NOTES

In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana

JULIA MIZUTANI*

ABSTRACT

America's history of Jim Crow segregation, redlining, and exclusionary zoning in combination with its present-day zoning laws and siting processes have created toxic communities in predominately black and poor neighborhoods. Existing policies and laws that are meant to remedy such disparities all have flaws which render them too weak to repair the damage already done or to prevent injustice from continuing. The disproportionate effects of environmental hazards and natural disasters on segregated communities are seen not only in Louisiana but also around the country, such as in Houston after Hurricane Harvey landed in August 2017. Given that climate change will likely disproportionately harm poor communities of color as natural disasters increase in frequency and intensity, the need for environmental justice laws to be created and strengthened in the very near future is critical. The connection between historical segregation and present-day zoning and siting processes that harm communities of color should be used to inform advocates and lawmakers of the need to make the environmental justice landscape more equitable.

TABLE OF CONTENTS

* Georgetown Law, J.D. expected 2019; SUNY Geneseo, B.A. 2016.

INTRODUCTION

The distribution of landfills, incinerators, power plants, toxic waste, and air pollution is highly correlated with the geographic distribution of minorities, especially poor minorities.[1] When taking out the factor of income, race is the single most significant indicator of where toxic waste or pollutant sites are located.[2] This means that, rather than finding hazardous waste in areas where it is most likely to be safely deposited and least likely to cause harm to health, toxic waste is most likely to be found in poor and black neighborhoods. Research that has sought to disentangle the causal sequence of siting toxic pollutants in black

1. D.R. Wernette & L.A. Nieves, *Breathing Polluted Air*, 18 EPA J. 16, 16–17 (1992); Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, 36 ENV'T 11 (1994) (citing Robert D. Bullard, *Environmental Racism*, ENVTL. PROTECTION 25–26 (1991)); Leslie A. Nieves, Argonne Nat'l Lab., *Not in Whose Backyard? Minority Population Concentrations & Noxious Facility Sites*, Paper Presented at the Annual Meeting of the Am. Assoc. for the Advancement of Sci. (Feb. 9, 1992).

2. Michel Gelobter, *Toward a Model of Environmental Discrimination*, *in* RACE AND THE INCIDENT OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 64 (Bunyan Bryant & Paul Mohai eds., 1992).

communities has found little evidence of "minority move-in," suggesting that facilities are sited in previously and already established poor communities of color.[3] Thus, toxicity follows poor, segregated communities, not the other way around. The terms "environmental racism" and "environmental injustice" are used to describe this phenomenon—the intentional and unintentional disproportionate siting and effects of environmental hazards on communities of color—while the "environmental justice" movement seeks to rectify the harms created by racism.[4]

This Note posits that the legacy of redlining and exclusionary zoning, as well as more current methods of determining environmental assessments, have led governments and local siting boards to place a disproportionate number of environmental hazards in segregated neighborhoods.[5] First, the Note will provide a broad overview of the historical and modern-day connection between segregation and environmental injustice by examining zoning and land use laws, court cases, the site selection process, and unequal Environmental Protection Agency ("EPA") enforcement of pertinent environmental regulations. Second, the Note will use an analysis of Louisiana's historical to present-day housing policies as a case study to show the relationship between segregation and environmental injustice in the development of "Cancer Alley" and the flood management system in New Orleans, which led to disastrous outcomes following Hurricane Katrina. Third, the Note will demonstrate that existing policies and laws that are meant to remedy such disparities are rarely utilized or successful because the government has not consistently implemented President Clinton's environmental justice executive order, and anti-discriminatory statutes require proof of discriminatory intent or causation, which are difficult for affected communities to show. Fourth, the Note will provide recommendations for strengthening laws and programs related to environmental justice.

I. OVERVIEW: SEGREGATED COMMUNITIES AND ENVIRONMENTAL JUSTICE

Segregation has both a historical and present-day relationship to the placement of environmental hazards—such as landfills, incinerators, petro-chemical plants, and coal-fired power plant—in predominately black and poor communities. Exclusionary zoning and land use laws often lead these hazards to be placed in segregated black communities because of the fear that such hazards will diminish property values in white communities.[6] Environmental assessments and siting

3. Robin Saha & Paul Mohai, *Historical Context and Hazardous Waste Facility Siting: Understanding Temporal Patterns in Michigan*, 52 SOCIAL PROBLEMS 618, 625–40 (2005).

4. Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 395 (1991) (noting that "environmental racism" was coined in 1987 by Reverend Benjamin Chavis Jr.); UNITED CHURCH OF CHRIST, COMM'N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES SURROUNDING HAZARDOUS WASTE SITES 13 (1987) (coining the term "environmental justice").

5. Bullard, *supra* note 1, at 10.

6. *Id*. at 13.

boards also cause environmental hazards to be placed in vulnerable communities because placing hazards in these areas is often less costly and more politically preferable given that underserved communities have less political power. In fact, government funded studies have at times justified the targeting of poor communities of color for polluting sites. California was once advised by a consulting firm that "ideally . . . officials and companies should look for lower socioeconomic neighborhoods that are also in a heavy industrial area with little, if any, commercial activity."[7] Local planning boards and zoning laws have both contributed to the environmental injustices that black communities face due to segregation, and the gap in enforcement by the EPA between black and white communities further aggravates the disparities between these neighborhoods.

A. THE CONNECTION BETWEEN ZONING AND TOXIC COMMUNITIES

Zoning began as a tool to improve blighted neighborhoods but was transformed into a tool to protect property values by excluding populations described as undesirable.[8] One of the earliest examples of exclusionary zoning tactics was San Francisco's prohibition against certain types of laundry businesses, which was designed to keep Chinese immigrants, who were disproportionately involved in the laundry industry, from entering white neighborhoods.[9] The San Francisco ordinance is an example of how local decisions regarding land use can appear neutral on their face, yet still disproportionately impact certain racial groups, whether intentionally or unintentionally.

Today, zoning and land use laws are important for environmental justice because they affect siting decisions concerning locally undesirable land uses such as toxic waste sites, incinerators, and power plants. State zoning acts are often modeled on the Standard State Zoning Enabling Act of 1922, which grants states the power to regulate land use for the "health, safety, morals, or the general welfare of the community," and includes regulating and restricting "density of population and the location and use of buildings, structures and land of trade, industry, residence or other purposes."[10] Unfortunately, state and local zoning laws modeled after this language often lead to restrictions on industrial use in residential neighborhoods in order to protect the health of wealthier, whiter communities, to the detriment of poorer, black communities.[11] In many cases, decisions placing

---

7. CERRELL ASSOCS., INC., POLITICAL DIFFICULTIES FACING WASTE TO ENERGY CONVERSION PLANT SITING 13 (1984), *available at* https://www.ejnet.org/ej/cerrell.pdf.

8. Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 101, 105 (Charles M. Haar & Jerold S. Kayden eds., 1989).

9. Yick Wo v. Hopkins, 118 U.S. 365 (1886).

10. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT, UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 4–5 (1926).

11. NAT'L ACAD. OF PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING 26 (2003), *available at* https://www.epa.gov/sites/production/files/2015-02/documents/napa-land-use-zoning-63003.pdf.

industrial and other hazardous land in low-income and black communities are made in compliance with local zoning ordinances.[12]

The issue of local officials exercising zoning power to the detriment of black residents was highlighted in a 2003 panel report by the National Academy of Public Administrators ("NAPA") titled, "Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning."[13] The report stated that significant evidence showed that people of color and low-income residents were likely to live close to polluting industries because of unequal distribution of environmental exposures in areas zoned for lower-income and historically segregated communities. Further, local zoning decisions regularly "created these disparities and . . . local decision-makers were often fully aware of the likely outcomes."[14] Thus, the report found that federal and state policies created and reinforced local decisions that limited housing for black residents to areas where hazardous and polluting industries were located, and then continued to place more such industries in those areas.[15]

1. *Euclid* and Expulsive Zoning

The Supreme Court first approved of the use of local police power over land use in *Haddacheck v. Sebastian* in 1915.[16] Local police powers for zoning were affirmed in what is now known as the landmark case, *Village of Euclid v. Ambler Realty Corp.*, in 1926.[17] The repercussions of *Euclid* were broad, as the general principle of exercising police power to separate "incompatible uses" to protect residential environments from industrialization was upheld.[18] Justice Sutherland noted that a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[19] The implications of the decision were significant because many municipalities figuratively deemed black neighborhoods to be barnyards, polluting industries to be pigs, and white residential neighborhoods to be parlors.[20] *Euclid* thus provided a legal basis for local municipalities to disproportionately place polluting facilities in black neighborhoods, while keeping such facilities out of white neighborhoods.

Professor Yale Rabin, of the Massachusetts Institute of Technology, has called this phenomenon "expulsive zoning."[21] Black residents who were not automatically

12. *Id.* at 28–29.
13. *Id.* at 26.
14. *Id.* at 25.
15. *Id.* at 27.
16. 239 U.S. 394 (1915).
17. 272 U.S. 365 (1926).
18. Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373, 380–81 (2010).
19. *Euclid*, 272 U.S. at 388.
20. Batchis, *supra* note 18, at 395–96 (2010).
21. Rabin, *supra* note 8, at 101.

displaced by racially restrictive covenants and zoning laws eventually found their neighborhoods filled with landfills, incinerators, factories, and power plants. Meanwhile, "white neighborhoods were consistently protected from intrusive traffic, noise, and pollution generated by such nonresidential uses."[22] Even in jurisdictions without codified zoning variances, such as Houston, local government authorities placed eight of ten solid waste facilities in black communities from 1920 to 1970, even though the black population of Houston was only a quarter of the city's population.[23] A national report published by the United Church of Christ's Commission for Racial Justice showed that race was the most significant factor nationwide in determining where a hazardous waste facility would be sited.[24] The report also found that black residents were heavily over-represented in areas with the largest number of uncontrolled hazardous waste sites.[25]

2. Exemplary Cases that Challenge Local Zoning Ordinances

A brief analysis of past cases shows that, at least under current law, lower federal courts have largely chosen to not proceed toward the goal of eradicating America's racially segregated society and have not interpreted civil rights laws in ways which have eliminated environmental injustice. The first lawsuit to charge environmental discrimination in the placement of a waste facility, *Bean v. Southwestern Waste Management Corp*., was filed in 1979.[26] "The case involved residents of Houston's Northwood Manor, a suburban, middle-class neighborhood of homeowners, and Browning-Ferris Industries, a private disposal company based in Houston."[27] Northwood Manor was a subdivision of detached, single-family homes, which typically would have made it an unlikely candidate for a municipal landfill, except for the fact that the neighborhood was more than 82% black.[28] The Northwood Manor residents sought the revocation of the land use permit granted to Browning-Ferris to build the waste facility. However, the relevant local statute only permitted revocation of a land use permit for reasons pertaining to health, or air or water pollution, and the department reviewing the permit would not examine allegations of race discrimination.[29] The district court stated that the plaintiffs did not establish a substantial likelihood of proving that the local permitting authority's decision to grant the permit was motivated by

22. NAT'L ACAD. OF PUB. ADMIN., *supra* note 11, at 28 (internal quotation marks and citation omitted).

23. Robert D. Bullard, *Building Just, Safe, and Healthy Communities*, 12 TUL. ENVTL. L.J. 373, 394–95 (1999).

24. UNITED CHURCH OF CHRIST, *supra* note 4, at 13.

25. *Id*. at 14.

26. 482 F. Supp. 673, 675 (S.D. Tex. 1979).

27. Bullard, *supra* note 1, at 40.

28. *Id*.

29. *Bean*, 482 F. Supp. at 675.

purposeful racial discrimination, and thus the court denied the preliminary injunction.[30]

Similarly, in *East Bibb Twiggs Neighborhood Association v. Macon Bibb Planning & Zoning Commission*, a permit was granted for a sanitary landfill to be placed in a majority black neighborhood.[31] Neighborhood residents filed a complaint that stated that their procedural and substantive due process rights were denied because the decision was not debated publicly in their community. Additionally, the permit did not relate to the public health, safety, morality, or general welfare of the community, as required under the 1922 model zoning law, which the community had adopted.[32] The district court and the Eleventh Circuit held that for the residents to demonstrate that their rights under the equal protection clause of the Fourteenth Amendment had been violated, the residents had to prove, in line with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, that the actions resulted in a disproportionate racial impact *and* that the Commission had acted with a discriminatory intent or purpose.[33] Because of the high evidentiary bar, the Eleventh Circuit held that the residents failed to present sufficient evidence to demonstrate that the permit decision was made with discriminatory intent or that the Commission had engaged in a pattern of discriminatory conduct.[34] The residents were therefore left without redress because of the immense difficulty in proving both that the planning commission's decision was motivated by discriminatory intent and that the placement of the landfill had a disproportionately negative environmental impact based on race.

Thus, present-day communities of color disproportionately impacted by environmental hazards are left without remedy, short of explicit proof showing that local powers intended to discriminate when approving a permit or zoning ordinance.

3. Summarizing the Influence of Zoning on Environmental Discrimination

Local officials have used zoning laws supposedly meant to protect the health, safety, morals, or general welfare of the community to the detriment of black neighborhoods by restricting industries from existing in white neighborhoods and thus relegating toxic industries to segregated communities. These communities have limited modes of redress under existing civil rights laws because the evidentiary bar for proving discriminatory intent is too high. Furthermore, after these toxic industries are placed in segregated black neighborhoods due to

30. *Id.* at 681.

31. 896 F.2d 1264 (11th Cir. 1989).

32. *Id.* at 1265.

33. 429 U.S. 252, 265 (1977) (holding that a zoning ordinance which had the outcome of barring people of color and low-income families from residing in a neighborhood was constitutional because there was no proof that a "discriminatory purpose was a motivating factor in the Village's decision").

34. *E. Bibb Twiggs*, 896 F.2d at 1267.

NIMBYism[35] in the site selection process, the EPA takes much longer to respond to their needs in comparison to white neighborhoods.

B. SITE SELECTION, NIMBYISM, AND DIFFERENTIAL ENFORCEMENT BY THE EPA: HOW HAZARDS CONTINUE TO BE DISPROPORTIONATELY PLACED IN VULNERABLE COMMUNITIES

Although most environmental regulations are an overall positive force in society that reign in pollution and toxicity, often, more stringent environmental regulations drive noxious facilities and local site selection boards to follow the path of least resistance.[36] The path of least resistance usually leads away from wealthier, whiter communities and towards poorer neighborhoods of color. Additionally, the EPA enforces federal environmental regulations unequally, typically cleaning up black communities at a much slower rate than white communities. As discussed below, each of these factors has further exacerbated environmental injustice.

1. NIMBYism and "The Path of Least Resistance" in Local Site Selection Processes

The site selection process in many localities often fails to prevent discriminatory siting. Most site selection processes go to a board that may be comprised of local experts, of those who have been elected by the locality, or sometimes of board members chosen by the governor.[37] These boards are restrained by land use laws that may already confine industrial sites to predominately black neighborhoods, and even if states preempt local land use statutes to allow sites to be placed in a wealthier neighborhood, boards can be prone to fall to NIMBYism.[38] NIMBY stands for "Not In My Back Yard," and it is a phenomenon where communities with economic and political power will use their advantages to block a toxic site selection planned for their neighborhood, thus relegating the site to a less wealthy and well-connected neighborhood. Robert Bullard, a legal expert in environmental justice, asserts that politicians and industrialists respond to the NIMBY phenomenon using the "PIBBY" principle: "Place in Black's Back Yard."[39] Because of the power of NIMBYism, noxious sites are often designated for communities of color so that industry can avoid any siting delays and expenses that might occur if the site was slated for a predominately white, middle class, residential neighborhood.[40]

---

35. *See infra* Part I.B.1.
36. Bullard, *supra* note 1, at 14.
37. Godsil, *supra* note 4, at 404.
38. *Id*. at 403–05.
39. Robert D. Bullard, *Environmental Blackmail in Minority Communities*, *in* REFLECTING ON NATURE: READINGS IN ENVIRONMENTAL PHILOSOPHY 132, 139 (Lori Gruen & Dale Jamieson eds., 1994).
40. *See* Godsil, *supra* note 4, at 405.

It should be noted that all states that use siting boards have preemption clauses in their documents that allow them to override opposition to a siting decision by residents of a whiter, wealthier neighborhood.[41] However, in the end, private developers often still choose the sites regardless of the board's final decision because they have a cost incentive to choose sites with lower land values, which are typically the neighborhoods of economically disadvantaged communities of color because of the history of segregation.[42] Thus, even when a local planning board may be willing to allow a toxic site to be placed in a wealthier neighborhood, developers of the site often choose to build in communities of color due to economic incentives created by the legacy of discrimination.

2. The EPA's Unequal Enforcement Based on Race

Compounding the problematic siting patterns of hazardous waste and polluting facilities in predominately black and communities of color is the issue of uneven enforcement of federal environmental laws by the EPA. A special investigation by the National Law Journal in 1992 found that "the federal government, in its cleanup of hazardous sites and its pursuit of polluters, favors white communities over minority communities under environmental laws meant to provide equal protection for all citizens."[43] Specifically, the investigation found that penalties for violations of environmental regulations committed in white communities were 46% higher than for violations in minority communities for all federal environmental laws protecting citizens from air, water, and waste pollution. Even more egregious, the investigation found that penalties under hazardous waste laws were 500% higher in white communities.[44] It also found that abandoned hazardous waste sites under the Comprehensive Environmental Response, Compensation, and Liability Act in minority communities took 20% more time to be placed on the National Priorities List than sites in white communities, and thus, EPA action on those cleanups began one to four years later in minority communities than in white ones.[45] When cleanup was finally ordered, the EPA ordered permanent treatment cleanup in white communities 22% more often than in minority communities. In minority communities, the EPA was more likely to order containment of the hazardous site instead, which is a less effective and drastic remedial measure.[46]

This nationwide phenomenon can be seen in examples such as Louisiana, where post-Katrina clean-up efforts largely happened in predominately white and

41. *See id.* at 404.

42. *Id.* at 405.

43. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, 15 NAT'L L.J. 1, 1 (1992).

44. *Id.* at 2.

45. *Id.* The Comprehensive Environmental Response Compensation and Liability Act, better known as CERCLA or Superfund, provides a federal "superfund" to clean up hazardous waste sites. *Id.*

46. *Id.*

affluent neighborhoods, while the government mainly ignored black and poor neighborhoods for over a decade.[47] The segregation that facilitated the national trends emphasized in this section are demonstrated in the following Part using Louisiana's "Cancer Alley"[48] and the effect Katrina left on New Orleans as case studies. Louisiana is perhaps an extreme example of the direct relationship between the marginalization of black communities dating back to slavery and how environmental hazards are geographically allocated, but it is an appropriate case because of its clear legacy.

II. SEGREGATION AND ENVIRONMENTAL HAZARD CONNECTIONS IN LOUISIANA: A CASE STUDY

Both the Louisiana constitution and state-planning legislation give local governments the power to adopt regulations for land use, zoning, and historic preservation; however, they do not mandate or give incentives for localities to plan or zone.[49] There is no statewide plan for Louisiana and no statewide role in approving or enforcing local plans.[50] If a locality does adopt regulations, it must plan in accordance with the Standard State Zoning Enabling Act of 1922 and plan to promote health, safety, and general welfare, which, as mentioned earlier, local officials often used to the detriment of black communities.

As a result, much of Louisiana developed locally, and much of the zoning, planning, or structure of the parishes (Louisiana's equivalent of counties) can be directly tied to slavery and Jim Crow. For example, many industrial lots where refineries and chemical plants were built are still called "plantations."[51] Bulk goods come from factories that are shipped to New Orleans from the Angelina and Goldmine Plantations, which are located along Cancer Alley.[52] Both the history of slavery in what is now Cancer Alley and the use of redlining in New Orleans have led to environmental injustices in Louisiana that are distinctly tied to segregation.

A. CANCER ALLEY

Cancer Alley is the eighty-five mile stretch along the Mississippi River between Baton Rouge and New Orleans where approximately 25% of the

47. *See generally* RACE, PLACE AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA: STRUGGLES TO RECLAIM, REBUILD, AND REVITALIZE NEW ORLEANS AND THE GULF COAST 19 (Robert D. Bullard & Beverly Wright eds., 2009) (describing racial disparities in the response to Hurricane Katrina).

48. *See infra* Part II.A.

49. Lauren Land, *Brief History of Planning and Zoning in Louisiana*, LA SEA GRANT (Jan. 10, 2013), http://www.laseagrant.org/wp-content/uploads/Lafourch-Brief-History-Planning-Zoning-La.pdf.

50. *Id.*; *see also* LA. STAT. ANN. §§ 38:101–30.54 (2018).

51. *See* Darwin Bond Graham, *The New Orleans That Race Built: Racism, Disaster, and Urban Spatial Relationships*, *in* SEEKING HIGHER GROUND: THE HURRICANE KATRINA CRISIS, RACE, AND PUBLIC POLICY READER 23 (Manning Marable & Kristen Clarke eds., 2008).

52. *Id.*

country's petrochemical production takes place. The refineries and factories operating there pollute so heavily that the exposure of humans to toxicity in the area created its namesake.[53] Cancer Alley is 40% black and nearly eighty census tracts in the corridor are comprised of at least 90% black residents.[54] The communities closest to the plants along the Mississippi are predominantly composed of black families. These neighborhoods also have lower levels of education and a higher ratio of families living below the poverty line.[55] Black-dominant areas bear a cumulative risk to cancer of 16% more than in white-dominant areas,[56] and low-income census tracts bear a 12% greater risk to cancer from air toxins.[57] Spatial analyses show that the gradient effect of being both a majority-minority and a socioeconomically disadvantaged community magnifies the disparity for the most highly concentrated black areas.[58]

Much of Cancer Alley is rural and made of unincorporated towns, meaning that these communities do not have local governance over their affairs.[59] Thus, the parish they are located in has jurisdiction and can establish rules of governance in the town.[60] Most unincorporated communities were created when slavery ended and groups of free black people, called "companies," were able to buy strips of land at the edges of plantations.[61] The descendants of the original companies remained on the land and continued to subdivide the parcels, resulting in a series of small black communities living on small strips of land.[62] The plantations directly adjacent to these black communities have either continued to be farming and sugar cane plantations or were sold to industries dependent on river access to ship goods, chemicals, and petroleum products.[63]

Unincorporated communities that were historically communities of freed slaves suffer an acute vulnerability to noxious facility siting because they do not have the power to govern themselves.[64] For example, Wallace, Louisiana—a small, unincorporated, black community in Cancer Alley—was rezoned from residential to industrial use by the mostly white officials of St. John the Baptist

53. *See* Wesley James, Chunrong Jia, & Satish Kedia, *Uneven Magnitude of Disparities in Cancer Risks from Air Toxics*, 9 INTL. J. ENVTL. RES. & PUB. HEALTH 4365, 4366 (2012).

54. *Id*. (internal citation omitted).

55. *Id*. (internal citation omitted).

56. *Id*. at 4373.

57. *Id*. at 4371.

58. *Id*. at 4365.

59. DARRYL MALEK-WILEY, COMMUNITY IMPACTS OF POLLUTION IN LOUISIANA 60 (2013), *available at* https://www.academia.edu/9697592/Community_Impacts_of_Pollution_in_Louisiana_27_June_2013.

60. NAT'L ACAD. OF PUB. ADMIN., *supra* note 11, at 202.

61. *Id*. at 192.

62. *Id*.

63. *Id*.

64. Robert D. Bullard, *Unequal Environmental Protection: Incorporation Environmental Justice in Decisionmaking*, *in* WORST THINGS FIRST? THE DEBATE OVER RISK-BASED NATIONAL ENVIRONMENTAL PRIORITIES 237, 255 (Adam M. Finkel & Dominic Golding eds., 1994).

Parish to allow for the construction of a Formosa Plastics Corporation plant.[65]

A quarter of the chemicals and a large portion of the transportation fuel that the United States consumes is processed in over seventy-five of the industrial zones and 130 industries located on historical plantations along Cancer Alley.[66] After generations of living alongside these historical plantations, many of the unincorporated communities founded by freed slaves were bought out by Dow Chemical after numerous lawsuits were brought due to dangerous explosions at the nearby oil and chemical facilities.[67] Five miles south of a hazardous Dow plant, another community founded by freed slaves was bought out by the Georgia Gulf Corporation, which paid the costs for fifty families to be moved away from its vinyl chloride plant.[68] While it is better that these families are relocated further away from toxic industries than to continue living in a hazardous location, these facilities should not have been sited in their community to begin with, nor should public health decisions come at the expense of destroying their community.

Similar to Cancer Alley, the history of segregation in New Orleans due to redlining has led to black communities being displaced by environmental hazards.

B. REDLINING IN NEW ORLEANS

Although some residential segregation existed before the Civil War because of restricted access to public facilities, New Orleans was noted as a city with low segregation during the antebellum period.[69] Residential segregation fully emerged during the height of Jim Crow and during the early twentieth century Progressive Era, when engineering began to transform the urban South. In New Orleans, segregation was not only caused by the practice of redlining but also by the re-engineering of urban public works that unequally distributed new sewage and drainage systems.[70]

1. New Orleans' History of Environmental Injustice

New Orleans was built on land shaped by the sweeping meandering of the Mississippi River, where floods used to regularly deliver large amounts of

65. *Id.*

66. Keith Schneider, *Chemical Plants Buy Up Neighbors for Safety Zone*, N.Y. TIMES (Nov. 28, 1990), https://www.nytimes.com/1990/11/28/us/chemical-plants-buy-up-neighbors-for-safety-zone.html.

67. *Id.*

68. *Id.*

69. Daphne Spain, *Race Relations and Residential Segregation in New Orleans: Two Centuries of Paradox*, 441 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 82, 86 (1979).

70. *See generally* Craig E. Colton, *Basin Street Blues: Drainage and Environmental Equity in New Orleans, 1890-1930*, 28 J. HIST. GEOGRAPHY 237 (2002) (describing how Progressive Era public works projects were intended to improve drainage conditions, but instead ended up contributing to segregation).

sediment on to the flood plain, creating well-drained ground.[71] Once the city was developed and levees constructed, sediment was no longer carried ashore to create higher ground, and the city had to construct drainage systems.[72] Largely below sea level, New Orleans created a racial geography brought by white folk building and buying on higher ground.[73] By 1850, European immigrants had displaced most of the black population towards the poorly drained sectors of the city, and once drainage and sewage improvements began, they served the business elite and placed emerging black neighborhoods last on the list of drainage projects.[74] While officials celebrated the dramatic decrease in malaria deaths attributed to the elimination of swamp conditions that bred mosquitos, the death rate among the black population remained much higher than for whites for both malaria and typhoid.[75]

After the Civil War, New Orleans' black population grew, and many were relegated to living in swamps where the river would periodically overflow and wash their homes away because that was the only available and affordable place to live.[76] The invention of the screw pump during the Progressive Era further contributed to the racial geography of New Orleans by making it possible to drain and eliminate flooding outside of Central City and into newly drained areas near the lake, where developers were building new white-only subdivisions.[77] This made it easier for whites to escape to areas farther from the central part of the city, thus creating more segregation.

During the Jim Crow era, newly drained territory in the northern part of New Orleans, near the lakeside, contained neighborhoods which were almost exclusively white.[78] This was due to an ordinance passed by the New Orleans City Council in 1924 which withheld building permits for black folk in white neighborhoods and prohibited black people from renting or buying a home in a white neighborhood.[79] Although the ordinance was overturned by the Supreme Court in 1927,[80] racially restrictive covenants and deeds drafted by private parties mimicked the original ordinance to impose segregation nonetheless.[81] Because these deeds and covenants were drafted by private parties, rather than the government,

71. H.W. Gilmore, *The Old New Orleans and the New: A Case for Ecology*, 9 AM. SOC. REV. 385, 385 (1944).

72. *Id*. at 392.

73. *See* RACE, PLACE AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA, *supra* note 47, at 19–23 (describing the history and racial geography of New Orleans before Hurricane Katrina).

74. Colton, *supra* note 70, at 242, 244–45.

75. *Id*. at 245–46 (internal citation omitted).

76. *Cf*. *id*. at 246 (describing the expansion of the black population into low-lying wards).

77. *Id*. at 251 (stating that the pumps have been identified as agents of racism, although segregation was a product of the prejudicial real estate system that created white-only subdivisions) (internal citation omitted).

78. *Id*. at 251–52.

79. *Id*.

80. *Id*. at 251.

81. *Id*.

they were not prohibited by the Court's decision.[82] Developers stipulated that no houses valued at less than $3,000 could go into the new neighborhoods, and specified that "no lots are to be sold to negroes or colored people."[83] The common narrative that plagued many of America's cities in the twentieth century, consisting of redlining and racially restrictive residential suburbs accompanied by white flight, affected New Orleans just as it did much of the country.[84]

The creation and maintenance of segregation in New Orleans later became the backdrop of the story of Hurricane Katrina's disproportionate harm on black communities in the city. Prior to Hurricane Katrina, patterns of racial segregation in New Orleans created a city that boasted the second-highest level of poverty concentration in the nation.[85] New Orleans was a city where low-income white residents had greater access to middle class neighborhoods, while low-income black residents were overwhelmingly concentrated in high poverty neighborhoods.[86] Post-Katrina New Orleans now exemplifies the exclusionary dynamic and fundamental failure of U.S. housing policy at the federal, state, and local levels to prevent racial segregation.[87]

2. Hurricane Katrina's Predictable Effects on Segregated Neighborhoods

In many ways, the disproportionate impact that Hurricane Katrina had on non-white neighborhoods was previewed by the flooding of the Ninth Ward during

---

82. *Id.*

83. *Id.* (internal citation omitted).

84. *See* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

> From the 1930s through the 1960s, black people across the country were largely cut out of the legitimate home-mortgage market through means both legal and extralegal. Chicago whites employed every measure, from "restrictive covenants" to bombings, to keep their neighborhoods segregated. Their efforts were buttressed by the federal government. In 1934, Congress created the Federal Housing Administration . . . The FHA had adopted a system of maps that rated neighborhoods according to their perceived stability. On the maps, green areas, rated "A," indicated "in demand" neighborhoods that, as one appraiser put it, lacked "a single foreigner or Negro." These neighborhoods were considered excellent prospects for insurance. Neighborhoods where black people lived were rated "D" and were usually considered ineligible for FHA backing. They were colored in red. Neither the percentage of black people living there nor their social class mattered. Black people were viewed as a contagion. Redlining went beyond FHA-backed loans and spread to the entire mortgage industry, which was already rife with racism, excluding black people from most legitimate means of obtaining a mortgage . . . [When black people moved into white neighborhoods,] white homeowners simply fled the neighborhood. The traditional terminology, *white flight*, implies a kind of natural expression of preference. In fact, white flight was a triumph of social engineering, orchestrated by the shared racist presumptions of America's public and private sectors. For should any nonracist white families decide that integration might not be so bad as a matter of principle or practicality, they still had to contend with the hard facts of American housing policy. . . . Redlining destroyed the possibility of investment wherever black people lived.

Id.

85. Stacy E. Seicshnaydre, *Article: How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U.L. REV. 661, 662 (2011).

86. *Id.*

87. *See id.* at 663.

Hurricane Betsy decades earlier. The Ninth Ward in New Orleans began as a neighborhood of white-ethnic immigrants and working-class black families because of its cheap properties.[88] However, after schools in the Lower Ninth Ward were integrated, many of the remaining white residents fled the city into white neighborhoods on higher ground, turning the area into a segregated black and poor community.[89] By the time Hurricane Betsy flooded the city in several feet of water in 1965, the Ninth Ward was virtually all black except for the southern section near the edge of the French Quarter, which, not coincidentally, is on higher ground and separated from the rest of the ward.[90] Hurricane Betsy exposed the harm created by racial segregation as the differential impact that the storm had on New Orleans's black population made a lasting impression. However, Hurricane Betsy served as little incentive for future investments, making it a preview of what Hurricane Katrina was to bring.[91]

Forty years later, Hurricane Katrina became one of the worst environmental disasters in American history, not only for the devastation the hurricane brought, but also for the tons of lethal and toxic chemicals released into the water.[92] Which neighborhoods were cleaned up and which ones were left contaminated or targeted as new sites to dump storm debris and waste from flooded homes is telling of which communities America values. The Wall Street Journal reported U.S. Congressman Richard Baker from Baton Rouge telling lobbyists about the demise of public housing: "[W]e finally cleaned up public housing in New Orleans. We couldn't do it, but God did."[93] Public housing options have been significantly reduced since Hurricane Katrina,[94] and the city has either ignored predominately black neighborhoods that were historically segregated or used them as dump sites.

East New Orleans is a majority black part of the city where black families could buy property during the Jim Crow era, making it a mostly black, middle-class neighborhood.[95] After Hurricane Katrina, the city opened up the Old Gentilly Landfill in East New Orleans to dump construction and demolition waste from the storm, and within four months it expanded to over 100 feet high.[96] Four

88. *See* Graham, *supra* note 51, at 6.

89. *Id*. at 19.

90. Darwin BondGraham, *The New Orleans that Race Built: Racism, Disaster, and Urban Spatial Relationships*, 9 SOULS 4, 7 (2007) (referencing CRAIG E. COLTEN, AN UNNATURAL METROPOLIS: WRESTING NEW ORLEANS FROM NATURE 24 (2005)).

91. *See* Graham, *supra* note 51, at 24.

92. *See* RACE, PLACE AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA, *supra* note 47, at 25.

93. Charles Babington, *Some GOP Legislators Hit Jarring Notes in Addressing Katrina*, WASH. POST (Sept. 10, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/09/AR2005090901930.html?noredirect=on.

94. *See* Della Hasselle, *In New Orleans, Public Housing Crunch Forces Thousands into Limbo*, AL JAZEERA (July 30, 2015, 5:30 AM), http://america.aljazeera.com/articles/2015/7/30/new-orleans.html.

95. RACE, PLACE AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA, *supra* note 47, at 26.

96. *Id*.

days after lawyers filed a lawsuit to block further dumping, the entire landfill caught fire.[97] In 2006, the Army Corps of Engineers and the Louisiana Department of Environmental Quality issued permits to allow another landfill to operate in East New Orleans.[98] Much of the waste after Hurricane Katrina was mixed with potential toxic contamination, and experts from the EPA said it would be fortunate if even 30% of the hazardous waste was removed from the waste stream before it was dumped into the landfills.[99] Yet, neither of these landfills have a liner to prevent contamination to soil or water.[100]

After eight years, in 2015, the city, the former operators of the landfill, and the individuals and businesses who owned land adjacent to the landfill settled for eight million dollars, and as part of the settlement, the city agreed to buy the properties of those who lived adjacent to the landfill for just one dollar per square foot.[101] This meant that for a one thousand square foot home, only one thousand dollars would be given to the owner, hardly a reasonable price for someone forced to give up his or her home after facing daily exposure to toxic substances for years. After exposing black neighborhoods to waste and potential toxicity for years, the city settled to displace the community.

Nearly 400,000 people were displaced from New Orleans after Hurricane Katrina, and a 2008 study found that only 53% of black households were able to stay or return to the city following the storm, while 81% of white households were able to.[102] The Lower Ninth Ward saw about 10% of its population return, and even middle class and upper class black communities in East New Orleans only had 60% of their residents return. Meanwhile, white neighborhoods in New Orleans have not only returned, but also have grown. The Garden District is 107% of its pre-Katrina population and the French Quarter is 103%.[103] The lower return rates for New Orleans's black population was likely caused by the racial disparity in rebuilding efforts in New Orleans, such as the lack of levee protection and pollution abatement in black neighborhoods, which are described in the following section.

3. Housing and Gentrification Post-Katrina

Recovery after Hurricane Katrina was largely focused on affluent white communities, while at the same time, black communities in New Orleans were

---

97. *Id.*
98. *Id.*
99. *See id.* at 27.
100. *Id.*
101. Mark Schleifstein, *New Orleans, Old Gentilly Landfill Operators Agree to $8 Million Settlement with Landfill Property Owners*, NOLA.COM (last updated Feb. 24, 2015), https://www.nola.com/politics/index.ssf/2015/01/new_orleans_old_gentilly_landf.html.
102. *See* RACE, PLACE AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA, *supra* note 47, at 30.
103. *Id.* at 31 (internal citation omitted).

neglected. Hurricane Katrina drove up housing prices because only a limited supply of housing survived the storm, while demand for both new and old units remained high.[104] Under federal programs, only 43% of affordable apartments will be rebuilt, even as rents increased 45% and housing discrimination became even more commonplace as scarcity increased.[105] The Greater New Orleans Fair Housing Action Center found discrimination in nearly six out of ten transactions.[106]

Reports of flood maps produced by the Army Corps of Engineers show that while 220 miles of levees and floodwalls need to be replaced or strengthened, no increase in levee protection is shown in East New Orleans or the Ninth Ward, and mostly black parts of New Orleans are still left vulnerable to future flooding.[107] These disparities in flood safety could lead insurers and investors to "redline" once again and lean towards not supporting the rebuilding efforts in vulnerable black areas. Unless intentional efforts are made to integrate and protect minority communities from environmental destruction, history will repeat itself when the next hurricane lands.

III. THE WEAKNESSES OF EXISTING ENVIRONMENTAL JUSTICE POLICIES AND LAWS

Although some advocates for fair housing and environmental justice remain optimistic that successful disparate impact claims may be made under existing legal frameworks, most acknowledge the immense roadblocks litigants face, and a number also acknowledge the weaknesses in case law, legislative history, and the scope of the statutes and orders. Executive Order 12898, Title VI of the Civil Rights Act, and the Fair Housing Act are all legal tools that have the potential to remedy environmental injustices. However, all have flaws which render them too weak to repair the damage already done or prevent injustice from continuing.

A. ENVIRONMENTAL JUSTICE EXECUTIVE ORDER

Federal legal requirements relating to environmental justice ("EJ") in regional planning and transportation and agency action derive from Executive Order 12898 (the "EJ Executive Order" or "EO 12898"), issued by President Bill Clinton in 1994.[108] The EJ Executive Order requires federal executive agencies and the entities to which they extend financial support or project approval to

104. *Id.*

105. *Id.* at 30–31.

106. GREATER NEW ORLEANS FAIR HOUSING ACTION CTR., STRATEGIES TO AFFIRMATIVELY FURTHER FAIR HOUSING: PROPOSALS FOR THE CITY OF NEW ORLEANS COMPREHENSIVE ZONING ORDINANCE (CZO) AND BEYOND 19 (2011), *available from* http://www.gnofairhousing.org/2011/04/27/gnofhac-and-lawyers-committee-for-civil-rights-releases-handbook-on-zoning-and-fair-housing-to-assist-in-development-of-comprehensive-zoning-ordinance/.

107. *See* RACE, PLACE AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA, *supra* note 47 at 38; REILLY MORSE, ENVIRONMENTAL JUSTICE THROUGH THE EYE OF HURRICANE KATRINA 23 (2008), *available from* https://inequality.stanford.edu/sites/default/files/media/_media/pdf/key_issues/Environment_policy.pdf (stating that post-Katrina flood control efforts left out many black communities).

108. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

"identif[y] and address[] disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations."[109] It also mandates that federally-funded "programs, policies, and activities" must "not have the effect of excluding persons . . . from participation in, denying persons . . . the benefits of, or subjecting persons . . . to discrimination under, such programs, policies, and activities, because of their race, color, or national origin."[110] Not to be confused with Title VI of the Civil Rights Act, the EJ Executive Order is a directive from the President which federal departments have implemented through their own orders, and Title VI is one of the tools used by agencies to implement the directive.

While, at first, civil rights and environmental activists were excited about the executive order, "[a]fter the initial flurry of activity subsequent to EO 12898, environmental justice issues largely lost their place on the federal government's policy agenda."[111] Because the EJ Executive Order calls upon federal agencies, most notably the EPA and their subsequent programs, to analyze and enforce their own environmental justice mandates, implementation has varied across presidential administrations. Within a couple of years after EO 12898 was issued, environmental justice waned in importance in the second half of the Clinton Administration, and waned further during the Bush Administration. Although the Bush EPA did not rescind Clinton's executive order outright, as was feared, it did retreat from its principles and enforcement.[112] Bush's EPA Administrator issued a memorandum in 2001 to agency leadership that emphasized that environmental justice was not about addressing disproportionate risks for poor and minority groups. Subsequently, the Office of Environmental Justice at the EPA directed agency management to recognize that "the environmental justice program is not an affirmative action program or a set-aside program designed specifically to address the concerns of minority communities and/or low-income communities. To the contrary, environmental justice belongs to all Americans."[113] The meaning of environmental justice was challenged and changed so much by the Bush EPA that "the EPA's own Inspector General accused the agency of undermining the spirit and purpose of EO 12898."[114]

Further, the EPA's own enforcement of EO 12898 has often been lacking. An analysis that examined EPA programs, policies, and procedures over the past two decades found that the EPA has regularly failed to aid black and poor

---

109. *Id*. at 7630.

110. *Id*. at 7630–31.

111. David M. Konisky, *Environmental Justice Delayed: Failed Promises, Hope for the Future*, 58 ENV'T MAG. 4, 12 (2016).

112. *Id*.

113. OFFICE OF THE INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 2004-P-00007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE 10 (2004).

114. Konisky, *supra* note 111, at 12.

communities with the same commitment as white communities.[115] The EPA has not written pollution control permits in a way that considered impacts on minority communities, has rarely considered the unequal impacts of pollution on different communities when it sets pollution standards, has only recently incorporated environmental justice concerns into its economic analysis of proposed rules, and has been ineffective in broadening public participation in the permitting process in low-income and communities of color.[116] The EPA has also failed to target any regulatory enforcement to pollution sources specifically located in communities of color and has not required that states implement federal laws that do so.[117]

The prioritization of environmental justice policies wax and wane within and across administrations, making it a particularly challenging policy effort with no legislative basis.[118] Without a legislative basis, there are also no citizen suit provisions as there are for other EPA regulations of air and water, making it especially difficult for communities of color to hold the EPA and other agencies accountable.[119]

B. TITLE VI ENFORCEMENT

Title VI of the Civil Rights Act of 1964 ("Title VI") prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance.[120] This prohibition applies to intentional discrimination as well as to procedures, criteria, or methods of administration that appear neutral but have a discriminatory effect on individuals.[121]

EJ communities turn to Title VI as a means to address racial discrimination in the permitting and siting of facilities that release hazardous pollutants and cause environmental health risks.[122] EJ communities have utilized Title VI in two major ways: by directly suing recipients of federal funds in federal and state courts under Title VI, and by filing Title VI administrative complaints with the EPA and other agencies.[123] Unfortunately, thus far, both avenues have yielded limited success in the courts and at the agency level.

---

115. *Id*. at 10.

116. *Id*.

117. *See* David M. Konisky & Christopher Reenock, *Evaluating Fairness in Environmental Regulatory Enforcement*, *in* FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT'S RESPONSE TO ENVIRONMENTAL JUSTICE 173–203 (David M. Konisky ed., 2015).

118. Konisky, *supra* note 111, at 12.

119. *Id*.

120. Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (2018).

121. U.S. COMM'N ON CIV. RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12898 10 (2016), *available at* https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf.

122. *Id*. at 1.

123. *Id*. at 10.

1. The Need to Prove Discriminatory Intent Prevents Plaintiffs from Bringing Title VI Complaints in Court

To bring a Title VI complaint to court rather than through an administrative complaint process, communities must allege that the operators of the program receiving federal funds had discriminatory intent, a high evidentiary bar. In *Guardians Association v. Civil Service Commission*,[124] the Supreme Court found that Section 601 of Title VI requires proof of intentional discrimination, and in *Alexander v. Sandoval*,[125] the Court held that Section 602 regulations prohibiting disparate impact do not create a private right of action. As a result of *Guardians* and *Sandoval*, EJ communities have moved away from bringing Title VI claims in courts because proving intentional discrimination is rarely possible and have focused instead on filing administrative complaints with federal agencies where the evidentiary bar is "disparate impact."[126]

2. The "Effects Test" Used in Administrative Complaints Places a High Burden on Plaintiffs

Administrative complaints also bring their own challenges, however. Title VI administrative complaints are only available as a legal avenue for disparate impact complaints against federal fund recipients.[127] The two elements necessary to include in a complaint are a description of the discriminatory acts alleged, and evidence that the discriminator receives federal funds, such as a government program under the Department of Housing and Urban Development ("HUD").[128]

The EPA Office of Civil Rights is charged with processing Title VI complaints and has a 20-day deadline to accept or dismiss a complaint, and a 180-day regulatory deadline for completing investigations of complaints accepted.[129] Yet, out of 247 complaints received by 2011, only 6% of requests were accepted or denied within the deadline.[130] Additionally, the EPA's backlog of Title VI complaints that remained unanswered in 2011 stretched back to 2001, despite the EPA's 180-day regulatory deadline.[131]

---

124. 463 U.S. 582 (1983).

125. 532 U.S. 275, 293 (2001).

126. U.S. COMM'N ON CIV. RIGHTS, *supra* note 121, at 10.

127. *Id.*

128. Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 315–16 (1994).

129. *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, AM. BAR ASS'N (Oct. 23, 2012), https://www.americanbar.org/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/.

130. DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS, ENVIRONMENTAL PROTECTION AGENCY, ORDER No. EP10H002058 (Mar. 21, 2011); *see id.*

131. DELOITTE, *supra* note 130; *see* AM. BAR ASS'N, *supra* note 129.

In addition, getting the EPA to accept and investigate Title VI complaints is merely the first step. Although EJ groups began to pressure the EPA to make more effective use of its Title VI regulations in the 1990s, the EPA only decided one administrative Title VI complaint on the merits before the year 2000—with an outcome adverse to the complainants.[132]

The EPA's investigative process when pursuing complaints alleging disparate impacts from the issuance of a permit by a federal fund recipient includes six steps:[133] 1) assessing the applicability of Title VI regulations; 2) determining the appropriate scope of the investigation; 3) evaluating the actual impacts; 4) determining whether the impact was adverse; 5) characterizing the demographic of the affected population; and 6) deciding whether the adverse disparate impact is sufficiently significant.[134] Each of these six steps requires data showing causality, the severity of the impact, and demographic information which may not be significant enough for the EPA to believe there is an adverse disparate impact.[135]

The EPA uses the "effects test" to determine disparate impact.[136] The "effects test" used in Title VI cases is the same as the disparate impact test used in Title VII cases, and thus, an analysis of the pitfalls of Title VI cases regarding environmental justice is instructive for plaintiffs litigating under both statutes.[137] Charles Abernathy analyzed the failure of the effects test for discrimination under Title VI and found that

> during the twenty-seven years of the study period, only twelve cases reached the federal appellate courts and were decided, even arguably, by applying the effects test. Of those twelve, only two involved plaintiffs' claims in a context where specific federal regulations predetermined certain discriminatory effects to be per se illegal. Plaintiffs won both cases. Of the remaining ten cases, none of which involved particularized regulations, and all therefore required pure judicial application of an effects test—and plaintiffs lost every case. . . . Only two judges in the entire twenty-seven-year life of the effects test ever voted to

---

132. Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENVTL. AFF. L. REV. 143, 164 (2002); *see also* Letter from Ann E. Goode, Dir., U.S. E.P.A., Office of Civil Rights, to Father Phil Schmitter, Co-Dir., Sister Joanne Chiaverini, Co-Dir., St. Francis Prayer Ctr., and Russell J. Harding, Dir., Michigan Dep't of Envtl. Quality, re: E.P.A. File No. 5R-98-R5 (Select Steel Complaint) (Oct. 30, 1998), *available at* https://www.eenews.net/assets/2017/05/09/document_gw_03.pdf.

133. *See* Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,66770 (June 27, 2000).

134. *Id.*

135. *Id.*

136. Michael Mattheisen, *Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 1, 9–11 (2000).

137. *Id.*

> enforce it based on their own normative judgment, unassisted by explicit administrative guidelines.[138]

Lower appellate courts developed Title VI's effects test by echoing the Supreme Court's three-step formulation for Title VII disparate impact cases, which uses a balancing approach that considers the countervailing interest of the defendant's "substantial legitimate justification" and alternative practices that might have a less disparate effect.[139] The development of a balancing approach to the effects test eventually undermined Title VI because appellate courts were reluctant to decide for plaintiffs after balancing a neutral policy's impact on minorities against the importance of the policy.[140] Similarly, although the EPA might find an adverse disparate impact in a case, the discriminatory action may be permissible if it is reasonably necessary to meet a goal that is legitimate and important to the institutional mission of the federally funded program.[141] A legitimate goal can include economic interests, such as a new power plant, that admittedly harms segregated communities, but may have direct economic benefits.

For example, in *New York City Environmental Justice Alliance v. Giuliani*, the plaintiffs sought to restrain the city from selling or bulldozing any of 1,100 city-owned parcels, comprising approximately 600 community gardens, on the grounds that any such sale or changed use of the city-owned parcels would have a disproportionately adverse impact on the city's black, Asian American, and Hispanic residents, in violation of regulations promulgated by the EPA to implement Title VI of the Civil Rights Act.[142] The court held that, while it was not disputed that plaintiffs would suffer irreparable harm from the loss of the lots, plaintiffs failed to show a likelihood of prevailing on their claim of disparate impact because plaintiffs' use of open space as the criteria for determining disparate impact did not meaningfully measure the impact of defendants' actions on minority communities compared with the impact of those actions on non-minority communities.[143] Additionally, the court held that the plaintiffs did not dispute the city's "substantial legitimate justification" that the plots would be used for urban renewal.[144] Plaintiffs also failed to demonstrate a less discriminatory option.[145] The case thus provides a great illustration of how difficult it is for plaintiffs to overcome the balancing test at the core of the effects test used in Title VI litigation.

---

138. Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test for Discrimination*, 94 GEO. L.J. 267, 274 (2006).
139. *Id*. at 286.
140. *Id*.
141. Yang, *supra* note 132, at 168.
142. 214 F.3d 65, 67 (2d Cir. 2000).
143. *Id*. at 72.
144. *Id*.
145. *Id*.

3. Even When Disparate Impact Is Shown, the EPA Often Settles Unilaterally and Before Favorable Decisions Are Published

Even when the EPA conducts a timely and successful investigation and actually finds disparate impact, oftentimes, the EPA will announce a settlement agreement that was reached without attorney or community engagement.[146] For example, in *Angelita C. v. California Department of Pesticide Regulation*, the EPA completed its investigation in 2011 of a Title VI complaint filed in 1994.[147] For the first time in history, the EPA found that the evidence demonstrated a prima facie violation of Title VI, not just disparate impact.[148] Although the evidence proved that California's implementation of pesticide registrations discriminated against Latinx children because it failed to take into consideration health impacts on children attending schools close by, the settlement was reached without consulting the complainants or community.[149] Although the settlement agreement stated that air monitors would be installed, because the community affected was left out of the conversation, the EPA did not include a substantive remedy for the decade long discrimination in the agreement.[150]

C. FAIR HOUSING ACT

Another possible piece of legislation that EJ communities can use to combat the disproportionate siting of hazardous and environmental disasters in their backyard is the Fair Housing Act. Title VIII of the Civil Rights Act of 1968—popularly known as the Fair Housing Act ("FHA")—prohibits discrimination concerning the sale, rental, advertising and financing of housing based on race, religion, national origin, and sex.[151] The FHA is enforced by the Department of Justice ("DOJ"), the states, local fair housing agencies, and private lawsuits in courts.[152]

For much of the beginning of its fifty-year history, the FHA was generously construed by the courts.[153] Over time, however, the modern federal judiciary has limited the power of this anti-discrimination law through holdings that narrow its scope.[154] Although discriminatory intent is not a technical requirement for a successful FHA claim, in practice, few plaintiffs are successful without a showing of

146. *See id.*
147. AM. BAR ASS'N, *supra* note 129 (internal citation omitted).
148. *Id.*
149. *Id.*
150. *Id.*
151. Fair Housing Act, 42 U.S.C. § 3604 (2015).
152. *The Fair Housing Act*, U.S. DEP'T OF JUSTICE (last updated Dec. 21, 2017), https://www.justice.gov/crt/fair-housing-act-1.
153. Benjamin Schepis, *Making the Fair Housing Act More Fair: Permitting Section 3604(B) to Provide Relief for Post-Occupancy Discrimination in the Provision of Municipal Services—A Historical View*, 41 U. TOL. L. REV. 411 (2010).
154. *Id.*

both disparate impact and discriminatory intent.[155] In 2015, the Supreme Court's adoption of a "disparate impact" test for FHA cases led to some optimism in the environmental justice community because discriminatory intent is extremely difficult to prove; yet a brief analysis of past cases, legislative history, and a comparison of the failure of the effects test used in Title VI cases, show that lower federal courts have largely not chosen to proceed toward the goal of eradicating America's racially segregated society, and have not chosen to eliminate environmental injustice through the FHA.[156]

1. Discriminatory Intent as a De Facto Requirement for Successful FHA Claims

Under the FHA, discrimination does not have to be intentional, but must have a "disparate impact," similar to Title VI, meaning that a neutral policy that has unjustified disproportionate impacts on one of the protected groups can violate the law.[157] The first successful model for proving discrimination regarding municipal services was the 1971 case, *Hawkins v. Town of Shaw*, where black citizens in Mississippi successfully established a prima facie case of discrimination by presenting statistical differences in street paving, lighting, sewage, water, and fire hydrants because of geographic segregation, leading to a pattern of discrimination.[158]

This statistical approach became a model for plaintiffs in subsequent municipal-service equalization cases, such as the more recent case of *Kennedy v. City of Zanesville* in 2008.[159] In *City of Zanesville*, residents of Coal Run, Ohio showed statistical discrepancies in access to the municipal water supply, with reports that noted that black or mixed-race homes had no service while white homes in the same geographic vicinity did.[160] Coal Run residents thus fulfilled the same factors required for a finding of discriminatory intent, in addition to disparate impact.[161] Similarly, in 2009, EJ advocates successfully brought a claim in New Orleans post-Katrina under the Fair Housing Act. In *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*,[162] St. Bernard Parish was found to have violated the Fair Housing Act by enacting an ordinance that placed a moratorium on the construction of all multi-family housing. The ordinance had a disparate racial

155. Kerri Thompson, *Fair Housing's Trap Door: Fixing the Broken Disparate Impact Doctrine under the Fair Housing Act*, 25 J. AFFORDABLE HOUSING 435, 440–42 (2017).

156. *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

157. *See* Thompson, *supra* note 155, at 437.

158. 437 F.2d 1286 (5th Cir. 1971).

159. 505 F. Supp. 2d 456 (S.D. Ohio 2007).

160. John Izak Monger, *Thirsting for Equal Protection: The Legal Implications of Municipal Water Access in Kennedy v. City of Zanesville and the Need for Federal Oversight of Governments Practicing Unlawful Race Discrimination*, 59 CATH. U.L. REV. 587, 609 (2010).

161. *Id.* at 591–93.

162. 641 F. Supp. 2d 563, 577 (E.D. La. 2009).

impact on black residents, but evidence indicated that the parish had also acted with discriminatory intent.[163]

These cases illustrate that although a showing of discriminatory intent is not technically necessary for plaintiffs to succeed in an FHA claim, in practice, claims are rarely successful without a showing of discriminatory intent. Where discriminatory intent cannot be shown, succeeding solely on a disparate impact theory poses significant challenges.

2. The FHA Has Proven Disappointing to EJ Advocates in Post-Katrina New Orleans

In places such as New Orleans, advocates hoped to use Title VIII in post-Katrina reconstruction, in the hopes of marrying the resale and re-letting of housing opportunities with an environmentally just cleanup.[164] Although courts had already interpreted Title VIII and Section 3604(b) in a way that suggested a limited environmental justice regime, Louisiana believed that the facts in post-Katrina New Orleans were distinct in very material ways from the more traditional nuisance cases in which the statute had often arisen before, and hoped to advance the doctrine in a positive direction.[165] However, many cases brought forth under the FHA in New Orleans were settled between the city, HUD, and the DOJ, and thus, did not lay down precedent that can be emulated. For example, the Old Gentilly Landfill located in East New Orleans, mentioned earlier, was one of the cases settled by the EPA. In addition to a very small monetary amount settled later on for the residents adjacent to the landfill, the first lawsuit related to Gentilly resulted in a settlement agreement between the plaintiff (the Louisiana Environmental Action Network, "LEAN") and the EPA that limited waste intake to 19,000 cubic yards per day at the site.[166] While this settlement successfully limited potentially toxic waste from entering a historically segregated neighborhood, it cannot be used as precedent for future environmental justice cases.

The Fair Housing Act, like the other environmental justice policies previously mentioned, is insufficient for communities who need recompense for discriminatory siting decisions. New policies or changes to existing laws need to be made if environmental hazards are to be distributed in a way which does not disproportionately burden black communities.

IV. RECOMMENDATIONS

In many areas of the country, the history of segregation has facilitated environmental racism, both directly and indirectly. In light of the correlation between

163. *See id.*

164. Benjamin Rajotte, *Environmental Justice in New Orleans: A New Lease on Life for Title VIII?*, 21 TUL. ENVTL. L.J. 51, 81 (2007).

165. *Id.*

166. Sierra Club v. EPA, No. 96-0527 (E.D. La. Apr. 1, 2002) (order granting consent decree).

historic segregation and environmental injustice, harms caused by the mechanisms of segregation, such as zoning and planning, should be reformed. Further, when environmental injustices do occur, affected communities should not be required to prove discriminatory intent by the wrongdoer, whether an action is challenged in a judicial or administrative setting. The legacy of segregation on environmental injustice is so long and powerful that it is almost impossible for affected communities to prove intentional discrimination today, thus causing many environmental injustices to go unpunished under current standards of review. Advocates must recognize the role that segregation has played in environmental injustice and must create tools that do not require proof of discriminatory intent.

Based on the weaknesses found in current laws, this Note makes a few recommendations to strengthen existing policies. To ensure that predominately black communities do not suffer disparate harms of repeated placement of toxic facilities nearby, (1) land use power that is held mostly by local officials should be handed directly to the impacted communities, even down to the neighborhood level if necessary; (2) local planning statutes should be updated to reflect environmental justice goals; (3) in cases using Title VI and the FHA, the burden of proof should be shifted to the agencies and development companies to prove that their programs are not disproportionately harming minorities; and (4) there should be a private right of action for communities with disparate impact cases under Title VI.

The environmental justice problems associated with local officials holding land use power to the detriment of black residents was highlighted in a 2003 panel report by the National Academy of Public Administrators ("NAPA").[167] NAPA recommended that immediate steps be taken by mayors, county executives, and governors, as well as local and state legislative bodies, to mobilize land use planning and zoning power to improve citizen participation in decisions with environmental and health impacts.[168] Citizen participation by those most affected by siting decisions must not only be improved, but also should be mandated. Land use and zoning power should be equitable, and the process must be one that includes an analysis of the disparate impacts a siting decision might have on a minority or poor community.

Additionally, the American Planning Association surveyed state and local laws on land use and planning in 1999 and determined that twenty-four states still used the Standard State Zoning Enabling Act of 1922, which, as previously mentioned, often leads to segregated outcomes. The Association suggested that state planning statues should be reformed to include ongoing problems of housing affordability, lack of housing diversity, exposure to natural hazards, and an obligation to promote social equity in "the expansion of opportunities for betterment, creating

167. NAT'L ACAD. OF PUB. ADMIN., *supra* note 11.
168. *Id*. at 22.

more choices for those who have few . . . in the face of economic and spatial separation."[169] States and local governments must update planning statutes to ensure equity in toxic waste and hazardous siting decisions, as well as to combat the segregation that allows such outcomes to occur. Locally, officials should be forced to use their land use planning and zoning authority to address environmental justice concerns in the community and do so by having to provide underrepresented communities with a large role in creating comprehensive land use plans.[170]

For cases involving Title VI and the FHA, Robert Bullard suggests that the burden of proof be shifted to polluters and developers who harm communities of color disproportionately or do not give equal protection to overburdened classes because, as it stands, redress often occurs only after minority communities prove that permitting or zoning decisions were discriminatory or have disparately impacted them.[171] Instead, the burden of proof should be shifted first to the entities applying for permits for landfills, incinerators, chemical plants, and refineries to prove that their operations will not disproportionately affect low-income and communities of color.[172]

In addition, there is currently no private right of action for Title VI disparate impact cases, and thus, there is only a private right of action for discriminatory intent cases, which are much more difficult to prove in court.[173] Title VI cases that show disparate impact can only be brought administratively through the EPA or other agencies, which have stringent regulatory deadlines for completing investigations, and where the great majority of requests to investigate are not accepted within the deadline. When disparate impact complaints are accepted, settlements with the EPA are often reached without community engagement as well. Instead, new legislation should create a citizen suit provision and private right of action in disparate impact cases, regulatory deadlines for investigation should be lengthened to longer than 180 days, the EPA or the DOJ should be given the strength and resources necessary to investigate, and settlements reached by federal agencies should be required to include input from the communities involved in the case.

Unless there are mandatory procedures to ensure that communities disproportionately harmed by hazardous facilities have a mode of redress, segregated black neighborhoods will continue to be environmentally toxic communities. At all steps of the permitting process and in all aspects of their operations, from siting to polluting to dumping waste, hazardous industries must be forced to consider and rectify their contribution to environmental injustices.

---

169. *Id*. at 39.
170. *Id*. at 42–44.
171. Bullard, *supra* note 1, at 39.
172. *Id*.
173. *See* Alexander v. Sandoval, 532 U.S. 275 (2001).

CONCLUSION

Jim Crow segregation, as well as present-day zoning laws and siting processes, have created toxic communities in predominately black and poor neighborhoods. The disproportionate effects of environmental hazards and natural disasters on segregated communities are not only seen in Louisiana but around the country, as seen more recently in Houston after Hurricane Harvey landed in August 2017. In a city where Jim Crow once reigned, whiter and wealthier neighborhoods in Houston had flood safeguards, such as dikes and berms, and lacked hazards, such as chemical plants and oil refineries.[174] In contrast, in neighborhoods on the east side, where nearly 90% of the population is Hispanic and less flood protection exists, the water rose over nine feet high and industrial facilities and toxic waste sites were damaged, raising fears of contamination.[175]

Given that climate change likely will harm poor communities of color disproportionately as natural disasters increase in frequency and intensity, it is crucial for environmental justice laws to be created, changed, and strengthened.[176] The connection between historical segregation and present-day zoning and siting processes that harm communities of color should be used to inform advocates and lawmakers of the need to make the environmental justice landscape more equitable. Although the scope of this Note does not cover the potential use of environmental justice work to create community-based reparations, further research should be done to understand how reparations should be allocated in communities where segregation has led to unequal, toxic outcomes.[177]

174. Alexander C. Kaufman, *Houston Flooding Always Hits Poor, Non-White Neighborhoods Hardest*, HUFFINGTON POST (Aug. 29, 2017, 3:17 PM), https://www.huffingtonpost.com/entry/houston-harvey-environmental-justice_us_59a41c90e4b06d67e3390993.

175. *See* Troy Griggs et al., *More Than 40 Sites Released Hazardous Pollutants Because of Hurricane Harvey*, N.Y. TIMES (Sept. 8, 2017), https://www.nytimes.com/interactive/2017/09/08/us/houston-hurricane-harvey-harzardous-chemicals.html.

176. *See generally* Maria Eugenia Ibarraran et al., *Climate Change and Natural Disasters: Macroeconomic Performance and Distributional Impacts*, 11 ENV'T, DEV. & SUSTAINABILITY 3 (2007).

177. *See* Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1358–72 (2016).