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Death by Committee: Reviving Federal Environmental Justice Legislation to Mitigate Disproportionate Impacts on Vulnerable Communities

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PACE ENVIRONMENTAL LAW REVIEW

NOTE

Death by Committee: Reviving Federal Environmental Justice Legislation to Mitigate Disproportionate Impacts on Vulnerable Communities

SARA C. BABCOCK*

ABSTRACT

This Note proposes legislation that provides an avenue for protecting the right to a clean and healthy environment by requiring agencies to consider vulnerable communities before initiating large-scale federal projects. Part I lays out the emergence of environmental justice issues in the United States, including its turning point. Part II introduces both successful and failed attempts at federal environmental justice legislation and analyzes why federal environmental justice legislation continuously fails. Part III discusses how executive environmental justice action becomes pointless to the overall progression of environmental justice and examines President Biden's progress in the first year of his presidency. Finally, Part V proposes specific language Congress should include in the proposed legislation and asserts why congressional action is the correct avenue for substantive environmental justice legislation. Part V additionally compares three governing documents—the National Environmental Policy Act, Executive Order 12898, and the New Jersey Environmental Justice law—to the proposed legislation in this Note.

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INTRODUCTION

The environment should not be a luxury for the privileged.¹ Clean air, clean water, and clean land should not be earned, but freely given. Yet, every day, communities of color, low-income communities, and other marginalized communities face the bulk of the environmental threats and toxic pollutants, leaving these communities overburdened and vulnerable.² Racist and otherwise discriminatory institutional rules, regulations, and

1. See generally *Booker Reintroduced Sweeping Environmental Justice Bill*, BOOKER.SENATE.GOV (Aug. 5, 2021), <https://www.booker.senate.gov/news/press/08/05/2021/booker-reintroduces-sweeping-environmental-justice-bill> [perma.cc/URQ2-7B4U] (reintroducing legislation to address the environmental injustices that target vulnerable communities).

2. See *id.*; see, e.g., CLIMATE CHANGE OUTREACH ROUNDTABLE MEETING MINUTES 7/24/15 (U.S. EPA 2022), ("People of color and low-income communities are less responsible for climate change yet bear disproportionate risk . . ."); Christopher W. Tessum et al., *PM2.5 pollutants disproportionately and systemically affect people of color in the United States*, 7 SCI. ADVANCES 1, 3 (Apr. 28, 2021), <https://www.science.org/doi/10.1126/sciadv.abf4491> (concluding that people of color are disproportionately exposed to a regulated air pollutant that can cause lung and heart problems); ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY 1987 — 2007 56 (United Church of Christ, 2007) (finding that more than half of the people who live within 1.86 miles of a toxic waste facility are people of color); Anne M. Wengrovitz & Mary Jean Brown, *Recommendations for Blood Lead Screening of Medicaid-Eligible Children Aged 1–5 Years: an Updated Approach to Targeting a Group at High Risk*, 58 CDC MORBIDITY & MORTALITY WEEKLY REPORT (2009). (determining that 11.2 percent of Black children are poisoned by lead compared to 2.3 percent of white children); James VanDerslice, *Drinking Water Infrastructure and Environmental Disparities: Evidence and Methodological Considerations*, 101 AM. J. PUB. HEALTH S109, S110 (Dec. 2011) (documenting that water contamination has largely affected children of color and indigenous communities).

policies combined with corporate decisions have intentionally targeted vulnerable communities for unfavorable land uses and poor zoning laws.³ *Buchanan v. Warley* banned the use of explicit race-based zoning in 1917, but city planners and homeowners found indirect methods to continue segregating neighborhoods.⁴ Citing to economic concerns, cities like St. Louis, Seattle, and Newark were able to create laws that kept minorities out of white neighborhoods.⁵ Despite the laws and policies no longer being in effect, St. Louis, Seattle, Newark, and many other cities nationwide maintain the segregation patterns to this day.⁶

Corporations and governments have taken advantage of the past racist and otherwise discriminatory institutional rules, regulations, and policies to disproportionately expose communities of color, low-income communities, and indigenous communities to toxic and hazardous waste.⁷ Years of consistent exposure to toxic and hazardous waste has led to a whole host of medical issues within these communities such as asthma, cancer, higher blood lead levels, cardiovascular disease, and developmental disorders.⁸

The Environmental Justice Movement has emerged from the realization that not only does the environment need protection, but so do people. Robert Bullard, the highly regarded Father of the Environmental Justice Movement and a sociologist, defines environmental justice as “the principle that all people and communities have a right to equal protection

3. See generally *Environmental Justice & Environmental Racism*, GREENACTION, <https://greenaction.org/what-is-environmental-justice/> [https://perma.cc/9GQV-RH28].

4. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (ruling that a Kentucky zoning ordinance that prohibited a white man from selling his property to a Black man if the surrounding neighborhood was already majority-white violated the Fourteenth Amendment of the US Constitution); Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/> [https://perma.cc/6ETR-ETEJ].

5. See Rouse et al., *supra* note 4; see, e.g., RICHARD ROTHSTEIN, *THE MAKING OF FERGUSON* 3–5 (Econ. Pol’y Inst., 2014) (explaining St. Louis’s 1919 zoning laws and how they led to the racial tension in Ferguson in 2014); Tate Twinam, *The long-run impact of zoning: Institutional hysteresis and durable capital in Seattle, 1920–2015*, 73 REG’L SCI. & URB. ECON. 155, 157 (2018) (examining Seattle’s 1923 zoning laws and providing commentary on how institutions can disrupt this pattern); Malina Welman, *The Starting Point: Structuring Newark’s Land Use Laws at the Outset of Redevelopment to Promote Integration Without Displacement*, 53 COLUM. J.L. & SOC. PROBS. 43, 45–46 (discussing the use of exclusionary zoning laws into keep out low-income and communities of color).

6. See ROTHSTEIN, *supra* note 5.

7. GREENACTION *supra* note 3.

8. *What is Environmental Justice?*, NJ DEP’T OF ENV’T PROT., <https://www.nj.gov/dep/ej/> [https://perma.cc/2AK9-LHPJ]; see Tessum et al., *supra* note 2 (describing the ways that communities of color and low-income communities are exposed to toxic pollutants and hazardous waste leading to disparate health issues).

and equal enforcement of environmental laws and regulations.⁹ The movement describes environmental justice through Ricardo Levins Morales' popular environmental justice artwork.¹⁰ The artwork reads "environmental justice is our cry of defiance against the onslaught of oppressive toxins and toxic oppressions that threaten to submerge our homes."¹¹

This Note proposes legislation that provides an avenue for protecting the right to a clean and healthy environment by requiring agencies to consider vulnerable communities before initiating large-scale federal projects. Part I lays out the emergence of environmental justice issues in the United States, including its turning point. Part II introduces both successful and failed attempts at federal environmental justice legislation and analyzes why federal environmental justice legislation continuously fails. Part III discusses how executive environmental justice action becomes pointless to the overall progression of environmental justice and examines President Biden's progress in the first year of his presidency. Finally, Part V proposes specific language Congress should include in the proposed legislation and asserts why congressional action is the correct avenue for substantive environmental justice legislation. Part V additionally compares three governing documents—the National Environmental Policy Act, Executive Order 12898, and the New Jersey Environmental Justice law—to the proposed legislation in this Note.

I. A Brief History of the Environmental Justice Movement

The Environmental Justice Movement originated in conjunction with the 1960s Civil Rights Movement and the 1970s Environmental Movement.¹² The movement gained real momentum in the 1980s in response to toxic dumping, municipal waste facility siting, and land use

9. DR. ROBERT BULLARD - FATHER OF ENV'T JUST., <https://drrobertbullard.com> [<https://perma.cc/B7PB-NTD9>].

10. *Environmental Justice*, RICARDO LEVINS MORALES ART STUDIO, <https://www.rlmartstudio.com/product/environmental-justice/> [<https://perma.cc/6ZFX-LP5A>].

11. *Id.*

12. See *Environmental Justice*, CONG. BLACK CAUCUS FOUND., INC., <http://www.avoiceonline.org/environmental/history.html> [<https://perma.cc/NWU3-L5Y6>] ; see generally *Civil Rights Movement*, ADL (June 13, 2022), <https://www.adl.org/education/resources/backgrounders/civil-rights-movement> [<https://perma.cc/U4YR-7A46>] (laying out a timeline to the Civil Rights Movement beginning in 1954); see generally Rex Weyler, *A Brief History of Environmentalism*, GREENPEACE (Jan. 5, 2018), <https://www.greenpeace.org/international/story/11658/a-brief-history-of-environmentalism/> [<https://perma.cc/7EEP-7N96>] (summarizing the history of the Environmental Movement).

decisions that disproportionately affected vulnerable communities.¹³ These vulnerable communities were tired of mistreatment and became activists for themselves against what they labeled “environmental attacks on their civil rights.”¹⁴

Warren County, North Carolina, a community with the highest percentage of Black residents in the state, was selected to host a hazardous waste landfill.¹⁵ This landfill would accept 60,000 tons of polychlorinated biphenyl-contaminated (PCB) soil.¹⁶ Contaminated with cancer-causing chemicals, the soil consisted of illegally dumped toxic waste found alongside roadways.¹⁷ This impoverished Black farming community publicly resisted the proposed waste facility.¹⁸ In response to this injustice, the National Association of the Advancement of Colored People (NAACP) organized a month-long protest which led to officers arresting more than 500 protestors.¹⁹ This protest gained massive attention nationwide labeling it the *turning point* of the Environmental Justice Movement.²⁰ National leaders joined the protest including then United Church of Christ’s Commission for Racial Justice director Dr. Benjamin Chavis, Southern Christian Leadership Conference member Joseph Lowery, and Congressional Black Caucus member Walter Fauntroy.²¹

Although the protest was ultimately unsuccessful, the momentum of the Warren County protest was not lost. The incident motivated the Commission for Racial Justice to conduct a study investigating the placement of hazardous waste sites.²² The study found that “the percentage of community residents that belong to a racial and ethnic group was a stronger predictor of the level of commercial hazardous waste activity than was household income, the value of homes, the number of uncontrolled toxic waste sites or the estimated amount of hazardous wastes generated

13. CONG. BLACK CAUCUS FOUND., INC., *supra* note 12.

14. *Id.*

15. *Environmental Justice History*, OFF. OF LEGACY MGMT., <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> [<https://perma.cc/V4WU-4JF9>].

16. *Id.*; Matt Reimann, *The EPA chose this county for a toxic dump because its residents were ‘few, black, and poor’*, TIMELINE.COM (Apr. 3, 2017), <https://timeline.com/warren-county-dumping-race-4d8fe8de06cb> [<https://perma.cc/9VWW-6BCB>].

17. OFF. OF LEGACY MGMT., *supra* note 15; *see* Reimann, *supra* note 16.

18. CONG. BLACK CAUCUS FOUND., INC., *supra* note 12.

19. *Id.*

20. OFF. OF LEGACY MGMT. *supra* note 15.

21. CONG. BLACK CAUCUS FOUND., INC., *supra* note 12.

22. DR. BENJAMIN F. CHAVIS JR. & CHARLES LEE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 15 (1987).

by industry.”²³ Building off this study, “the Congressional Black Caucus and a bipartisan coalition of academic, social scientists and political activists met with Environmental Protection Agency (EPA) officials to discuss” the disproportionate number of toxic waste facilities in minority and low-income communities.²⁴ The EPA created the Environmental Equity Workgroup to address these concerns in a report titled *Reducing Risk for All Communities*.²⁵

Further, the Warren County protest inspired the U.S. General Accounting Office to conduct their own study. The study found that three out of four hazardous waste landfill sites, located in Region VI, had a Black population majority and at least a quarter of those Black communities averaged an income below the poverty level.²⁶ To address these concerns, the Executive Branch created the Office of Environmental Equity (whose name was later changed to the Office of Environmental Justice).²⁷

The story of Warren County is just one of many.²⁸ Years prior, Robert Bullard found that 14 of Houston’s 17 industrial waste sites were placed in Black neighborhoods, despite there being only a 25 percent Black population in Houston.²⁹ When Hurricane Katrina hit New Orleans, 75 percent of residents in badly flooded areas were Black; yet, research found

23. See *id.* at 13,

24. CONG. BLACK CAUCUS FOUND., INC., *supra* note 12.

25. U.S. EPA, REDUCING RISK FOR ALL COMMUNITIES 1–3 (1992).

26. OFF. OF LEGACY MGMT., *supra* note 15.

27. OEJ Milestones, Timeline in *Office of Environmental Justice in Action*, EPA, https://www.epa.gov/sites/default/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf [<https://perma.cc/P79M-T7DB>].

28. See, e.g., Carla Campbell et al., *A Case Study of Environmental Injustice: The Failure in Flint*, 13 INT’L ENVIRON RSCH. & PUB. HEALTH 951 (Sep. 27, 2016) (explaining the failure of Flint’s government to properly treat their municipal water system that has led to contaminated water and increased health issues); Timothy W. Collins et al., *Household-level Disparities in Cancer Risks from Vehicular Air Pollution in Miami*, 10 ENV’T. RSCH. LETTERS. 095008, at 1 (2015) (describing a study “using generalized estimating equations to examine distributive environmental inequities in the Miami metropolitan area”); U.N. News Global Perspective Human Stories, *Environmental Racism in Louisiana’s ‘Cancer Alley’, Must End, Says UN Human Rights Experts*, (Mar. 2, 2021) <https://news.un.org/en/story/2021/03/1086172> [<https://perma.cc/8MAF-Q2AQ>] (discussing an area of Louisiana nicknamed ‘Cancer Alley’ for its nearly 150 pollution-emitting oil refineries, plastics plants, and chemical facilities); see also *Environmental Justice Timeline*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> [<https://perma.cc/RQ48-W9NZ>] (listing additional examples of grassroots movements).

29. Alejandra Borunda, *The Origins of Environmental Justice—and Why it’s Finally Getting the Attention it Deserves*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/environment/article/environmental-justice-origins-why-finally-getting-the-attention-it-deserves> [<https://perma.cc/VVU4-U4Y4>].

that “recovery aid flowed more readily to white, wealthy communities than to poor or minority ones.”³⁰ Currently, Black and minority communities in Flint, Michigan are exposed daily to toxins in their drinking water.³¹

The environmental justice movement is remarkable because the movement emerged with the people.³² Affected communities had enough with environmental injustices and band together to create this grassroots movement.³³ This injustice is exacerbated because corporations and governments, who will never see the damage they create, are the ones inflicting the damage.³⁴ Community members relentlessly scream at the top of their lungs until the media or their government officials pick up their case.³⁵ Community members have done endless groundwork, but the government still needs to step up for impactful change to happen.

II. Congress’ Attempts at Federal Environmental Justice Legislation

Throughout history, Congress has failed to adopt meaningful environmental justice legislation. Currently, the most influential federal environmental justice legislation was not even written to be environmental justice legislation.³⁶ Rather, the legislation, Title VI of the Civil Rights Act of 1964, was intended to protect civil rights.³⁷ The Civil Rights Act of 1964’s

30. *Id.*

31. *Id.*

32. See EPA, *supra* note 28; see also Robert D. Bullard & Glenn S. Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56:3 J. Soc. Issues 555, 560 (2009) (showing how grassroots activists have responded to injustice by coordinating a nationwide effort to change governmental and corporate practices that endanger the health of people of color and low-income communities).

33. See EPA, *supra* note 28.

34. See generally Campbell, *supra* note 28 (explaining the failure of Flint’s government to properly treat their municipal water system that has led to contaminated water and increased health issues); United Nations, *supra* note 28 (discussing the federal government’s failure to protect people residing in ‘Cancer Alley’ through environmental regulations); see also EPA, *supra* note 28.

35. See generally Campbell, *supra* note 28 (explaining the failure of Flint’s government to properly treat their municipal water system that has led to contaminated water and increased health issues); United Nations, *supra* note 28 (discussing the federal government’s failure to protect people residing in ‘Cancer Alley’ through environmental regulations); see also EPA, *supra* note 28.

36. See generally Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000(d) to 2000(d)-(7) (1999).

37. See *id.* (prohibiting discrimination on the basis of race, color, or national origin); see also *The Facts on Title VI of the Civil Rights Act of 1964*, EPA, <https://www.epa.gov/ogc/facts-title-vi-civil-rights-act-1964> [<https://perma.cc/LWR4-F7EQ>] (“Title VI of the Civil Rights Act of 1964 is a federal law that prohibits discrimination on the basis of race, color, or national origin in all programs or activities receiving federal funding.”); see Barry E. Hill, *Time Has*

Title VI became a powerful tool to address environmental injustice because of its extensive breadth of coverage.³⁸ Beyond Title VI, there is only a long list of failed attempts at enacting federal environmental justice legislation.

A. Title VI, Civil Rights Act of 1964 as Environmental Justice Legislation

Title VI reads: “No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³⁹ This Act prohibits the EPA and EPA-funded agencies from permitting actions that are discriminatory based on race, color, or national origin.⁴⁰ Title VI applies to all recipients of federal funding including states whose environmental programs may be partially federal government funded.⁴¹ It applies to recipients of federal funding, but Title VI does not inherently apply to the agencies themselves nor does it apply to the EPA.⁴² However, there are a few issues that hinder using Title VI as a powerful environmental justice tool.

First, there has historically been a large backlog of pending Title VI complaints.⁴³ Through Title VI, citizens can file complaints with the EPA raising environmental justice issues.⁴⁴ The complaints can allege discriminatory effects of pollution control permits by state and local government agencies.⁴⁵ In response, the EPA can conduct investigations

Come Today for Environmental and Climate Justice Legislation, 51 ENV'T L. REP. 19192, 19195 (2021).

38. See *Federal Coordination of Title VI and Environmental Justice*, DEP'T OF JUSTICE, <https://www.justice.gov/crt/fcs/newsletter/Spring-2015/TitleVIandEJ> [<https://perma.cc/7K68-WDDV>] (“Title VI’s breadth of coverage is extensive and it can address a huge array of injustices: from environmental racism...to disparities in basic health care and basic services to inequities in transportation, housing, and education.”).

39. 42 U.S.C. § 2000(d).

40. See generally 42 U.S.C. §§ 2000(d) to 2000(d)-(7); see also *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (holding that § 601 of Title VI prohibits only intentional discrimination).

41. *Title VI and Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice> [<https://perma.cc/Q296-ACD9>] (Title VI of the Civil Rights Act prohibits recipients of federal financial assistance (states, grantees, etc.) from discriminating based on race, color, or national origin in any program or activity).

42. See generally 42 U.S.C. §§ 2000(d) to 2000(d)-(7) (1999); EPA, *supra* note 41.

43. EPA OFFICE OF INSPECTOR GENERAL, IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS’ TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION 6 (2020) (61 backlogged cases existed at the end of 2016).

44. See generally 42 U.S.C. §§ 2000(d) to 2000(d)-(7) (1999); EPA, *supra* note 41.

45. EPA, *supra* note 41; Hill, *supra* note 37.

under Title VI and determine whether environmental justice issues are occurring.⁴⁶ For example, the EPA found no civil rights violation in a California complaint about the permitting and siting of three hazardous waste disposal facilities in Latino neighborhoods.⁴⁷ But the Agency “dragged its feet for years on these investigations” and they culminated a backlog of hundreds of environmental justice complaints.⁴⁸

Second, Title VI allows for considerable discretion. In *Alexander v. Sandoval*, the Court determines that “regulation promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under 601.”⁴⁹ Also, to recover compensatory damages, the discriminatory impact must be intentional.⁵⁰

Third, Congress failed to explicitly include a private right of action provision in Title VI. While courts have long disagreed whether there was a private right of action under Title VI, the Supreme Court definitively ruled in *Alexander v. Sandoval* that “there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of Civil Rights Act of 1964.”⁵¹ Therefore, Title VI is no longer an adequate tool to address environmental justice issues.

B. Failed Attempts at Enacting Federal Environmental Justice Legislation

Late Representative John-Lewis introduced the Environmental Justice Act of 1992 and Senator Albert Gore Jr. introduced the companion bill.⁵² The Act had four main parts: (1) identification of at-risk environmental areas, (2) enforcement initiatives, (3) community involvement, and (4) identification and prevention of health effects.⁵³ Under the first main part, the Act required the EPA Administrator to publish a ranked list of *Environmental*

46. Brentin Mock, *Cory Booker Wants to Tackle the ‘Corporate Villainy’ Behind Environmental Injustice*, BLOOMBERG CITYLAB (Nov. 13, 2017), <https://www.bloomberg.com/news/articles/2017-11-13/cory-booker-wants-environmental-justice-to-be-the-law> [https://perma.cc/LD9T-6VU5].

47. Brentin Mock, *The EPA attempts CPR on its own Civil Rights Act enforcement*, GRIST (May 22, 2014), <https://grist.org/cities/the-epa-attempts-cpr-on-its-own-civil-rights-act-enforcement/> [https://perma.cc/7RDE-KGH7].

48. Mock, *supra* note 46.

49. *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

50. *Id.* at 275–76.

51. *Id.* at 275.

52. Environmental Justice Act of 1992, H.R. 5326, 102nd Cong. (1992).

53. *Id.*

High Impact Areas—counties with a certain total weight of toxic chemicals present.⁵⁴

Under the proposed Environmental Justice Act of 1992, the Administrator and the Assistant Secretary of the Occupational Safety and Health Administration would annually check compliance with inspections and reviews of toxic chemical facilities in the *Environmental High Impact Areas*.⁵⁵ The Act would authorize the Secretary of Health and Human Services to make a grant for technical assistance or representative access to individuals in Environmental High Impact Areas.⁵⁶ Additionally, the Act would require the Secretary to issue a report laying out the “nature and extent of acute and chronic impacts on human health.”⁵⁷ If the report exposed significant acute and chronic impacts then the President would direct Congress to propose legislation to remedy those impacts.⁵⁸

Despite the promise and intricacies established, both bills—the Environmental Justice Act of 1992 and Senator Albert Gore Jr.’s companion bill—died when they were referred to committee.⁵⁹ The failure of the bill is not the fault of the bill itself. Although Democrats gained control of the presidency after the 1992 election, the president at the time was Republican George H.W. Bush.⁶⁰ With a Democratic-controlled Congress, the Environmental Justice Act of 1992 could have still potentially passed through Congress.

However, 1992 is the same year as the Rodney King Riots.⁶¹ A year prior, Rodney King, a Black man, was brutally beaten by four Los Angeles policemen.⁶² The video of the attack was broadcasted nationwide.⁶³ When the four policemen were acquitted in April of 1992, riots lasting five days erupted in Los Angeles.⁶⁴ Furious citizens set fires, looted stores, and destroyed commercial property.⁶⁵ Some motorists were pulled out of their

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at § 401.

58. *Id.*

59. Hill, *supra* note 37.

60. See George H.W. Bush, BALLOTPEDIA, https://ballotpedia.org/George_H.W._Bush [<https://perma.cc/CAF3-N9UY>].

61. Anjuli Sastry Krbechek & Karen Grigsby Bates, *When LA Erupted In Anger: A Look Back At the Rodney King Riots*, NPR (Apr. 26, 2017), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots> [<https://perma.cc/XNZ2-S2QA>].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

cars and beaten.⁶⁶ Heightened tensions between races and between citizens and police officers called Congress's attention to this issue. Congress prioritized emergency aid legislation to small businesses then turned to enacting a series of initiatives including "public housing transformation, inner-city empowerment zones, housing mobility vouchers, community development banking, lead-based paint removal, and youth employment initiatives."⁶⁷ Regardless of late Representative John-Lewis' efforts, environmental justice fell to the bottom of the legislative priority list.

Between 2017 and 2018, more than 40 environmental-justice-themed bills were introduced in one of the houses, but *all* died in committee.⁶⁸ Most notably, Senator Booker introduced the Environmental Justice Act of 2017. Some of the purposes of the Act were to:

- "[R]equire Federal agencies to address and eliminate the disproportionate environmental and human health impacts on communities of color, indigenous communities, and low-income communities";
- "[M]itigate the inequitable distribution of the burdens and benefits of Federal programs having significant impacts on human health and the environment";
- "[R]equire consideration of cumulative impacts in permitting decisions";
- "[A]llow a private right of action under title VI of the Civil Rights Act of 1964...to challenge discriminatory practices."⁶⁹

Representative Ruiz introduced the companion bill, but to no surprise, both bills died.⁷⁰

Despite the efforts of Senator Booker and Representative Ruiz, these bills started off with one foot in the grave. On January 20, 2017, President Trump was inaugurated and congressional gridlock was at an all-time high.⁷¹ President Trump was elected on his promise to "Make American Great Again" by securing the United States borders and protecting American

66. *Id.*

67. Bruce Katz, *Los Angeles 1992 to Baltimore 2015: Washington's changed response to urban crisis*, BROOKINGS (May 27, 2015), <https://www.brookings.edu/blog/the-avenue/2015/05/27/los-angeles-1992-to-baltimore-2015-washingtons-changed-response-to-urban-crisis/> [https://perma.cc/A87H-RMKR].

68. Hill, *supra* note 37.

69. Environmental Justice Act of 2017, S. 1996, 115th Cong. (2017).

70. Hill, *supra* note 37.

71. Talia Buford, *Has the Moment for Environmental Justice Been Lost?*, PROPUBLICA (July 24, 2017), <https://www.propublica.org/article/has-the-moment-for-environmental-justice-been-lost> [https://perma.cc/73X8-NRYN].

workers.⁷² 96 bills made it into law in 2017.⁷³ With President Trump in office and a Republican control of Congress, the economy and foreign policy were at the forefront of the legislative priorities for the year.⁷⁴ These legislative priorities can be seen through the bills President Trump signed into law including a tax cut bill, a national defense fund bill, and a sanctions bill. Even if the bills had been passed, President Trump and EPA Administrator Pruitt would have immediately undermined any authority the bill carried.⁷⁵ Administrator Pruitt had made it clear that industry's desires were a higher priority than protecting environmental justice communities.⁷⁶

History repeated itself from 2019 to 2020.⁷⁷ Environmental-justice-themed bills were introduced then referred to committee where they would meet their death.⁷⁸ Resuscitating his bill, Senator Booker reintroduced the Environmental Justice Act of 2019, while Representative Ruiz introduced the companion bill.⁷⁹ The requirements of this bill included the above provisions of the preceding proposed bill.⁸⁰ This Bill added: (1) increased cooperation and coordination among Federal agencies to achieve a just environment, (2) provided disenfranchised communities access to public health opportunities, (3) offered information for participating in decision-making affecting their health and environment, and (4) a private right of action under Title VI of the Civil Rights Act of 1964.⁸¹ The bills were referred to multiple committees and one subcommittee but have not been heard from since.⁸²

From 2017 to 2019, not enough had changed to create an opportunity for the Environmental Justice Act of 2019 to be made into a law. President Trump still held office in 2019, the Republican party retained their majority

72. James G. McGann, *Why Donald Trump Won the Election and Does it Mean The End to Think Tanks and Policy Advice as We Know it?*, THINK TANKS AND CIV. SOC'YS PROGRAM (2016), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1004&context=ttcsp_papers [<https://perma.cc/D98D-2YRQ>].

73. Tamara Keith, *Trump Signed 96 Law in 2017, Here Is What They Do And How They Measure Up*, NPR (Dec. 27, 2017), <https://www.npr.org/2017/12/27/573546883/trump-signed-96-laws-in-2017-here-is-what-they-do-and-how-they-measure-up> [<https://perma.cc/44EB-66Q9>].

74. McGann, *supra* note 72; see also *115th United States Congress*, BALLOTEDIA, https://ballotpedia.org/115th_United_States_Congress [<https://perma.cc/PCE7-YDN3>].

75. Mock, *supra* note 46.

76. *Id.*

77. Hill, *supra* note 37.

78. *Id.*

79. Environmental Justice Act of 2019, S. 2236, 116th Cong. (2020).

80. *Id.*

81. *Id.*

82. Hill, *supra* note 37.

of Congress, and the Act still lacked the sponsorship from any Republican Senators.⁸³ The year experienced the longest government shutdown in the United States' history.⁸⁴ Many federal government employees, those whose salaries depended on the budget and contractors who would not be backdated pay, struggled during the 35 days the government was shutdown.⁸⁵

Then-Senator Harris introduced the Environmental Justice for All Act in 2020 and Representative Raúl Grijalva introduced the companion bill.⁸⁶ The Bill, similar to the bills prior, discussed the right to "breathe clean air, drink clean water, and live free of dangerous levels of environmental pollution" regardless of race, national origin, or income.⁸⁷ The 2020 Environmental Justice for All Act established several environmental justice requirements, advisory bodies, and programs.⁸⁸ The Act would have required agencies to prepare community impact reports that evaluate the prospective impacts of their actions on vulnerable communities and creates advisory bodies and positions in these bodies to oversee these requirements.⁸⁹ These bills, unfortunately, fell into the same cycle and met their death in committee.⁹⁰

For one last year, President Trump was still in office and the Republican party still controlled the majority in both houses.⁹¹ But the real reason for the failure of the 2020 Environmental Justice for All Act can be explained through the year's historical context. Three months into the year, a

83. 116th United States Congress, *BALLOTPEDIA*, https://ballotpedia.org/116th_United_States_Congress [https://perma.cc/QVH8-P5XC]; *Booker Reintroduces Sweeping Environmental Justice Bill*, CORY BOOKER (July 24, 2019), <https://www.booker.senate.gov/news/press/booker-reintroduces-sweeping-environmental-justice-bill> [https://perma.cc/WQ6G-2BMY].

84. Adrienne Hollis, *State and Federal Action on Environmental Justice in 2019: A Year of Milestones*, THE EQUATION (Dec. 16, 2019), <https://blog.ucsusa.org/adrienne-hollis/state-and-federal-action-on-environmental-justice-in-2019-a-year-of-milestones/> [https://perma.cc/BP2F-BDNB] (resulting from Congress' failure to reach a budget agreement because of disagreements over funding for President Trump's Mexican border wall).

85. *Id.*; Fiza Pirani, *This Was the Longest Government Shutdown in Us History—a Timeline of Federal Shutdowns*, THE ATLANTA J.-CONST. (Jan. 25, 2019), <https://www.ajc.com/news/national/when-was-the-last-government-shutdown-timeline-shutdowns/KIN1FLdhfBz9FznrrIBpTI/> [https://perma.cc/VE2Q-AY96].

86. Hill, *supra* note 37.

87. Environmental Justice for All Act, S. 4401, 116th Cong. (2020).

88. *See id.*

89. *Id.*

90. Hill, *supra* note 37.

91. United States Congress elections, 2020, *BALLOTPEDIA*, https://ballotpedia.org/United_States_Congress_elections_2020 [https://perma.cc/25QB-RAAW].

contagious disease spread worldwide.⁹² Coronavirus led to a nationwide shutdown of schools and businesses.⁹³ People were required or recommended to wear face masks, social distance, and self-isolate.⁹⁴ Legislative priorities switched overnight to finding ways to offer monetary assistance and protect Americans from this potentially deadly disease.⁹⁵

Once again, then-Senator Harris introduced an environmental and climate justice bill—the Climate Equity Act of 2020—with Representative Ocasio-Cortez introducing the companion bill.⁹⁶ This Bill would have created a specific office within the Congressional Budget Office.⁹⁷ The office would have reviewed environmental legislation, regulation, and federal investments to analyze the impact on vulnerable communities.⁹⁸ Sadly, pull out your black clothing, as both bills died in committee again.⁹⁹ At this point, congressional bills regarding environmental justice are nicknamed dead-on-arrival.¹⁰⁰

Environmental justice bills continue to fail for three reasons. First, “laws, regulations, and policies are often deliberately poorly designed or sabotaged when created.”¹⁰¹ Laws are specifically formed to include language that appears powerful and pointed on the surface, but also includes mechanisms that weaken the intended purpose and disrupt the law’s implementation.¹⁰²

For example, an environmental justice bill may protect the right to live and work in a clean and healthy environment, but then the next section could contain an incredibly high standard to reach or unclear language in determining how that right is protected.¹⁰³ Environmental justice laws are

92. *Our Pandemic Year – A COVID-19 Timeline*, YALE MED., <https://www.yalemedicine.org/news/covid-timeline> [<https://perma.cc/CY8R-VX3F>].

93. *Id.*

94. *How to Protect Yourself and Others*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> [<https://perma.cc/7FLW-EWW2>].

95. *Federal Policy Priorities for an Equitable COVID-19 Relief and Recovery*, POLICYLINK, <https://www.policylink.org/resources-tools/covid-federal-policy> [<https://perma.cc/8L99-VYQ5>] (click “download pdf”).

96. Climate Equity Act of 2020, H.R. 8019, 116th Cong. (2020).

97. *Id.*

98. *Id.*

99. Hill, *supra* note 37.

100. Amanda K. Franzen, *The Time Is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN ST. ENV'T L. REV. 379, 390 (2009).

101. David Barnhizer, *What Causes Laws to Succeed or Fail?* 1 (Cleveland-Marshall Coll. of L., Working Paper No. 16-297, 2016).

102. *Id.*

103. *Id.*

written to heavily rely on deference regarding agency decision making.¹⁰⁴ Beyond that, the laws incapacitate themselves by underfunding and understaffing the agencies that implement the laws.¹⁰⁵

Second, powerful fossil fuel industry lobbyists, comprising of power generators and oil and gas producers, push back against these bills.¹⁰⁶ Many environmental justice bills would require the fossil fuel industry to comply with new emissions standards and pollution regulations.¹⁰⁷ These new standards and regulations would cost the industry money to incorporate and potentially decrease the profit for the industry and its shareholders.¹⁰⁸ Opponents of the environmental justice bills argue that new enforcements would lead to job loss for those who depend on the energy sector for employment.¹⁰⁹

Third, federal environmental justice legislation generally continues to fail because there has been little compromise in the legislative process. Republicans and Democrats cannot seem to find mutual playing ground in their legislative interests.¹¹⁰ The two parties battle environmental justice and a healthy economy as if they are mutually exclusive.¹¹¹ Republicans have “sought to add language or otherwise prohibit funding for environmental justice initiatives in at least 13 bills since 2006.”¹¹² Majority control in Congress potentially shifts every two to four years, but the rift in Congress leaves environmental justice legislation at a standstill.¹¹³

104. *Id.*

105. *Id.*

106. See Tripp Baltz, *Environmental Justice ‘Finding Voice,’ if Not Votes, in States*, BLOOMBERG L. (June 23, 2021), <https://news.bloomberglaw.com/environment-and-energy/environmental-justice-finding-voice-if-not-votes-in-states> [<https://perma.cc/QB4X-WAM7>].

107. *See id.*

108. *Id.*

109. *Id.*

110. *See* Buford, *supra* note 71.

111. *See id.* (“Republicans have sought to add language or otherwise prohibit funding for environmental justice initiatives in at least 13 bills since 2006,” while Democrats do “little to codify the progress and programs related to it, even when they were best positioned politically to do so”).

112. *Id.*

113. *See generally* Nate Cohn, *Why Political Sectarianism Is a Growing Threat to American Democracy*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/2021/04/19/us/democracy-gop-democrats-sectarianism.html> [<https://perma.cc/9R4K-7GYF>]; *see also* Cale Jaffe, *Melting the Polarization Around Climate Change Politics*, 30 GEORGETOWN ENV'T L. REV. 455 (2018); Riley E. Dunlap & Michael Patrick Allen, *Partisan Differences on Environmental Issues: A Congressional Roll-Call Analysis*, 29 W. POL. Q. 384 (1976).

III. Shortcomings of Executive Environmental Justice Action

Unlike federal environmental justice legislation, there has been—what appears to be—successful and impactful executive environmental justice action.¹¹⁴ Former President Clinton’s Executive Order No. 12898, the EPA’s Plan EJ 2014, and, most recently, President Biden’s Executive Order No. 14008 lay the foundation for understanding the depths of executive environmental justice action.¹¹⁵

A. Executive Order No. 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

In 1994, President Clinton issued an executive order that said: “To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission.”¹¹⁶ The executive order directed federal agencies to: (1) identify and address health and environmental effects of their actions on communities of color and low-income communities; (2) develop strategies to implement environmental justice; and (3) promote nondiscrimination in federal programs.¹¹⁷ In conjunction with promoting nondiscrimination in federal programs, the executive order established an Interagency Working Group on environmental justice.¹¹⁸ The EPA Administrator chaired the group and the group consisted of the heads of 11 departments, agencies, and White House offices.¹¹⁹ At the time, this executive order was a significant step in the direction towards environmental justice.¹²⁰

However, an election passed, and President George W. Bush’s administration gutted the executive order when they came into office. The Administration cut the Office of Environmental Justice’s budget by more than twenty-five percent and simultaneously downplayed environmental injustice impact to lower income and minority communities.¹²¹ Executive

114. See Hill, *supra* note 37.

115. See generally Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994); see also U.S. ENV’T PROT. AGENCY, PLAN EJ 2014 (2011); see generally Exec. Order No. 14,008, 3 C.F.R. 477 (2022).

116. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 § 1–101 (1994).

117. See *id.*

118. *Summary of Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> [<https://perma.cc/7VY7-LBUE>].

119. *Id.*

120. Hill, *supra* note 37.

121. Franzen, *supra* note 100.

Order 12898 requires federal agencies to assume the financial costs of compliance, so many agencies with stretched budgets chose to ignore the Order.¹²² Although Executive Order 12898 has not been revoked, the executive order in practice has failed because it is not judicially enforceable.¹²³

Even without Administration changes, executive orders are doomed from the start. While executive orders govern federal government officials' and agencies' actions, there are downsides that limit their effectiveness.¹²⁴ Executive orders are issued in relation to a congressional law or based on constitutional presidential powers.¹²⁵ Consistent with those authorities, Executive Order 12898 states: "Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law."¹²⁶ However, the instances in which executive orders have enforceable legal obligations are narrowly circumscribed.¹²⁷

Courts have said that executive orders are not enforceable in private citizen suits unless the president specifically intended them to be.¹²⁸ In Executive Order 12898, a provision clarifies that the executive order is only intended for internal management of the executive branch.¹²⁹ The broad language of the Order leaves agencies confused on how to properly comply.¹³⁰ The Order does not create any "right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person."¹³¹ This executive order does not create any right to judicial review for

122. See Elizabeth Glass Geltman et al., *Beyond Baby Steps: An Empirical Study of the Impact of Environmental Justice Executive Order 12898*, 115 ENV'T HEALTH PERSP. 1087 (2007).

123. Hill, *supra* note 37.

124. See Gary J. Schmitt, *Executive Orders and Filibusters; The Constitutional Downsides*, AM. ENTER. INST. (Feb. 15, 2021), <https://www.aei.org/op-eds/executive-orders-filibusters-the-constitutional-downsides/> [https://perma.cc/93FF-ALYJ].

125. Hill, *supra* note 37, at 10106.

126. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

127. Hill, *supra* note 37, at 10106.

128. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 176 F. Supp. 3d 839, 847 (D. Minn. 2016) (holding the executive order needs to be "intended" by the President to be "a legal framework enforceable by private civil action," as opposed to a "managerial tool for implementing the President's personal . . . policies").

129. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

130. See Colin Provost & Brian J. Gerber, *In the U.S., Black, Brown and Poor People Suffer the Most from Environmental Contamination*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/18/in-the-u-s-black-brown-and-poor-people-suffer-the-most-from-environmental-contamination/> [https://perma.cc/8SQY-XTMD].

131. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

compliance or noncompliance of the United States, its officers, or any other person.¹³²

Yet, some courts have differed in their opinion and found that the executive order is reviewable under the Administrative Procedure Act's arbitrary and capricious standard.¹³³ The variance in court opinions creates uncertainty among jurisdictions. Although Executive Order 12898 demonstrates that environmental justice is an important federal policy, it is ineffective because it fails to universally create legally enforceable requirements or legal authority as an avenue for environmental justice.¹³⁴

B. Plan EJ 2014

Under President Obama's Administration in 2014, the EPA Administrator created and distributed Plan Environmental Justice.¹³⁵ The Plan strategized ways to better protect environmental justice communities, to include those communities in environmental decision-making, and to deepen relationships with governmental agencies that influence environmental decisions.¹³⁶ By encouraging agencies to integrate environmental justice into their rulemaking and permitting processes, the Plan would have ensured that environmental justice was prioritized throughout the agency.¹³⁷

Alas, the Plan was not legally binding. The Plan was the EPA Administrator's guidance to Agency employees regarding her expectations and administrative priorities, but guidance has no enforceable legal obligations.¹³⁸ When President Obama left office, no other government entities had the authority to force the Trump Administration to comply with Plan EJ 2014.¹³⁹ Nor did any community-based organization have a case to

132. *Id.*

133. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012) (courts must hold agency action unlawful if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...."); see, e.g., *Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 689 (D.C. Cir. 2004); see also *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F. 3d 215, 232 (5th Cir. 2006); see also *Latin Ams. For Soc. & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014).

134. See Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

135. U.S. ENV'T PROT. AGENCY, *supra* note 115, at I.

136. *Id.*

137. U.S. ENV'T PROT. AGENCY, *supra* note 115.

138. Hill, *supra* note 37, at 10106.

139. *Id.*

sue the Trump Administration for noncompliance with Plan EJ 2014.¹⁴⁰ And so, the Plan essentially faded away.¹⁴¹

C. Executive Order No. 14008: Tackling the Climate Crisis at Home and Abroad

During the campaign cycle for the 2020 presidential election, Biden issued “The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity.”¹⁴² In his plan, he explained his desire to “revise and reinvigorate” President Clinton’s Executive Order No. 12898 by: (1) establishing an United States Department of Justice Environmental and Climate Justice Division, (2) prioritizing environmental justice in the federal government, and (3) overhauling the EPA External Civil Rights Compliance Office.¹⁴³ The Biden Administration committed to implement Senator Booker’s Environmental Justice Act of 2019, reestablish White House environmental-based councils, and cooperate with Congress to reinstitute a private right of action under Title VI of the Civil Rights Act of 1964.¹⁴⁴ The plan further mandated new monitoring, requiring community notification, establishing interagency teams, creating a national crisis strategy, and establishing a task force.¹⁴⁵

Approximately two years since taking office, the Biden Administration’s environmental justice action has been inconsistent.¹⁴⁶ A dichotomy has developed between Biden’s campaign promises and Biden’s actions.¹⁴⁷ The Administration has supported carbon capture and storage technology, approved new leases for oil and gas drilling in the Gulf of Mexico, and failed to cancel permits for Line 3 oil sands pipeline running from Canada through Minnesota.¹⁴⁸ The approval of these actions jeopardize vulnerable communities and directly contradict campaign promises.¹⁴⁹

In contrast, Biden has recently signed Executive Order 14008. The Order is nicknamed Justice40 because it allocates forty percent of federal

140. *Id.*

141. *See id.*

142. The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity, DEMOCRATIC NAT’L COMM., <https://joebiden.com/environmental-justice-plan/> [<https://perma.cc/8E8Y-R4N9>].

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* Zack Colman, *Tensions erupt between environmental justice leaders and White House*, POLITICO, (Oct. 5, 2021), <https://www.politico.com/news/2021/10/05/environmental-justice-white-house-biden-515094> [<https://perma.cc/DG7J-8ELZ>].

147. *Id.*

148. *Id.*

149. *See id.*

investments in climate and clean energy to overburdened communities.¹⁵⁰ Further, the Order establishes the first White House Environmental Justice Advisory Council.¹⁵¹ Biden's Justice40 initiative offers guidance to agencies on how to comply, launches the Justice40 Pilot Program, and includes tools to ensure accountability and transparency.¹⁵² The Justice40 Pilot Program identifies 21 programs to immediately address problems in overburdened and disadvantaged communities.¹⁵³ Priority programs like the Department of Homeland Security Flood Mitigation Assistance Program, Environmental Protection Agency Drinking Water State Revolving fund, the Department of Housing and Urban Development Lead Hazard Reduction and Healthy Homes Grants will provide a blueprint for other agencies.¹⁵⁴

Although Executive Order 14008 is currently in practice, it faces the same problems that Executive Order 12898 does.¹⁵⁵ Despite definitive terms for compliance, Executive Order 14008 still lacks judicially enforceable measures and dedicated funding.¹⁵⁶ With the administration switching almost every four years, much of the progress made with environmental justice faces reversal or dilution when the new administration takes office.¹⁵⁷ More permanent environmental justice legislation needs to be enacted to combat this problem.

150. Exec. Order No. 14008, 3 C.F.R. § 232(a) (2022); see Elizabeth Gore, *Biden's first year: A robust record of climate action*, ENV'T DEF. FUND (Jan. 20, 2022), <https://www.edf.org/blog/2022/01/20/bidens-first-year-robust-record-climate-action> [<https://perma.cc/Z748-2VNL>].

151. Gore, *supra* note 150.

152. See Exec. Order No. 14008, 3 C.F.R. § 232 (2022).

153. Shalanda Young et al., *The Path to Achieving Justice40*, THE WHITE HOUSE (Jul. 20, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/> [<https://perma.cc/2NA6-DFNB>].

154. See *id.*; see also *Flood Mitigation Assistance (FMA) Grant*, FEMA, <https://www.fema.gov/grants/mitigation/floods> [<https://perma.cc/H6ZH-UWVX>] ("The Flood Mitigation Assistance Program is a competitive grant program that provides funding to states, local communities, federally recognized tribes and territories...[that] can be used for projects that reduce or eliminate the risk of repetitive flood damage to buildings insured by the National Flood Insurance Program."); see also *Drinking Water State Revolving Fund (DWSRF)*, U.S. EPA, <https://www.epa.gov/dwsrf/how-drinking-water-state-revolving-fund-works#tab-1> [<https://perma.cc/F7A7-Q4TA>] ("The [Drinking Water State Revolving Fund] is a financial assistance program to help water systems and states to achieve the health protection objectives of the [Safe Drinking Water Act]."); see also *Programs Division—Lead-Based Paint & Lead Hazard Reduction Demonstration Grant Programs*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/healthy_homes/lbp/lhc [<https://perma.cc/3G9P-A7GP>] ("The purpose of the Lead-Based Paint Hazard Control (LHC) and the Lead Hazard Reduction grant programs (LHRD) is to identify and control lead-based paint hazards in eligible [privately] owned housing for rental or owner-occupants.").

155. See *supra* Part III.

156. See Exec. Order No. 14008, 3 C.F.R. §222(b)(i) (2022).

157. See Hill, *supra* note 37.

V. Proposed Legislation: 2022 Environmental Justice for All Act

In 2019, late Representative John Lewis described Congress's responsibility to protect environmental justice as follows:

Each and every one of us must cherish this planet, for it is likely the only home we will ever know. Combating climate change is not a Democratic or a Republican issue. It is a question of preserving this little piece of real estate that we call Earth for generations to come, for generations yet unborn. Together, we can solve this problem, but time is of the essence, Congress cannot stand on the sidelines. We have a moral responsibility to lead, and the time to act is now.¹⁵⁸

Congressional action is the better route for environmental justice legislation for three reasons: (1) environmental injustice occurs across jurisdictions; (2) there is an important government interest in building a more resilient America; and (3) it is crucial to repair the injustices of the past.

First, the environment does not constrain itself to a singular state's boundaries. Neither do environmental injustices. Cooperative attempts to mitigate environmental justice issues across states are doubtful and individual state's attempts are unlikely to have a large impact on environmental hazards.¹⁵⁹ Environmental justice needs to be addressed with a united front from the federal government. Yet, federalism calls for a distribution of power between the federal and state governments.¹⁶⁰ The federal government is limited in power and states wield plenary powers. However, Congress can constitutionally justify federal environmental justice legislation.¹⁶¹ Congress can use its power to regulate commerce under the Commerce Clause.¹⁶² Congress can "regulate activities that are either traditionally intrastate or not inherently economic in nature."¹⁶³

158. *Hearing on The Economic and Health Consequences of Climate Change Before the H. Comm. On Ways and Means*, 116th Cong. (2019).

159. Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENV'T L. J. 54, 57 (2006) (discussing the unused opportunity for cooperative efforts to counteract the federal government's failure to address global climate change).

160. Robert R. M. Verchick & Nina A. Mendelson, *Preemption and Theories of Federalism* (Pub. L. & Legal Theory Working Paper Series 2007) (examining Congress's preemption power and answering the question: when should state laws be preempted?).

161. *See id.*

162. *Id.* at 3.

163. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *see also* James R. May, *Trends in Constitutional Environmental Law*, 37 *TRENDS: ABA SECTION OF ENV'T, ENERGY &*

By enacting the Supremacy Clause, Congress can use its lawmaking powers to preempt state power.¹⁶⁴ The Supremacy Clause requires state law to yield to federal law.¹⁶⁵ While federal preemption is theoretically fair because of built-in political safeguards, it should only be used in situations where a centralized approach is needed. This approach promises “fewer transaction costs associated with compliance, the containment of transboundary ‘spillover’ effects, and economies of scale.”¹⁶⁶ The Tenth Amendment is the only foreseeable obstacle to the Supremacy Clause.¹⁶⁷ But, because courts have interpreted the Amendment to restrain Congress from preempting state authority only narrowly, the Tenth Amendment has yet to present an obstacle to federal preemption in areas concerning the environment.¹⁶⁸

Second, the chance to build an America that is stronger and more resilient to future threats is the most important governmental interest. Climate change is an issue that will impact vulnerable communities first. Without investing in vulnerable communities, these communities are at risk at being lost. Congress will be forced to deal with residents evacuating their homes and a potentially large-scale refugee crisis. But if Congress prioritizes vulnerable communities and works to heal environmental injustices, the communities can strengthen and stabilize. Through providing affordable housing, creating better infrastructure, improving schools, supporting access to health care, and increasing jobs, Congress can go a step beyond to lessen the vulnerability of these communities. Investing in overburdened communities will strengthen them and prepare them to withstand the impacts of climate change.

RES. NEWSL. 1, 8 (2006) (analyzing constitutional environmental law including the extent to which Congress can regulate under the Commerce Clause); see also Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 375 (allowing Congress “greater latitude to regulate intrastate activities under the Commerce Clause if they are regulated as part of a comprehensive statutory scheme that on the whole appropriately regulates interstate commerce”); see generally *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding the Commerce Clause allows Congress to regulate activity that has a substantial economic effect on interstate commerce).

164. U.S. CONST. art. VI, cl. 2 (declaring “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land...”); see generally Verchick & Mendelson, *supra* note 160.

165. U.S. CONST. art. VI, cl. 2; see generally Verchick & Mendelson, *supra* note 160.

166. Verchick & Mendelson, *supra* note 160, at 2.

167. U.S. CONST. amend. X (ensuring that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); Verchick & Mendelson, *supra* note 160, at 3.

168. U.S. CONST. amend. X; Verchick & Mendelson, *supra* note 160, at 3.

Finally, decades of environmental injustices beg to be rectified. By investing in our overburdened communities, Congress will address the nation's history of environmental injustice and inequity. Congressional action would reduce pollution in these communities halting the infliction of medical issues and would begin to repair the damage from the past.

Congress should enact legislation to protect the right to a clean and healthy environment. An example of a successful bill would include language, in conjunction with the National Environmental Policy Act (NEPA), that requires the filing administrative agency to create a detailed statement on the environmental impact of the proposed action to vulnerable communities. A potentially successful bill would apply to all major federal actions substantially affecting the right to a clean and healthy environment.¹⁶⁹ To allow environmental justice advocates judicial remedies, the 2022 Environmental Justice for All Act would include a private right of action to enforce federal law, unlike the decision in *Alexander v. Sandoval*.¹⁷⁰

Combining these crucial components, the 2022 Environmental Justice for All Act would, in part, read similarly to this:

BE IT ENACTED BY THE LEGISLATURE HERE ASSEMBLED THAT:

Section 1. The right to a clean and healthy environment is a right that should be awarded to everyone, regardless of race, gender, income, or any other divisive characteristics.¹⁷¹ A just environment is one that protects the fair treatment and encourages the meaningful involvement of all people in the development, enactment, and enforcement of environmental laws, regulations, and policies.¹⁷² Historically, minority and low-income communities have been disproportionately exposed to toxic and hazardous waste resulting in numerous medicals issues including, but not limited to, asthma, cancer, increased blood lead levels, cardiovascular disease, and developmental disorders.¹⁷³ The damaging effects plaguing overburdened communities stifle the overall well-being and long-term sustainability of these communities. The individuals in these community's face numerous burdens and it is time to remove their exposure to toxic and hazardous

169. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332.

170. See *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that "Congress did not intend [section] 602 of Title VI [of the Civil Rights Act] to provide for a private right of action for disparate impact claims").

171. See *Principles of Environmental Justice*, EJNET (Apr. 6, 1996), <https://www.ejnet.org/ej/principles.html> [<https://perma.cc/5KPV-E3KD>].

172. *What is Environmental Justice?*, N.J. DEP'T OF ENV'T PROT. (Jan. 6, 2022), <https://www.nj.gov/dep/ej/> [<https://perma.cc/ZZ9H-T8CE>].

173. *Environmental Justice & Environmental Racism*, GREENACTION, <https://greenaction.org/what-is-environmental-justice/> [<https://perma.cc/9B2M-V5ZE>].

waste from the list. The historical environmental injustice needs to be corrected.¹⁷⁴

Section 2. Overburdened Community means any community where thirty-five percent of the households qualify as low-income according to the U.S. Census, forty percent of households are minority, or forty percent of households have limited English proficiency as the definition for vulnerable community.¹⁷⁵

Fair Treatment means no group of people should bear a disproportionate share of the adverse environmental consequences resulting from industrial, governmental, and commercial operations or policies.¹⁷⁶

Meaningful Involvement means all people have an opportunity to participate in decisions about activities that may affect their environment and health.¹⁷⁷ The public's contribution can then influence the regulatory agency's decision and decisionmakers will seek out and facilitate the involvement of those potentially affected.¹⁷⁸

Section 3. The United States Environmental Protection Agency in tandem with the Office of Environmental Justice will oversee the enforcement of this bill.

The Legislature authorizes and directs that, to the fullest extent possible, all agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action to overburdened communities.¹⁷⁹

The Legislature reserves an individual private right of action to ensure fair enforcement and equal application of the law.

NEPA is divided into substantive and procedural policies.¹⁸⁰ Section 101 defines the substantive policies and is flexible.¹⁸¹ Abdication to this section is left to the agency's discretion if they satisfy the "all practicable means" requirement.¹⁸² Section 102 provides the procedural policies that all administrative agencies must follow to comply with this statute.¹⁸³

174. See, e.g., N.J. REV. STAT. § 13:1D-157 (2020).

175. *Governor Murphy Signs Historic Environmental Justice Legislation*, OFFICIAL SITE OF THE STATE OF N.J.: GOVERNOR PHIL MURPHY (Sept. 18, 2020), <https://www.nj.gov/governor/news/news/562020/20200918a.shtml> [<https://perma.cc/TL2E-456W>].

176. See GREENACTION, *supra* note 173.

177. See *id.*

178. See *id.*

179. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332.

180. See *generally id.*

181. See *id.*

182. *Id.* § 4331(b).

183. *Id.* § 4332.

Specifically, Section 102(2)(c) requires that an Environmental Impact Statement be completed for all “major federal actions substantially affecting the quality of the human environment.”¹⁸⁴ Applying to all federal agencies and federally funded private sector and state projects, this statute is inflexible and requires completion “to the fullest extent possible.”¹⁸⁵

NEPA requires consideration of the environment, but ultimately still adopts a balance approach to federally funded projects.¹⁸⁶ The agency proposing a project completes an Environmental Assessment to answer the question of whether the action is a “major federal action substantially affecting the quality of the human environment” and if so, an Environmental Impact Statement is required.¹⁸⁷ NEPA’s purposes are to aid in the agency’s own decision-making process, to tell other agencies of their plans, and to tell the public their plans.¹⁸⁸

The 2022 Environmental Justice for All Act should incorporate the Environmental Impact Statement procedural process of NEPA but would expand the process to include civil rights. While NEPA is the groundwork of environmental protection legislation, it only requires federal administrative agencies to consider environmental protection.¹⁸⁹ NEPA does not include hard limits on environmental injustices and does not force agencies to avoid projects that cause environmental harm.¹⁹⁰ The balancing approach of NEPA still places heavier weight to other governmental interests like monetary gain and improved infrastructure, but often allows for the environment to take the bulk of the loss.¹⁹¹ The proposed legislation would account for the priceless environmental benefits as well as address the disproportionate impact of these environmental losses.

Executive Order No. 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) does not define, nor does it set a standard for defining which communities are to be considered minority or low-income as to the communities that are

184. *Id.* § 4332(C).

185. *Id.* § 4332.

186. *Id.* § 4332(b)(5).

187. *Id.* § 4332(C)(i).

188. *Id.* § 4321.

189. *What is the National Environmental Policy Act?*, EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act> [<https://perma.cc/G3EA-WNZV>] (“Section 102 in Title I of the Act requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach”).

190. *Id.*

191. *Id.*

disproportionately impacted by environmental injustices.¹⁹² The executive order relies on the agency to identify those communities.¹⁹³ The executive order itself states that it was “intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantial or procedural, enforceable at law or equity by a party against the United States.”¹⁹⁴ If the executive order is going to be enforced, it comes from the president.¹⁹⁵

The proposed legislation, however, should specifically define how to measure and identify vulnerable communities. The 2022 Environmental Justice for All Act should codify a pre-existing individual right to live and work in a clean and healthy environment, while creating a procedural, enforceable law by the individual.

Governor Phil Murphy, alongside U.S. Senator Cory Booker, Mayor Ras Baraka, Senator Troy Singleton, Assemblyman John McKeon, and environmental advocates, signed legislation S-232 in 2020.¹⁹⁶ The law requires the state Department of Energy Protection to evaluate the environmental and public health impacts on vulnerable communities when reviewing permit applications for certain new facilities.¹⁹⁷ New facilities range from gas-fired power plants, incinerators, sewage plants, landfills, and beyond.¹⁹⁸ The law defines an overburdened community as any

192. Franzen, *supra* note 100, at 388.

193. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

194. *Id.*

195. See Franzen, *supra* note 100, at 405.

196. OFFICIAL SITE OF THE STATE OF N.J.: GOVERNOR PHIL MURPHY, *supra* note 175.

197. See N.J. REV. STAT. § 13:1D-160(a)

(“the department shall not consider complete for review any application for a permit for a new facility or for the expansion of an existing facility, or any application for the renewal of an existing facility’s major source permit, if the facility is located, or proposed to be located, in whole or in part, in an overburdened community, unless the permit applicant first: (1) Prepares an environmental justice impact statement that assesses the potential environmental and public health stressors associated with the proposed new or expanded facility, or with the existing major source, as applicable, including any adverse environmental or public health stressors that cannot be avoided if the permit is granted, and the environmental or public health stressors already borne by the overburdened community as a result of existing conditions located in or affecting the overburdened community; . . .”); see also *Making the Case for why New Jersey Needs this Landmark Environmental Justice Law*, NJ SPOTLIGHT NEWS (Nov. 23, 2020), <https://www.njspotlight.com/2020/11/why-new-jersey-needs-this-landmark-environmental-justice-law/> [<https://perma.cc/3L5J-HSPK>].

198. N.J. STAT. § 13:1D-158 (“‘[F]acility’ means any: (1) major source of air pollution; (2) resource recovery facility or incinerator; (3) sludge processing facility, combustor, or incinerator; (4) sewage treatment plant with a capacity of more than 50 million gallons per day; (5) transfer station or other solid waste facility, or recycling facility intending to receive at least 100 tons of recyclable material per day; (6) scrap metal facility; (7) landfill, including,

community where: thirty-five percent of the households qualify as low-income according to the U.S. Census, forty percent of households are minority, or forty percent of households have limited English proficiency.¹⁹⁹ There are around 310 municipalities with populations totaling about 4,489,000 that have overburdened communities within their municipalities.²⁰⁰

This proposed legislation mirrors the New Jersey Environmental Justice Law. However, the strongest difference is that the rights protected in the New Jersey Environmental Justice law should be protected on the federal level. While state action can be effective, state efforts to address environmental justice issues can be stymied where the EPA has the final say.²⁰¹ Therefore, the proposed legislation requires Congress enact a law like New Jersey's, requiring recipients of federal funding to consider the environmental impacts to overburdened communities, allowing states to add additional protections as they see fit. The rights that all residents "regardless of income, race, ethnicity, color, or national origin, have a right to live, work, and recreate in a clean and healthy environment" are rights that expand across state borders and beyond state jurisdictions.²⁰²

CONCLUSION

Low-income communities and communities of color being subject to a "disproportionately high number of environmental and public health stressors" is a problem that can and needs to be addressed nationwide.²⁰³ The right to a clean and healthy environment is as inherent as any other inalienable right. Inalienable rights do not have to be earned, bought, or begged for. Yet, communities of color, low-income communities, and indigenous communities still must fight for these rights. Current federal environmental justice legislation like Title VI of the Civil Rights Act of 1964

but not limited to, a landfill that accepts ash, construction or demolition debris, or solid waste; or (8) medical waste incinerator . . .").

199. *Id.* ("Overburdened community" means any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency."); *see also* OFFICIAL SITE OF THE STATE OF N.J.: GOVERNOR PHIL MURPHY, *supra* note 175.

200. OFFICIAL SITE OF THE STATE OF N.J.: GOVERNOR PHIL MURPHY, *supra* note 175.

201. *The Basics of the Regulatory Process*, EPA, <https://www.epa.gov/laws-regulations/basics-regulatory-process> (the EPA is able to create and enforce regulatory requirements that apply to state or local governments).

202. N.J. STAT. § 13:1D-157.

203. *Id.*

and the National Environmental Policy Act have not been able to resolve these injustices.²⁰⁴ Executive Orders like 12898 and 14008 have not been judicially enforceable to force compliance of polluting agencies.²⁰⁵ State law does not cover enough jurisdiction to be impactful.²⁰⁶ It is Congress' responsibility to enact legislation to address environmental hazards and health problems that are discriminating based on race. Never has there been a better time for Congress to enact the 2022 Environmental Justice for All Act.

204. Civil Rights Act of 1964, tit. VI, 42 U.S.C. §§ 2000(d)–2000(d)-(7); National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331.

205. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994); Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Feb. 1, 2021).

206. See discussion *supra* Section V.