazing to read “the federal government has been speaking environmental justice language for quite a while now . . . but putting things on paper is one thing, implementation is another.”<sup>84</sup> Furthermore, the policies do not go far enough.

### 1. *Geospatial Environmental Screening Tool*

With regards to the Geospatial Screening Tool, “the purpose of the tool will be to identify disadvantaged communities to which federal investments and benefits will be targeted as well as to inform equitable decision making across the federal government.”<sup>85</sup> Currently, the federal government utilizes the EPA’s Environmental Justice Screen (“EJSCREEN”) to perform this task, however, California also has developed its own screening technology and similar to California’s the federal government should update their design in accordance with several guiding principles that include being:

- (1) “Science-based and data-driven;
- (2) Informed by community experience;
- (3) Endorsed and used by government agencies;
- (4) Available for the public to use;
- (5) Developed through a process of public participation;
- and
- (6) Includes a third-party validator that can speak to the lived experiences of disadvantaged communities.”<sup>86</sup>

### 2. *Justice40 Initiative Plans*

In order to properly direct the proposed funds, the federal governments updated geospatial screening tool needs to make sure to

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*Jobs, and Restore Scientific Integrity Across Federal Government*, The White House – Briefing Room (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/>.

<sup>84</sup> Mahoney, *supra* note 62 (quoting Dr. Beverly Wright).

<sup>85</sup> Barnes, *supra* note 82.

<sup>86</sup> Charles Lee, *A Game Changer in the Making Lessons From States Advancing Environmental Justice Through Mapping and Cumulative Impact Strategies*, 50 ENVTL. L. REP. [ELR] 10203, 10209 (2020), <https://heinonline-org.fl.s.idm.oclc.org/HOL/Page?handle=hein.journals/elrna50&div=29&collection=journals> (requires HeinOnline subscription access).

apply the right scale for analysis. According to Aimee Barnes, Angela Luh, and Matthew Gobin, three environmental authors and policy activists, that is one that can:

- (1) “Produce a cumulative disparate impact score that can be used to provide community assessments and comparisons;
- (2) Establishes a threshold for determining which communities are designated as disadvantaged;
- (3) Establishes minimum thresholds for investment in disadvantaged communities.
- (4) Prioritizes community co-creation, leadership, and engagement;
- (5) Acknowledges and accounts for the limitations to and incompleteness of data, and continuously and regularly iterate upon and improve the tool;
- (6) Develops funding programs specifically designed for disadvantaged communities using information from the tool, and;
- (7) Provides technical assistance and capacity-building resources to support communities and community leaders, including to help them successfully access funds designated for disadvantaged communities.”<sup>87</sup>

The federal government needs to use screening tools not only to target the Justice40 Initiative’s benefits and investments, but also to improve and better coordinate regulatory compliance and enforcement work in disadvantaged communities.<sup>88</sup> As well as, acknowledge that mapping tools have limitations and offer guidance not a conclusive picture.

### 3. *Section Summary*

Through adopting the above criteria into the updated design for the geospatial tool which can be used to direct the Justice40 Initiative funds, the Biden-Harris Administration can perhaps create a strong national focus on environmental justice which can serve as a role model for the international community, as well as perhaps achieve Charles Lee’s hopes to usher in a new game changing era of environmental activism.<sup>89</sup> Lee being the environmental activist and

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<sup>87</sup> Barnes, *supra* note 82.

<sup>88</sup> *Id.*

<sup>89</sup> *See generally*, Lee, *supra* note 86.

pioneer who helped draft the 1987 Environmental Justice Report “Toxic Waste and Race,” referenced earlier in this paper, that helped to ignite the first wave of environmental justice advocacy pushing to create policy that helped fight against and bring awareness to environmental racism.

### *B. Environmental Justice Litigation & Adjudications*

“When asked directly whether environmental racism was at play in Flint’s water crisis, Michigan Governor Rick Snyder replied last month, “Absolutely not.””<sup>90</sup> Nevertheless, the city officials actions to cut costs by switching the cities water supply poisoned anywhere from 6000-12000 children, as well as many more people, most of whom were Black.<sup>91</sup> Newborns and young children exposed to lead have the greatest health risks as the toxic metal in their bodies can cause life-long problems intellectually and physically.<sup>92</sup> In order to aid the families poisoned in Flint Michigan, United Way, a non-profit, organized a fundraiser with the goal of generating \$100 million in aid for the victims over a 10-15 year period.<sup>93</sup> The reality is that often when there is a major environmental catastrophe in a low-income minority neighborhood in this country, the victims often have to rely upon fundraisers or other charity based organizations to provide aid because 95 percent of the civil-rights claims brought by communities of color against polluters are denied by the EPA.<sup>94</sup> In fact, the EPA has never once made a formal finding of a civil-rights violation in an environmental disaster claim.<sup>95</sup> “[W]hen [the] sour-smelling, discolored water came out of Flint residents’ pipes in the spring of 2014, their complaints went ignored for nearly two years.”<sup>96</sup>

#### *1. Current Legal Options*

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<sup>90</sup> Covert, *supra* note 50.

<sup>91</sup> *See id.*; *see also* Andrew Keller, *United Way Estimates Cost of Helping Children \$100M*, WNEM (Jan 18, 2016), <https://web.archive.org/web/20160203004456/http://www.wnem.com/story/30995770/united-way-estimates-cost-of-helping-children-100m>.

<sup>92</sup> *See* Keller, *supra* note 91; *see generally* *Lead Poisoning*, MAYO CLINIC (Dec. 20, 2019), <https://www.mayoclinic.org/diseases-conditions/lead-poisoning/symptoms-causes/syc-20354717>.

<sup>93</sup> *See* Keller, *supra* note 91.

<sup>94</sup> Covert, *supra* note 50.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

As it stands, plaintiffs alleging environmental racism have only a few limited legal options. Two of the main categories include filing a claim under the Equal Protection Clause of the U.S. Constitution or alleging violations of the National Environmental Policy Act (“NEPA”).<sup>97</sup>

a. Limitations of the Equal Protections Claims

The Fourteenth Amendment to the U.S. Constitution was established at the end of the Civil War, originally to make sure the freed Blacks were guaranteed all of the same rights as any other citizens, and required governments to provide “equal protection of the laws.”<sup>98</sup> However, the Supreme Court's holding in *Washington v. Davis* undercuts this purpose by requiring a discriminatory intent (i.e., purposely discriminating), as opposed to showing only a discriminatory effect.<sup>99</sup> In *Davis*, several Black job-applicants claimed that a Washington, D.C. Police Department's recruitment test was discriminatory because a disproportionate percentage of African Americans failed the test in comparison to white applicants.<sup>100</sup> The Supreme Court held that to establish racial discrimination a disproportionate effect must be shown to have had a discriminatory purpose.<sup>101</sup>

Based on the current state of the law, victims of environmental racism do not have effective legal recourse for being disproportionately exposed to environmental contaminants.<sup>102</sup> So, while in theory they may rely upon the Equal Protection Clause to begin litigation, they must have strong evidence that the defendants they are accusing of environmental racism placed an environmental hazard in their community were motivated by racist intentions.<sup>103</sup>

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<sup>97</sup> See generally Sacred B. Huff, *Overcoming Environmental Racism: A Lesson from the Voting Rights Act of 1965*, 11 GEO. WASH. J. ENERGY & ENVTL. L. 22, 24 (2020), file:///C:/Users/ccnea/Downloads/11GeoWashJEnergyEnvtlL22.pdf.

<sup>98</sup> U.S. CONST. Amend. XIV, § 1.

<sup>99</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

<sup>100</sup> *Id.* at 232-33.

<sup>101</sup> See *id.* at 245; see also Huff, *supra* note 97, at 25.

<sup>102</sup> Huff, *supra* note 97, at 28.

<sup>103</sup> *Id.*

Ultimately, having to show discriminatory intent is an onerous burden for environmental racism plaintiffs, and since most people are wise enough not to officially document any racist intentions when they are drafting policy, the result is that most Equal Protection Clause actions will fail.<sup>104</sup>

#### b. Limitations of NEPA

NEPA was signed into law on January 1, 1970 by then President Richard M. Nixon, and requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions.<sup>105</sup> According to the EPA, Section 102 in Title I of NEPA requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach.<sup>106</sup> Specifically, all federal agencies are required to prepare detailed statements assessing the environmental impact of, and any alternatives to, major federal actions that can significantly affect the environment.<sup>107</sup> These statements are commonly referred to as Environmental Impact Statements (“EIS”) and Environmental Assessments (“EA”).<sup>108</sup> NEPA may function as a preventative measure because it requires federal agencies to assess the potential impact of a proposed action on communities of color, however, it only forces the agency to consider other options and then detail the impact the proposed action will have on the targeted communities.<sup>109</sup> The communities are provided with an opportunity to voice their concerns, but NEPA operates in a similar manner as Clinton’s Executive Order 12898 discussed above, in that there are no penalties for non-compliance.<sup>110</sup>

## 2. *Proposed Legal Options*

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<sup>104</sup> See *id.*; see also Covert, *supra* note 50.

<sup>105</sup> See *What is the National Environmental Protection Act?*, EPA (last updated Sept. 17, 2020), <https://www.epa.gov/nepa/what-national-environmental-policy-act> [hereinafter *What is NEPA?*]; see also *President Nixon Signing the National Environmental Policy Act of 1969*, DOCSTEACH, <https://www.docsteach.org/documents/document/nixon-sign-nepa>.

<sup>106</sup> *What is NEPA?*, *supra* note 105.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Huff, *supra* note 97, at 29.

<sup>110</sup> *Id.*

Based on the above, under the current legal framework, bringing litigation to challenge an environmentally racist agency or government action under either Equal Protections or NEPA violation grounds is often a lost cause. Environmental justice advocates have begun to argue that in order to hold polluters accountable and ensure that communities of color do not remain the primary dumping grounds for locally unwanted land uses (“LULUs”),<sup>111</sup> there needs to be an established right of action that allows to directly sue. Additionally, they argue there needs to be a preclearance provision that requires actors to obtain federal permission before they place anymore LULU’s in already disadvantaged majority-minority communities.

a. The Right to Private Action

Currently, under Title VI of the Civil Rights Act of 1964 disparate impact claims are allowed under Section 602,<sup>112</sup> because Under Title VI, no program or contract receiving federal funds may have a racially discriminatory purpose or effect.<sup>113</sup> This would include disparate impact claims for environmental damage in low-income minority communities, however, while technically “Title VI allows disparate impact claims under Section 602, the Supreme Court held in *Alexander v. Sandoval* that private rights of action are not authorized under Title VI for disparate impact claims.”<sup>114</sup> In *Sandoval*, a lawsuit was brought against the state of Alabama for administering its driver’s license exams in English only.<sup>115</sup> The plaintiffs alleged that administering the exam in English only created a disparate impact on

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<sup>111</sup> See FJ Popper, *LULUs: Locally Unwanted Land Uses*, 73 Resources (1983), <https://www.osti.gov/biblio/5869734-lulus-locally-unwanted-land-uses> (“A LULU is a locally unwanted land use. It may be an old-age home or a nuclear-waste-disposal site. People need it but do not want to live next to it.”); see also Madeline Halimi, *Siting Homeless Shelters in New York City: Fair Share Versus Borough-Based*, 47 FORDHAM URB. L. J. 1519, 1521 (2020), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2819&context=ulj>.

<sup>112</sup> See Huff, *supra* note 97, at 25; see generally Nicholas C. Christiansen, *Environmental Justice: Deciphering the Maze of a Private Right of Action*, 81 MISS. L.J. 843, 870-73 (2012).

<sup>113</sup> Michael B. Jones & Peter J. Jacques, *Responding to Environmental Injustice: The Civil Rights Act and American Federal Institutional and Systemic Barriers to Private Redress of Disparate Environmental Harm*, 9 FLA. A & M U. L. REV. 417, 420 (2014).

<sup>114</sup> *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001); see also Huff, *supra* note 97, at 25.

<sup>115</sup> *Sandoval*, 532 U.S. at 275.

applicants who could not speak English.<sup>116</sup> The Court reasoned that, Congress did not intend to create a private right of action for Section 601 of Title VI because the statute's language focused on giving regulating agencies power to enforce Section 601 not private actors and therefore, the plaintiffs lawsuit was barred.<sup>117</sup>

In 2017 U.S. Senator Cory Booker, a Democrat representing New Jersey introduced the Environmental Justice Act of 2017.<sup>118</sup> The Bill if passed would codify several parts of Clinton's Executive Order 12898, by requiring federal agencies to address environmental justice through agency actions and permitting decisions, and strengthens legal protections against environmental injustice for communities of color, low-income communities, and indigenous communities.<sup>119</sup> Most importantly though the Bill would reinstate a private right of action for discriminatory practices under the Civil Rights Act, overruling the Supreme Court decision in *Alexander v. Sandoval*.<sup>120</sup> Individual citizens would no longer have to rely upon a government agency to bring actions against entities engaging in discriminatory practices that have a disparate impact.<sup>121</sup> Senator Booker's Bill has been held up in the Committee for the Environment and Public Work,<sup>122</sup> but were it to pass into law, it would be a powerful step in terms of environmental justice accountability. However, the Bill still would not do anything to prevent environmental harms from occurring in the first place.

#### b. The Preclearance Provision

Initially, under Section 5 of the Voting Rights Act of 1965,<sup>123</sup> there existed a preclusion process where any change made to the voting

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<sup>116</sup> *Id.* at 288-89.

<sup>117</sup> *Id.* at 293.

<sup>118</sup> *Booker Announces Landmark Environmental Justice Bill*, CORY BOOKER (Oct. 23, 2017), <https://www.booker.senate.gov/news/press/booker-announces-landmark-environmental-justice-bill#:~:text=The%20Environmental%20Justice%20Act%20of,income%20communities%2C%20and%20indigenous%20communities> [*Booker Announcement*].

<sup>119</sup> *See id.*; Huff, *supra* note 97, at 29.

<sup>120</sup> *Booker Announcement*, *supra* note 118.

<sup>121</sup> *Id.*

<sup>122</sup> Huff, *supra* note 97, at 29.

<sup>123</sup> The Civil Rights Voting Rights Act, Pub.L. 88-352, 78 Stat. 241, (enacted July 2, 1964) ("Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United

process within a covered jurisdiction could not legally be enforced unless the jurisdiction first obtained a required determination by the United States District Court for the District of Columbia, or made a submission to the Attorney General.<sup>124</sup> This process required proof that the proposed voting change did not deny or abridge the right to vote on account of race, color, or membership in a language minority group.<sup>125</sup> If the jurisdiction was unable to prove the absence of such discrimination, the District Court would deny the requested judgment, or in the case of administrative submissions, the Attorney General would object to the change, leaving it legally unenforceable. A finding of disparate impact on low-income or minority communities would qualify as discrimination and make a proposed rule change unenforceable. A similar provision could be passed with regards to NEPA, however, the United States Supreme Court in *Shelby County v. Holder*, held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act.<sup>126</sup>

The coverage formula of the Voting Rights Act was always considered controversial because it singled out specific jurisdictions, most of which were in the Deep South.<sup>127</sup> And in *Shelby County*, the Supreme Court reasoned the formula was unconstitutional because the criteria used in it were outdated and therefore violated principles of “equal state sovereignty and federalism.”<sup>128</sup> So while at first glance adding a preclearance provision to NEPA or a similar environmental justice law might not seem to be a viable path to creating actionable litigation, it is important to remember that the Supreme Court did not rule on the constitutionality of Section 5 itself.<sup>129</sup> Preclearance as a policy was never itself declared by the Supreme Court to be *per se*

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States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”)

<sup>124</sup> *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUST. [DOJ] (last updated Sept. 11, 2020), <https://www.justice.gov/crt/about-section-5-voting-rights-act> [*About Section 5*].

<sup>125</sup> *Id.*

<sup>126</sup> *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

<sup>127</sup> *1965 Voting Rights Act*, GEORGETOWN L. (last updated Apr. 12, 2021), <https://guides.ll.georgetown.edu/c.php?g=592919&p=4172704>.

<sup>128</sup> *Id.*

<sup>129</sup> *About Section 5*, *supra* note 124.



unconstitutional,<sup>130</sup> so the door is open for Congress to implement policy provisions to prevent projects that will have disparate impact of on low-income or minority communities before they even really begin, so long as they do not single out specific state jurisdictions based on out of date metrics.

### 3. *Section Summary*

In the current legal landscape there exist very few options for plaintiffs alleging environmental racism to file actionable claims.<sup>131</sup> Due to the Supreme Court's reluctance to consider disparate impact as evidence of explicit racist intent for Equal Protection Clause arguments, as well as their prohibition of private actions for Title VI claims, low-income communities of color are left with very few ways to prove racist intent,<sup>132</sup> regardless of the mounting statistical data that shows LULU sites are more often placed in communities with majority-minority populations. This couples with the fact that people of color are disproportionately impacted by environmental damage and pollution,<sup>133</sup> a game changing shift in the way we address environmental justice has become necessary. In order to effectively combat environmental racism a stringent preclearance process must be applied to specified proposals that may create environmental harms in communities of color, additionally, a right to private actions must be established that allows individuals or organizations to bring claims of alleged environmental justice violations under the Civil Rights Act.<sup>134</sup>

### CONCLUSION

One area of the environmental crisis that I have not spent much time addressing in this Article is the issue of extreme weather events that are on the rise due to climate change. However, no substantive discussion about the need for environmental justice would be complete without discussing the impact of Hurricane Katrina that made landfall in the Gulf Coast of the United States on August 29, 2005, devastating the city of New Orleans.<sup>135</sup> In New Orleans, levee boards composed of

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<sup>130</sup> Huff, *supra* note 97, at 29.

<sup>131</sup> *Id.* at 25.

<sup>132</sup> *Id.*

<sup>133</sup> Covert, *supra* note 50.

<sup>134</sup> See generally, Huff, *supra* note 97, at 27, 30.

<sup>135</sup> History.com Editors, *Hurricane Katrina*, HISTORY - A&E TELEVISION NETWORKS (Nov. 9, 2009), <https://www.history.com/topics/natural-disasters-and-environment/hurricane-katrina>.

members who were mostly affluent and white, determined the allocation of federal funds for building or supporting the levee systems.<sup>136</sup> Prior to Katrina, most of the federal money went to repair the levee system in Lakeview, a predominantly white neighborhood.<sup>137</sup> Federal money did not go to repair the structurally deficient levees in New Orleans East and the Lower Ninth Wards, which are predominantly Black.<sup>138</sup>

As Katrina approached, officials delayed issuing their mandatory evacuation orders until less than 24 hours before landfall, knowing many residents lacked the financial means or even a vehicle to escape on short notice.<sup>139</sup> The Mayor of New Orleans failed to deploy buses and trains at his disposal to evacuate vulnerable residents, and during the storm, the city failed to provide adequate protection for the 25,000 residents sheltering within the Superdome.<sup>140</sup> The facility had no running water and was equipped with only enough food and water for 15,000 people for three days at most, even though it took more than a week for rescue efforts to begin.<sup>141</sup> The East and Ninth Ward levees predictably failed, and according to some sources, Hurricane Katrina claimed more than 1,800 lives the majority of them being people of color; and has been recorded as one of the costliest natural disasters in U.S. history.<sup>142</sup> Hurricane Katrina's high death toll and staggering property losses highlight the disparate impact that severe weather events, racially influenced emergency planning and the absence of good leadership at the state, local and federal level have on communities of color.<sup>143</sup> Katrina represents in many ways the "poster-child" for environmental injustice and environmental racism.<sup>144</sup>

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<sup>136</sup> Wesson, *supra* note 19.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See Sarah Pruitt, *How Levee Failures Made Hurricane Katrina a Bigger Disaster*, HISTORY (Aug. 27, 2020), [https://www.history.com/news/hurricane-katrina-levee-failures#:~:text=At%205%20a.m.%2C%20an%20hour,drainage%20canal%2C%20had%20been%20breached; see also The Editors of Encyclopedia Britannica, \*Hurricane Katrina\*, Britannica \(Sept. 23, 2020\), <https://www.britannica.com/event/Hurricane-Katrina>.](https://www.history.com/news/hurricane-katrina-levee-failures#:~:text=At%205%20a.m.%2C%20an%20hour,drainage%20canal%2C%20had%20been%20breached;see%20also%20The%20Editors%20of%20Encyclopedia%20Britannica,Hurricane%20Katrina,Britannica%20(Sept.%2023,%202020),https://www.britannica.com/event/Hurricane-Katrina)

<sup>143</sup> Wesson, *supra* note 19.

<sup>144</sup> See generally *id.*

This Article was not written merely to bring attention to the various horrific environmental injustices happening both globally and domestic, similar to Charles Lee's several works, many of which are referenced in this paper, this piece is meant to be a call to action! "We are only beginning to level the playing field. Much work still needs to be done."<sup>145</sup> Lawyers on an individual level need to play a vital role in the fight for environmental justice.<sup>146</sup> By trade, lawyers are officers of the legal system with a special responsibility to work towards increasing the quality of justice. "They are charged with a mission to seek fairness for the underrepresented and to protect the most vulnerable members of our society."<sup>147</sup> Lawyers can fight environmental racism by bringing lawsuits to enforce governmental compliance with existing laws to protect the marginalized, such as NEPA and Executive Order 12898.

Lawyers can prepare and draft legislation to strengthen the environmental protections that exist and lobby legislators to promote environmental justice policy.<sup>148</sup> Lawyers need not be called to careers in civil rights or environmental law to impact climate change, because through volunteer work and pro bono projects, they can commit invaluable time and legal research to identify and defend the groups most affected by the climate crisis.<sup>149</sup> Lawyers with the finances but lacking in time can donate. Every hurdle overcome in the environmental justice movement has been a collaboration between hundreds of lawyers, activists, politicians and legal professionals, and in order to continue the fight to end environmental racism against low-income minority groups, in the words of Joy Alise Davis, a civil rights writer, "[w]e don't need racial equity allies; we need active accomplices."<sup>150</sup>

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<sup>145</sup> Lee, *supra* note 86.

<sup>146</sup> Wesson, *supra* note 19.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Joy Alise Davis, *We Don't Need Racial Equity Allies; We Need Active Accomplices*, DESIGN PORTLAND (2021), <https://designportland.org/stories/2018/we-need-active-accomplices>.

