CRITICAL INFRASTRUCTURE, ENVIRONMENTAL RACISM, AND PROTEST: A CASE STUDY IN CANCER ALLEY, LOUISIANA

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ABSTRACT

The ability to assemble, protest, and air grievances in the public sphere of one's community is not only a cherished right but is also an essential safeguard of other rights. In the Black communities of Cancer Alley, a polluted industrial corridor in Southern Louisiana, the state's critical infrastructure law has rendered protest on or near the region's ubiquitous industrial infrastructure a felony. This Note describes the history of critical infrastructure laws in states across the country, as well as the legal challenges brought against critical infrastructure laws and their counterparts. Louisiana's critical infrastructure law, when intersected with environmental racism, has the potential to disproportionately criminalize protest in Black communities. Equal Protection and First Amendment law do not adequately address this disproportionate censorship of Black communities based on their high concentration of environmental hazards. This Note proposes two solutions: first, *Arlington Heights* may be read to allow the historical context and history of segregation in a region act as evidence of discriminatory intent; second, Time, Place, and Manner doctrine can be easily expanded to incorporate issues of racial geography.

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INTRODUCTION

In St. James Parish, Louisiana, a plastics plant has been zoned on the site of a historic burial ground, home to the graves of people once enslaved.[1] Descendants of the buried continue to live in the neighboring majority Black communities.[2] In the fields where enslaved people cultivated sugarcane, smokestacks now exhale toxic chemicals. Where the roots of the plantation economy took hold, natural gas, oil, and other pipelines snake, omnipresent in the ground. Sharon Lavigne, who calls this area home, founded Rise St. James, a community grassroots organization, to engage the members of her community against its pollution.[3] She has seen how the Parish government kept her home as a site of Louisiana's extractive economy by rezoning her district from residential to industrial use.[4] She and other members of Rise St. James regularly protest in the shadow of the industrial infrastructure occupying their homes. To her, "[t]he civil rights struggle that [her] parents fought for continues today . . . we fight for our survival against industrial polluters."[5] Yet, her ability to fight for her community has been compromised. Louisiana, along with over a dozen other states, has made the act of protest on or near critical industrial infrastructure a felony.[6] Ms. Lavigne's First Amendment right to protest, and the rights of others living in the racialized geography of the United States' industrialized zones, has been effectively suspended.

The ability to assemble, protest, and air grievances in the public sphere of one's community is not only a cherished right but is also an essential safeguard of other rights.[7] However, the right to protest has been

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1. *RISE St. James–The Fight to Protect Burial Sites of Enslaved People,* CTR. FOR CONST. RTS, https://ccrjustice.org/home/what-we-do/our-cases/rise-st-james-fight-protect-burial-sites-enslaved-people [https://perma.cc/AF23-JYGU].

2. Verified Pet. for TRO and Inj. Relief at 2–3, Rise St. James v. Fromosa Plastics (23d Dist. Ct. La., 2020) (No. 20-C-192), *writ denied*, (5th Cir. Ct. La., 2020), https://ccrjustice.org/sites/default/files/attach/2020/06/RISE%20TRO%20Memo%20Order%206.15.20.pdf [https://perma.cc/6HTR-KGZH].

3. *Building a 100 Percent Clean Economy: The Challenges Facing Frontline Communities: Hearing Before the H. Subcomm. on Env't and Climate Change of the H. Comm. on Energy and Com.*, 116th Cong. 1 (2019) [hereinafter *Hearing*] (statement of Sharon Lavigne, Founder and President, Rise St. James).

4. *Id*.

5. *Id*.

6. *Sharon Lavigne*, CTR. FOR CONST. RTS., https://ccrjustice.org/Sharon%20Lavigne [https://perma.cc/U2W9-9G8G].

7. *See* Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

limited by new state laws[8], which in the context of environmental racism, can render entire communities no-speech zones. This recent wave of laws aimed at criminalizing protest speech arose in response to the Standing Rock #NoDAPL (Dakota Access Pipeline) movement that began in August 2016 by Native Americans and environmentalists opposing the construction of the Dakota Access Pipeline.[9] After this extended protest, thirteen states enacted laws making protesting on or near "critical infrastructure" a felony.[10] These laws usually define critical infrastructure broadly and almost always include fossil fuel pipelines, refineries, and other infrastructure supporting polluting industries.[11] Not only do these laws threaten the rights of Native Americans and amount to content suppression of environmental speech, but they also suppress speech in communities that live in the closest proximity and density of industrial pollution. Due to environmental racism and the racial geography, the imposed racial identity of a space,[12] created by centuries of slavery and segregation, Black communities, particularly in the Gulf South, are subjected to higher concentrations of critical infrastructure than other communities.[13] With both visible and invisible pipelines crisscrossing Black

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essential to the security of the Republic, is a fundamental principle of our constitutional system.").

[8] PEN AMERICA, ARRESTING DISSENT: LEGISLATIVE RESTRICTIONS ON THE RIGHT TO PROTEST 5 (May 2020), https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf [https://perma.cc/3W34-CWJ9].

9. *Id.*

10. *Id*. The following is a list of all state laws to date criminalizing protests that occur on or near critical infrastructure: H.B. 1123, 56th Leg. (Okla. 2017); H.B. 727, 2018 Reg. Sess. (La. 2018); S.B. 2044, 66th Leg. (N.D. 2019); S.B. 471, 121 Gen. Assemb., 1st Reg. Sess. (Ind. 2019); S.B. 264, 111th Reg. Sess. (Tenn. 2019); H.B. 3557, 86th Leg. Reg. Sess. (Tex. 2019); H.B. 355, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); AB 426, 2019 – 2020 Leg. (Wis. 2019); H.B. 44, 2020 Reg. Sess. (Ky. 2020); S.B. 151, 2020 Leg. (S.D. 2020); H.B. 4615, 2020 Leg. Reg. Sess. (W.Va. 2020); H.B. 1243, 2020 Leg. Reg. Sess. (Miss. 2020); S.B. 33, 133rd Gen. Assemb. (Ohio 2021); H.B. 1321, 2021 93rd Gen. Assemb. (Ark. 2021); S.B. 172, 2021 Reg. Sess. (Kan. 2021); H.B. 481, 67th Leg. (Mont. 2021). Alabama has introduced a similar law, which will be considered in the 2022 legislative session. H.B. 21, 2022 Reg. Sess. (Ala. 2021).

11. The most common definition of critical infrastructure among the states is modeled after the Oklahoma Critical Infrastructure law. *See infra* note 32 and accompanying text. For states modeling their critical infrastructure bills after the Oklahoma Critical Infrastructure law, see also N.D. S.B. 2044; Tex. H.B. 3557; Mo. H.B. 355; W. Va. H.B. 4615; Ohio S.B. 33. All states' critical infrastructure bills include oil and natural gas pipelines. All except for Tennessee's include infrastructure for the manufacture, transport, or storage of hazardous chemicals. Tenn. S.B. 264.

12. Elise C. Boddie, *Racial Territoriality*, 58.2 UCLA L. REV. 401, 415 (2010).

13. LESLEY FLEISCHMAN & MARCUS FRANKLIN, NAACP & CATF, FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES 1–3 (Nov. 2017), https://www.naacp.org/wp-content/

neighborhoods, critical infrastructure laws create a minefield of felonies for people who wish to assemble in their own community. Yet, constitutional law has a blind spot and does not currently provide redress for this consequence of racial geography.

In this Note, I will examine these critical infrastructure laws through an environmental justice and racial justice lens. To date, litigation and literature on critical infrastructure laws has contextualized these laws within the history of censoring Native American protests and content suppression of environmental speech.[14] I discuss the disproportionate impact of this law on communities of color, specifically Black communities in Louisiana's Cancer Alley, arguing that Louisiana's critical infrastructure law effectively creates no-protest zones in the historic communities which bear the burden of the United States' extractive industries. Current Fourteenth and First Amendment doctrines ignore the very real role of racialized geography.

Part I examines the existing literature and content of the current challenges to critical infrastructure laws. Part II focuses on a case study of the Louisiana critical infrastructure law. Part III places this case study of the disproportionate suppression of speech of Louisiana's Black communities within the context of First Amendment and anti-discrimination literature. Part IV discusses potential avenues to bring racialized geography into the legal discussion in a way that would recognize critical infrastructure law's denial of constitutionally protected rights. I conclude that racial geography may be incorporated in two places in constitutional law. First, I propose an alternate reading of *Arlington Heights* that offers an opening in which the historic chain of title to a piece of land and the laws that created its status as a racialized area could be used as evidence of discriminatory intent, allowing for Equal Protection Clause challenges. Second, I argue that the First

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uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP-and-CATF-Study.pdf [https://perma.cc/RF3V-VLUA].

14. *See* Elizabeth Hampton, *Thus in the Beginning All the World Was America: The Effects of Anti-Protest Legislation and an American Conquest Culture in Native Sacred Sites Cases*, 44 AM. INDIAN L. REV. 289, 291–92 (2020) (placing critical infrastructure laws within the context of Native Law and continued colonization); Alix Bruce, *Enough's Enough, Protest Law and the Tradition of Chilling Indigenous Speech*, 8 AM. INDIAN L.J. 53, 58–63, (2019) (places the critical infrastructure laws in the context of Native freedom of speech, while also providing discussion of the Due Process clause, but with a specifically Native focus); Grace Nosek, *The Climate Necessity Defense: Protecting Public Participation in the U.S. Climate Policy Debate in a World of Shrinking Options*, 49 ENV'T. L. 249, 250 (2019) (describing importance of climate movement protest, with some discussion of critical infrastructure legislation as one of the tactics to suppress climate movement protest); Jenna Ruddock, *Coming Down the Pipeline: First Amendment Challenges to State-Level "Critical Infrastructure" Trespass Laws*, 69 AM. U. L. REV. 665, 667–69 (2019) (describing First Amendment challenges to critical infrastructure laws, including Louisiana's.).

Amendment "time, place, and manner" doctrine may recognize racial geography by considering restrictions that disproportionately impact Black communities as 1) regulations that are not neutral; 2) are not narrowly tailored; and 3) provide no meaningful alternatives where Black residents may voice their grievances within their communities.

I. Critical Infrastructure Laws

This Part describes the series of events that led to the critical infrastructure laws and the status of challenges against them. The critical infrastructure laws arose as a direct response to the Standing Rock Movement against the Dakota Access Pipeline and quickly proliferated across the country due to the involvement of legislative drafting organizations. Two lawsuits that challenged critical infrastructure and related protest laws emerged in response.[15] However, these challenges focused primarily on First Amendment claims and did not consider issues of environmental racism and the disproportionate siting of critical infrastructure near and within Black communities. This is likely due to limitations in Equal Protection and First Amendment doctrine that will be discussed in Part III.

A. History of Critical Infrastructure Laws

States initiated protest suppression efforts in 2016, following nation-wide uprisings and protests.[16] Initiated by the Black Lives Matter Movement of 2014, the movement against the Keystone XL Pipeline of 2014, and the Occupy Wall Street Movement of 2011, the current generation of large-scale protest movements are associated with progressive policy objectives.[17] Following these movements, the Standing Rock Uprising of 2016 became a critical inciting moment in the conservative movement to criminalize protest.[18]

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15. Dakota Rural Action v. Noem, 416 F. Supp. 3d 874 (2019) (finding the South Dakota riot-boosting law to be unconstitutional on first amendment grounds); White Hat v. Landry, No. CV 19-322-JWD-EWD, 2020 WL 4370129 (M.D.L.A., July 30, 2020) (complaint arguing Louisiana's critical infrastructure law is unconstitutional on First Amendment Grounds.)

16. PEN AMERICA, *supra* note 8, at 5.

17. *Id.*

18. *ALEC Attacks: How Evangelicals and Corporations Captured State Lawmaking to Safeguard White Supremacy and Corporate Power*, CTR. FOR CONST. RTS. ET AL. 41–43 (2019), https://www.alecattacks.org/sites/default/files/ALEC%20Attacks.pdf [https://perma.cc/7BGB-B297].

Beginning in August 2016, Native Americans from across the continent, along with environmentalists and progressive allies, gathered at the planned location of a pipeline that would slice through the Standing Rock Sioux Tribe's sacred sites and primary water source. Protestors occupied the land and interrupted the construction process.[19] The Standing Rock Sioux Tribe identified several burial and prayer sites that construction disrupted.[20] In the following weeks, private security forces violently clashed with protesters.[21] Despite this, members of the Standing Rock Sioux began an encampment named Oceti Sakowin Camp along the proposed route of the pipeline.[22] This encampment grew and attracted thousands of Native activists and allies from all over the Americas. To many, it was seen as a moment of Pan-American indigenous solidarity.[23] The camp was largely evacuated under federal order when seasonal flooding began in February 2017, and the remaining forty-six water protectors were arrested.[24] The Dakota Access Pipeline has since faced starts and stops, becoming operational under the Trump administration before a district court found that the environmental assessment was inadequate and revoked the pipeline's easement.[25] Eventually, in May 2021, the pipeline was allowed to operate, and as of the date of publication, the Dakota Access pipeline is in operation.[26]

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19. Hampton, *supra* note 13, at 293.

20. Rebecca Herscher, *Key Moments in the Dakota Access Pipeline Fight*, NPR: THE TWO-WAY (Feb. 22, 2017), https://www.npr.org/sections/thetwoway/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight [https://perma.cc/NHP7-9PSN].

21. *Id.*

22. *Oceti Sakowin Camp*, NIMA TARADJI, https://www.nimataradji.com/oceti-sakowin-camp-dapl [https://perma.cc/NN56-N6PR].

23. Mitch Smith, *Standing Rock Protest Camp, Once Home to Thousands, Is Razed*, N.Y. TIMES (Feb. 23, 2017), (on file with the Columbia Human Rights Law Review); *see also Oceti Sakowin*, STAND WITH STANDING ROCK, https://standwithstandingrock.net/oceti-sakowin/ [https://perma.cc/K7RC-UG8W] (celebrating the Oceti Sakowin Camp as a first of its kind historic gathering of Indigenous Nations).

24. Smith, *supra* note 22.

25. The uprising directly interfered with planned extractive economic activity by delaying the Dakota Access Pipeline ("DAPL") construction and bringing sufficient press and attention such that the Federal Energy Regulatory Commission ("FERC") halted the project. Ellen Gilmer, *Dakota Access Pipeline Fate Uncertain After Court Hearing*, BL NEWS (Nov. 4, 2020), https://news.bloomberglaw.com/environment-and-energy/dakota-access-pipeline-fate-unclear-after-d-c-circuit-hearing [https://perma.cc/VWN9-2BL2].

26. Devika Krishna Kumar, *U.S. Judge Orders that Dakota Access Oil Pipeline Can Remain Open*, REUTERS (May 21, 2021), https://www.reuters.com/business/legal/us-judge-orders-that-dakota-access-oil-pipeline-can-remain-open-2021-05-22/ [https://perma.cc/YY43-7M5C]; Laura Sanicola, *Illinois Court Vacates Approval of Dakota Access Pipeline Capacity Expansion*, REUTERS (Jan. 21, 2022), https://www.reuters.com

Conservative lawmakers reacted to these protest movements with a campaign to constrain protest speech.[27] At the beginning of the next legislative session, North Dakotan legislators proposed six anti-protest bills and passed four.[28] These laws were important predecessors to the critical infrastructure laws. They included expanded criminal trespass laws, "riot boosting" acts (placing penalties for rioting or inciting a riot), and other limitations on protests similar to Standing Rock. However, the North Dakotan Legislature did not propose a critical infrastructure protest law until 2019.[29] Oklahoma passed the first actual critical infrastructure law in May 2017.[30] Oklahoma's critical infrastructure law levied penalties from a minimum $1,000 fine or six months imprisonment to a maximum $100,000 or ten years imprisonment.[31] The law defined critical infrastructure extremely broadly and the only notice requirement for protesters was fencing or some signage to indicate the location of some critical infrastructure.[32] Oklahoma's law then became the model for the

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/business/energy/illinois-court-vacates-approval-dakota-access-pipeline-capacity-expansion-2022-01-12/ [https://perma.cc/7L4F-CQRY] (describing court order allowing the Dakota Access Pipeline to continue running.)

27. PEN America, *supra* note 8, at 5.

28. *Id*. Both the North Dakotan House and Senate at that time were controlled by Republican lawmakers, and North Dakota had a Republican Governor. *See 65th Legislative Assembly House Leadership*, ND.GOV, https://www.legis.nd.gov/assembly/65-2017/members/leadership/house [https://perma.cc/5SEV-N7RH] (describing the political make-up of the North Dakotan House); *65th Legislative Assembly Senate Leadership*, ND.GOV, https://www.legis.nd.gov/assembly/652017/members/leadership/senate [https://perma.cc/478G-YZUS] (describing the political make-up of the North Dakotan Senate); *Governor Doug Bergum*, NORTH DAKOTA REPUBLICAN PARTY, https://ndgop.org/team-members/governor-doug-burgum/ [https://perma.cc/KQL2-PUXK] (describing the North Dakotan Governor as a Republican).

29. Introduced in January of 2019, and then signed into law in April of 2019, North Dakota's S.B. 2044 established that the intentional "[d]amaging, destroying, vandalizing, defacing, impeding, inhibiting, or tampering with the operations of a critical infrastructure facility; or interfering, inhibiting, impeding, or preventing the construction or repair of a critical infrastructure facility," would be a Class C felony, while reckless commission of the above would be a class A misdemeanor, and unintentional commission of the above would be a class B misdemeanor. Like all the other laws, critical infrastructure was focused on heavily polluting industry and energy infrastructure. S.B. 2044, 66th Leg. Assemb., Reg. Sess. (N.D. 2019).

30. *US Protest Law Tracker: Oklahoma*, INT'L CTR. FOR NON-PROFIT L. [hereinafter ICNL], https://www.icnl.org/usprotestlawtracker/?location=40 [https://perma.cc/M3SF-NKJC].

31. H.B. 1123, 56th Leg., 1st Sess. (Okla. 2017).

32. In H.B. 1123, critical infrastructure is defined as:

> 1. a. a petroleum or alumina refinery, b. an electrical power generating facility, substation, switching station, electrical control center or electric power lines and associated equipment infrastructure, c. a chemical, polymer or rubber manufacturing

conservative, pro-industry group American Legislative Exchange Council (ALEC),[33] which began drafting and lobbying for similar bills in other states.[34] Louisiana's critical infrastructure bill, introduced in 2018 by an

> facility, d. a water intake structure, water treatment facility, wastewater treatment plant or pump station, e. a natural gas compressor station, f. a liquid natural gas terminal or storage facility g. a telecommunications central switching office, h. wireless telecommunications infrastructure, including cell towers, telephone poles and lines, including fiber optic lines, i. a port, railroad switching yard, railroad tracks, trucking terminal or other freight transportation facility, j. a gas processing plant, including a plant used in the processing, treatment or fractionation of natural gas or natural gas liquids, k. a transmission facility used by a federally licensed radio or television station, l. a steelmaking facility that uses an electric arc furnace to make steel, m. a facility identified and regulated by the United States Department of Homeland Security Chemical Facility Anti-Terrorism Standards (CFATS) program, n. a dam that is regulated by the state or federal government, o. a natural gas distribution utility facility including, but not limited to, pipeline interconnections, a city gate or town border station, metering station, aboveground piping, a regulator station and a natural gas storage facility, or p. a crude oil or refined products storage and distribution facility including, but not limited to, valve sites, pipeline interconnections, pump station, metering station, below or aboveground pipeline or piping and truck loading or offloading facility; or
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> 2. Any aboveground portion of an oil, gas, hazardous liquid or chemical pipeline, tank, railroad facility or other storage facility . . . .

Id. Of the seventeen enumerated categories of critical infrastructure, seven involve the production or transportation of oil or natural gas, three refer to heavy industrial infrastructure, two relate to electrical production and transmission, two to telecommunications, one to water and waste-water infrastructure, one to freight transport, and one to national security facilities.

33. ALEC is a corporate-funded group whose membership includes legislators and industry groups responsible for drafting model legislation that can easily be introduced in multiple state legislatures. *See About ALEC*, AM. LEG. EXCHANGE COUNCIL, https://www.alec.org/about/ [https://perma.cc/9KC4-WZY4] (describing ALEC's general purpose and detailing the extent of its membership); Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, THE ATLANTIC (April 14, 2012), https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/ [https://perma.cc/8WY6-SSVL] (describing ALEC's conservatism and practice of drafting model legislation for state legislatures across the country); *What is ALEC*?, CTR. FOR MEDIA & DEMOCRACY: ALEC EXPOSED (Oct. 13, 2017), https://www.alecexposed.org/wiki/What_is_ALEC%3F [https://perma.cc/5N45-F79U] (describing the connection between legislators and industry groups).

34. *See* H.B. 1158, 58th Leg., 1st Sess. (Okla. 2021) (highlighting an example of a similar bill); *see also* CTR. FOR CONST. RTS. ET. AL., *supra* note 17, at 41–44 (describing how ALEC adopted Oklahoma's bill as model legislation).

ALEC-affiliated legislator, was the first of the ALEC-drafted critical infrastructure bills to become law.[35]

Legislators introduced these bills with the goal of preventing Standing Rock-like movements. With the fourth largest crude oil production in the country and the largest per capita Native American population in the contiguous United States, Oklahoma was a natural starting point for critical infrastructure laws.[36] Additionally, legislators in Oklahoma described the Dakota Access Pipeline protests as "the main reason behind" the introduction of the bill.[37] The Louisiana Legislature passed a critical infrastructure law following protests against the Bayou Bridge Pipeline, which protestors intentionally modeled after the Standing Rock protests.[38] A co-sponsor of the Louisiana bill also referenced the Standing Rock protests when describing the bill: "I saw what happened in parts of the country like North Dakota. Oklahoma had some legislation, and this is kind of modeled after that."[39] This trend is ongoing. For example, protests against the Atlantic Coast Pipeline in 2020 spurred an anti-protest law in West Virginia.[40]

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35. CTR. FOR CONST. RTS. ET. AL., *supra* note 17, at 43–44; *see* H.B. 727, 2018 Leg., Reg. Sess. (La., 2018) (showing the first ALEC drafted bill).

36. *Oklahoma State Energy Profile,* ENERGY INFO. ADMIN. (March 19, 2020), https://www.eia.gov/state/print.php?sid=OK [https://perma.cc/6VX2-YQ4Q] (providing statistics regarding Oklahoma's oil production); *Native American Population 2020,* WORLD POPULATION REV., https://worldpopulationreview.com/staterankings/native-american-population [https://perma.cc/9TD7-6HDZ] (providing state by state data on total Native American residents).

37. CTR FOR CONST. RTS. ET. AL., *supra* note 18, at 42 ("Yes, [the Dakota Access Pipeline protests] is the main reason behind this.") (citing 56 1st Leg., 2nd Sess., *Judiciary–Criminal Justice and Corrections*, OKLA. H.R. (Feb. 22, 2017 10.45.36 A.M.), https://www.okhouse.gov/Video/Default.aspx [https://perma.cc/T5JC-GNUR];

38. Ruddock, *supra* note 13, at 676; CTR. FOR CONST. RTS. ET. AL., *supra* note 17, at 44; Lux, *Tougher Laws on Pipeline Protests Face Test in Louisiana*, NPR (Sept. 19, 2018), https://www.npr.org/2018/09/19/648029225/tougher-laws-on-pipeline-protests-face-test-in-louisiana [https://perma.cc/3368-KY8K].

39. CTR. FOR CONST. RTS. ET. AL., *supra* note 17, at 44 (citing Alleen Brown & Will Parrish, *Louisiana and Minnesota Introduce Aanti-Protest Bills Amid Fights over Bayou Bridge and Enbridge Pipelines*, THE INTERCEPT (Feb. 21, 2018), https://theintercept.com/2018/03/31/louisiana-minnesota-anti-protest-bills-bayou-bridge-enbridge-pipelines/ [https://perma.cc/7BGB-B297]).

40. The West Virginia critical infrastructure law was passed in March 2020 following protests against the Atlantic Coast Pipeline. *See* H.B. 4615, 2020 Leg., Reg. Sess. (W. Va. 2020) (showing that the H.B. was passed shortly after the Atlantic Coast Pipeline protests).

B. Legal Challenges to Critical Infrastructure Laws

The American Civil Liberties Union ("ACLU") and the Center for Constitutional Rights ("CCR") have engaged in two significant First Amendment challenges to anti-protest laws in South Dakota and Louisiana.

1. Litigation Against South Dakota's "Riot Boosting" Act

After the Standing Rock movement, South Dakota passed four anti-protest laws in 2017 that were similar to North Dakota's predecessors to critical infrastructure laws.[41] In March 2019, the South Dakota Legislature passed S.B. 181, a law that created civil penalties for riot boosting and established a state of emergency to give the bill immediate effect upon signing.[42] Although this law predated South Dakota's critical infrastructure law, it gave the state broad power to prosecute and convict those who plan, support, or participate in protests that might result in property damage.[43] On the same day the bill became law, the ACLU brought suit against the Governor and other officials of the South Dakotan Government on behalf of groups wishing to protest the Keystone XL Pipeline.[44] In its complaint, the ACLU described the "riot boosting" act as a clear attempt by the South Dakotan government to silence ongoing local Keystone XL Pipeline protests.[45] In the complaint, the ACLU argued that the "riot boosting" act was unconstitutional on its face because:

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41. S.B. 176, 2017 Leg., Reg. Sess. (S.D. 2017), https://sdlegislature.gov/#/Session/Bill/8262 [https://perma.cc/UTP8-JHGH] (allowing the governor to set up public safety zones, limiting protests to 20 or less, and authorizing the Department of Transportation to prohibit protestors from stopping, standing, or parking in certain areas); S.B. 189, 2019 Leg., Reg. Sess. (S.D. 2019), https://sdlegislature.gov/#/Session/Bill/10176 [https://perma.cc/9D2E-9JJL] (creating civil penalties for "riot boosting" and declaring a state of emergency); S.B. 151, 2020 Leg., Reg. Sess. (S.D. 2020), (establishing felonies for protesting on or near critical infrastructure); H.B. 1171, 2020 Leg., 95th Sess. (S.D. 2020), (repealing portions of S.B. 198, §§ 22-10-6 and 22-10-6.1: Encouraging or soliciting violence in riot—Felony and Encouraging or soliciting violence in riot without participating—Felony, while creating a new felony charge: 22-10-17. Incitement to riot—Violation as felony). South Dakota did not pass a critical infrastructure bill until 2020.

42. S.B. 189, 2019 Leg., Reg. Sess. (S.D. 2019); Press Release, South Dakota Governor Drops Anti-Protest Laws in Settlement Agreement with ACLU, ACLU (Oct. 24, 2019), https://www.aclu.org/press-releases/south-dakota-governor-drops-anti-protest-laws-settlement-agreement-aclu [https://perma.cc/KHF7-JU4R] [hereinafter ACLU].

43. S.D. S.B. 189.

44. Complaint at 1, Dakota Rural Action v. Noem, 416 F. Supp. 3d 874 (D.S.D. 2019) (No. 5:19-cv-05046).

45. *Id.*

> (1) [it] target[s] protected speech, (2) [it was] written too broadly and so reach[es] a substantial amount of protected speech, and (3) [it] fail[s] to make it clear to Plaintiffs, others subject to the[] law[], and government actors tasked with enforcing the law[] what conduct and speech is prohibited by [it]. As such, the Act . . . violate[s] the First and Fourteenth Amendments.[46]

District Court Judge Lawrence L. Piersol agreed and granted a preliminary injunction against the enforcement of certain provisions of the riot boosting act. Judge Piersol wrote that South Dakota went "beyond that appropriate interest [of preventing riots and violence] and . . . do[es] impinge upon protected speech and other expressive activity as well as the right of association."[47] He concluded his analysis with an analogy to the Civil Rights Movement, arguing that a riot boosting law of this nature would have created liability for leaders like Dr. Martin Luther King Jr.[48] The ACLU and the Governor of South Dakota then settled the suit and agreed that South Dakota would not enforce the riot boosting act.[49]

Although the litigation was a success, the South Dakota Legislature continued to pass anti-protest legislation. The subsequent act that repealed the riot boosting act challenged in the ACLU lawsuit, added a new section defining the class five felony of "inciting a riot" as "any person who, with the intent to cause a riot, commits an act or engages in conduct that urges three or more people . . . to use force or violence to cause any injury to any person or any damage to property."[50] The act states, "[t]his section may not be construed to prevent the peaceable assembly of persons for lawful purposes of protest or petition."[51] However, "peaceable assembly . . . for lawful purposes" is not defined. That same session, the South Dakotan Legislature passed its own critical infrastructure act, which classifies actions that cause a "substantial interruption or impairment in: (a) Public transportation; (b) Water supply; (c) Gas service; (d) Electric service; (e) Critical infrastructure facility; or (f) Other utility service" as class five felonies.[52] To date, these laws have not been challenged as violations of free speech.

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46. *Id.* at 3.
47. Dakota Rural Action v. Noem, 416 F. Supp. 3d 874, 883 (D.S.D. 2019).
48. *Id.* at 889–90.
49. ACLU, *supra* note 41.
50. H.B. 1171, 2020 Leg., 95th Sess. (S.D. 2020). A class five felony in South Dakota is defined as "five years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed." S.D. CODIFIED LAWS § 22-6-1.
51. H.B. 1171, 2020 Leg., 95th Sess. (S.D. 2020).
52. S.B. 151, 2020 Leg., Reg. Sess. (S.D. 2020).

2. Litigation Against Louisiana's Critical Infrastructure Law

Louisiana passed its critical infrastructure act in May 2018 in the midst of protests against the Bayou Bridge Pipeline.[53] Louisiana's definition of critical infrastructure is particularly broad, including:

> Any and all structures, equipment, or other immovable or movable property located within or upon chemical manufacturing facilities, refineries, electrical power generating facilities, electrical transmission substations and distribution substations, water intake structures and water treatment facilities, natural gas transmission compressor stations, liquified natural gas (LNG) terminals and storage facilities, natural gas and hydrocarbon storage facilities, and transportation facilities, such as ports, railroad switching yards, pipelines, and trucking terminals, or any site where the construction or improvement of any facility or structure referenced in this Section is occurring.[54]

The law's penalties are draconian. A person charged with "unauthorized entry" onto critical infrastructure faces a minimum of five years of prison, "with or without hard labor."[55] Conspirators for criminal damage "where it is foreseeable that more than one human life will be threatened" face up to twelve years in prison, with or without hard labor, and $250,000 in fines.[56] Like the South Dakota riot boosting act, Louisiana's critical infrastructure law carves out exceptions for "lawful assembly and peaceful and orderly petition . . . regarding legitimate matters of public interest" and for "lawful commercial or recreational activities."[57]

Days after Louisiana's critical infrastructure law went into effect, non-violent demonstrators protesting at the proposed site of the Bayou Bridge Pipeline were arrested[58] despite having the landowners' written consent.[59] In May 2019, CCR brought a suit against Louisiana government

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53. H.B. 727, 2018 Leg., Reg. Sess. (La. 2018), (now statute La. R.S. 14:61); *White Hat v. Landry*, CTR. FOR CONST. RTS. ET. AL., (May 6, 2021), https://ccrjustice.org/home/what-we-do/our-cases/white-hat-v-landry [https://perma.cc/CR9B-TBVE].

54. La. H.B. 727.

55. *Id.* at § 61(C).

56. *Id.* at § 61.1(E).

57. *Id.* at § 61(D)(1)–(2).

58. CTR. FOR CONST. RTS. ET. AL., *supra* note 52; Travis Lux, *Tougher Laws on Pipeline Protests Face Test in Louisiana*, NPR (Sept. 19, 2018), https://www.npr.org/2018/09/19/648029225/tougher-laws-on-pipeline-protests-face-test-in-louisiana [https://perma.cc/RQY4-5XYQ].

59. White Hat v. Landry, 475 F. Supp. 3d 532, 540 (M.D. La. 2020); Complaint at 5 White Hat v. Landry, 475 F. Supp. 3d 532, No. 3:19-cv-00322 (M.D. La. 2020)

officials on behalf of three individuals arrested under Louisiana's critical infrastructure law as well as other stakeholders. The sixteen plaintiffs included two protesters of the Bayou Bridge Pipeline who were arrested under the critical infrastructure law, a journalist covering the protest who was arrested, two landowners along the Bayou Bridge Pipeline route, and environmental justice organizations including Rise St. James, 350 New Orleans, and the Louisiana Bucket Brigade.[60]

In the complaint, CCR asserted several different constitutional claims. CCR argued that the law is:

> [U]nconstitutional on its face and as applied because: 1) it is vague as it does not provide adequate notice to plaintiffs and others, as well as state actors who must enforce the law, what conduct is prohibited and where, and allows for arbitrary and discriminatory enforcement; 2) it is overbroad and has the effect of chilling constitutionally protected speech or expression; and 3) targets speech and expressive conduct with a particular viewpoint for harsher punishment.[61]

The Fourteenth Amendment Due Process claim discussed the law's overbroad definition of "critical infrastructure," particularly its inclusion of pipelines, because pipelines are nearly ubiquitous in Louisiana. These pipelines are often underground and unmarked, making it nearly impossible for anyone walking or protesting in Louisiana to avoid breaking the law.[62] The plaintiffs alleged that the critical infrastructure laws led to the arrest of the Bayou Bridge Pipeline protesters for exercising their First Amendment rights and could chill other persons' ability to protest and assemble in the future.[63] The plaintiffs brought a second First Amendment claim, alleging that the critical infrastructure law also singled out a particular viewpoint—pipeline opposition—for harsher punishment.[64] The third First Amendment claim, similar to the Due Process claim, argued that the statute is an overbroad regulation of speech.[65]

CCR's complaint also described the prevalence of pipelines throughout Louisiana.[66] Pipelines in Louisiana are often underground, and can be found running under private property and under sidewalks and other

60. Complaint at 1, *White Hat*, 475 F. Supp. 3d 532, No. 3:19-cv-00322.
61. *Id*. at 2.
62. *Id*. ¶¶ 55–64, 109–15.
63. *Id*. ¶¶ 116–22.
64. *Id.* ¶¶ 123–29.
65. *Id.* ¶¶ 130–35.
66. *Id*.

public spaces, without signage.[67] Because pipelines and other "critical infrastructure" are ubiquitous and often unmarked or hidden, the law could reasonably be read to make any "illegitimate" activity in these communities punishable by five years in prison, with or without hard labor.[68] This creates an obvious notice issue since Louisianans "cannot be sure of where they can lawfully remain present, what conduct is prohibited . . . or even who determines whether it is prohibited and how."[69]

Describing the circumstances of the arrests, CCR's complaint also mentioned the potential impact of the critical infrastructure law on people of color. The complaint explained that the Bayou Bridge Pipeline would pass through 700 bodies of water, including the United Houma Nation's primary water source.[70] In the complaint, plaintiff Sharon Lavigne—the aforementioned Black landowner and the founder of Rise St. James—also expressed concern that "the law [would] impact their ability to march and protest in areas where there are numerous pipelines."[71] Nonetheless, these acknowledgements were not part of the legal analysis. Despite the unequal impact of the placement of critical infrastructure on free speech in communities of color—specifically the United Houma Nation and Black communities in "Cancer Alley"—the lawsuit made no legal claim of discrimination.[72]

The *White Hat* litigation remains before the court.[73] A decision on the merits would be the first decision on the constitutionality of critical infrastructure laws and could show how courts conceptualize critical infrastructure laws within the current understanding of First Amendment doctrine.[74]

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67. *Id*.

68. *Id*.

69. *Id*.

70. *Id*. at 4, 14.

71. *Id*. at 9, 11; *see also* CTR. FOR CONST. RTS. ET. AL., supra note 6 (describing Ms. Lavigne's concerns that the critical infrastructure laws will negatively impact the ability of her organization to continue to march and organize in the majority-Black areas of Louisiana with many pipelines).

72. Complaint at 30–34, White Hat v. Landry, No. 6:20-cv-00983 (W.D. La. July 31, 2020) (docket for case in current court).

73. The court has granted a motion to dismiss for the Louisiana Attorney General and granted a transfer of venue to the Western District of Louisiana. White Hat v. Landry, No. CV 19-322-JWD-EWD, 2020 WL 4370129, at *13, *18 (M.D. La. Jul. 30, 2020); CTR. FOR CONST. RTS., *supra* note 52; *see also* White Hat v. Landry, No. 6:20-cv-00983 (W.D. La. Jul. 31, 2020) (docket for case in current court).

74. A second suit was brought by individuals arrested during the Bayou Bridge Pipeline protest against the pipeline company as well as state officials, primarily on state constitutionality grounds. The claims do not directly attack the critical infrastructure law, but rather the lawfulness of the arrests. *Spoon v. Bayou Bridge Pipeline LLC et al.*,

C. Environmental Racism: The Elephant in the Room

Environmental racism describes the disproportionate burden that environmental hazards have on people of color through the concentrated siting of polluting industries and infrastructure in marginalized communities.[75] Black communities in the United States face a particularly harsh environmental burden. For instance, Black Americans are 75% more likely to live in a "fenceline community"—a community in close proximity to a polluting industrial site—than the average American.[76] Over one million Black Americans live within a half mile radius of oil and gas wells or compressors.[77] Environmental racism related to oil and gas production is particularly acute in Louisiana and Texas, both states with critical infrastructure laws.[78] In Louisiana, many of the state's counties are among the United States' top 200 oil and gas producing counties and nearly all these counties have more than double the average Black population of the United States.[79] Cancer Alley in Louisiana is perhaps one of the most well-known manifestations of environmental racism in the United States. Through the histories of segregation and discriminatory housing policies, polluting industries and their related infrastructure have been concentrated in Black neighborhoods.

Although the typical impacts of environmental racism are understood as public health concerns, such as elevated rates of asthma and cancer,[80] the critical infrastructure laws add a risk of heightened policing and the criminalization of protest speech. Critical infrastructure, as defined by these laws, includes all infrastructure that supports industries responsible for polluting marginalized communities.[81] Given the breadth of behavior that is considered a felony under the Louisiana critical infrastructure law, Black communities in Louisiana's industrial corridor could also face disproportionate arrest for protest.

MACARTHUR JUST. CTR. (Aug. 9, 2019), https://www.macarthurjustice.org/case/spoon-v-bayou-bridge-pipeline-llc-et-al/ [https://perma.cc/4MHH-2BQW].

75. Paul Mohai & Bunyon Bryant, *Race, Poverty & the Distribution of Environmental Hazards: Reviewing the Evidence,* 2 RACE, POVERTY & ENV'T 3, 24–27 (Fall 1991/Winter 1992); Robert D. Bullard, *Symposium: The Legacy of American Apartheid and Environmental Racism*, 9 St. JOHN'S J.L. COMM. 445, 445 (1994); *Env't. Issues: Hearings Before the Subcomm. on Transp. and Hazardous Materials of the Comm. on Energy and Commerce*, 103rd Cong. (1993).

76. Fleischman & Franklin, *supra* note 12, at 6.

77. *Id*.

78. *Id*. at 9, 21.

79. *Id*. at 9.

80. Fleischman & Franklin, *supra* note 12, at 2–4.

81. *See supra* notes 9 and 32.

II. Environmental Racism in Cancer Alley

The term "environmental racism" first arose in 1982 during protests against the siting of a toxic polychlorinated biphenyl ("PCB") landfill in the predominantly Black Warren County, North Carolina.[82] Although the protests were unable to prevent the placement of the landfill, they inspired two canonical studies of the role race has played in the siting of toxic burdens: the U.S. General Accounting Office's ("GAO") 1983 report "Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities,"[83] and the United Church of Christ's ("UCC") Commission for Racial Justice "Toxic Wastes and Race in the United States."[84] Both studies found race to be the most relevant factor in the siting of hazardous industrial sites, even more than economic status.[85] Following the UCC report, Reverend Benjamin Chavis Jr. coined the term "environmental racism" to describe the phenomenon of "the intentional and unintentional disproportionate imposition of environmental hazards" on people of color.[86]

A. History of Environmental Racism in Cancer Alley

Cancer Alley is the regional nickname for an industrial corridor in Louisiana along the Mississippi River between Baton Rouge and New Orleans. This eighty-five mile stretch is home to 25% of the United States' petrochemical production.[87] The petrochemical production has had devastating health consequences for residents and has resulted in elevated rates of cancer. Cancer Alley's overall population is 40% Black, but many communities in the corridor are more than 90% Black, a result of the region's post-slavery reconstruction.[88] Consequently, these Black communities are

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82. Rachel D. Godsil, *Remedying Environmental Racism*, 90.2 U. MICH. L. REV. 394, 394 (1991).

83. U.S. GOV'T ACCT. OFF., RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), https://www.gao.gov/products/rced-83-168 [https://perma.cc/R7HC-ZX6W].

84. UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter UNITED CHURCH OF CHRIST], https://www.nrc.gov/docs/ML1310/ML13109A339.pdf [https://perma.cc/RK4F-QZXV].

85. U.S. GOV'T ACCT. OFF., *supra* note 82, at 1; UNITED CHURCH OF CHRIST, *supra* note 83, at xiii.

86. Godsil, *supra* note 81, at 395.

87. Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L.J. 363, 372–73 (2019).

88. *Id*.; *see also* DEEP S. CTR. FOR ENV'T JUST., SURVIVING CANCER ALLEY: STORIES OF FIVE COMMUNITIES 2 (2020), https://fluxconsole.com/files/item/211/109412/SurvivingCancerAlleyReport.pdf [https://perma.cc/LG8C-RRDR] (describing how GIS mapping

often closest to the petrochemical plants and are exposed to higher health risks.[89]

Cancer Alley's status as a center of industry and pollution is a direct result of the legacy of slavery and segregation in the region. After emancipation, communities of freed Black people formed "companies" and purchased strips of former plantation land.[90] The descendants of the original freed slaves continued to live in these communities which are now economically poor, "but rich in family histories going back many generations."[91] These small rural communities are densely populated, but typically unincorporated and thus have limited local self-governance.[92] Adjacent plantation lands that were not purchased by companies and remained with the former plantation owners and their descendants during Reconstruction have largely been sold off. In many cases, these lands have become the sites of polluting industries.[93] For example, in the unincorporated former freed-Black community Reserve, the infamous chemical plant Pontchartrain Works is on the land of the neighboring Belle Pointe Plantation—the site of the largest slave rebellion in U.S. history.[94] This plant is the primary reason the area has the most polluted air in the country.[95]

Because many of these communities that descended from the freed Black companies are unincorporated, zoning decisions are not made by local community leaders, but rather by the majority-white parish governments.[96]

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shows that pollution sources increase as the population of African Americans increases along Cancer Alley).

89. Mizutani, *supra* note 86, at 373.

90. PHILIP RUTLEDGE ET AL., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION 192 (2003), https://www.csu.edu/cerc/documents/AddressingCommunityConcernsHowEnvironmentalJusticeRelatesToLandUsePlanningandZoningJuly2003.pdf [https://perma.cc/5XSU-CWFF]; *see also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 53–55 (2017) (describing the nation-wide practice of toxic-waste and industrial zoning to maintain the "slum" status of Black neighborhoods).

91. RUTLEDGE ET AL., *supra* note 89, at 192.

92. Mizutani, *supra* note 86, at 373.

93. RUTLEDGE ET AL., *supra* note 89, at 192.

94. Oliver Laughland & Jamiles Lartey, *First Slavery, Then a Chemical Plant and Cancer Deaths: One Town's Brutal History*, THE GUARDIAN (May 6, 2019), https://www.theguardian.com/us-news/2019/may/06/cancertown-louisiana-reserve-history-slavery [https://perma.cc/C9RN-6B66].

95. *Id*.

96. Parishes are the equivalent of county governments in Louisiana and take on the responsibilities of a municipality for unincorporated areas. Mizutani, *supra* note 86, at 373–74.

One such majority-Black unincorporated community—Wallace, Louisiana—was rezoned from residential to industrial use by the majority-white St. John the Baptist Parish government.[97] This rezoning decision allowed for the construction of a plastics plant.[98] District Five of St. James Parish—Sharon Lavigne's home and a majority-Black area—was also rezoned from residential to industrial use in 2011, making way for pipelines and the proposed Formosa Plastics plant sited at a historic graveyard of the enslaved and free ancestors of the district's residents.[99]

New Orleans, at the terminus of the Mississippi River and Cancer Alley, has its own history of environmental racism. Early in New Orleans' history, the city was relatively integrated.[100] However, as time advanced and the city developed, white residents fled to higher ground, leaving the vast areas of the city below sea level for Black residents, both free and enslaved.[101] By the 1850s, this had led to disproportionate public health impacts, placing Black communities closer to sources of malaria and with the lowest priority for drainage and sewage projects.[102] Development and improvement of city infrastructure exacerbated existing inequalities between the white and Black neighborhoods.[103] Eventually, New Orleans solidified these patterns with a 1924 ordinance that banned building homes for Black residents in white neighborhoods and prevented Black residents from renting or owning homes in white neighborhoods.[104] Federal agencies later redlined these neighborhoods, withholding financing for homes that could be leased to Black tenants and homeowners.[105]

This led to disastrous and disproportionate flooding in Black communities, most famously during Hurricane Katrina. Hurricane Katrina's

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97. *Id*.

98. *Id*.

99. Sabrina Canfeild, *Cancer Alley Residents Decry 'Environmental Racism' in Louisiana*, COURTHOUSE NEWS SERV. (Jan. 15, 2019), https://www.courthousenews.com/cancer-alley-residents-decry-environmental-racism-in-louisiana/ [https://perma.cc/LV3F-NDCK]; CTR. FOR CONST. RTS. ET. AL., *supra* note 1.

100. Mizutani, *supra* note 86, at 374; Daphne Spain, *Race Relations and Residential Segregation in New Orleans: Two Centuries of Paradox*, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 86 (1979).

101. Mizutani, *supra* note 86, at 375.

102. *Id*.

103. *Id*.

104. Craig E. Colten, *Basin Street Blues: Drainage and Environmental Equity in New Orleans, 1890–1930*, 28 J. HIST. GEOGRAPHY, 237 n.66 (2002) ("Louisiana Act No. 117 (1912) authorized municipalities to enact segregation ordinances and Act No. 118 (1924) prohibited racial mixing by neighborhood. New Orleans Ordinance 8037, Common Council Series (1924) implemented the state acts in the city. The major challenge to this act dealt with a rental property.").

105. Mizutani, *supra* note 86, at 376.

flood waters were also filled with chemicals from upstream Cancer Alley industrial plants, creating a "toxic soup" that permeated the ground beneath these neighborhoods.[106] As the city attempts to re-develop after Hurricane Katrina, majority-Black communities are still home to the industrial infrastructure deemed necessary for the city's recovery. For example, in 2016, the Entergy New Orleans Gas Plant was slated for construction in the 82% Black neighborhood of East New Orleans.[107] Next, the city of New Orleans made a proposal to rezone areas for industrial development.[108] Many of the areas proposed for rezoning directly overlap with old Black neighborhoods that had been redlined in the early 20th century.[109]

B. Potential for Polluting Infrastructure to Silence Black Protest in Cancer Alley

The industries covered by critical infrastructure laws encompass nearly all the industries that pollute Black communities in Cancer Alley. Among the protected infrastructures are "any and all structures, equipment, or other immovable or movable property located within or upon chemical manufacturing facilities, refineries . . . natural gas and hydrocarbon storage facilities, and transportation facilities, such as ports, railroad switching yards, pipelines."[110] In preparing this Note, I worked with Brianna Cunliffe at Bowdoin College to investigate the relationship between the siting of one type of critical infrastructure, natural gas pipelines, with racial composition. By utilizing mapping data from the Energy Information Association and the Census Bureau, Cunliffe analyzed the density of natural gas pipelines with respect to the racial composition of neighborhoods in Cancer Alley. Her Geographic Information System ("GIS")[111] maps and statistical analysis show a correlation between the proportion of Black residents in a neighborhood

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106. John Manuel, *In Katrina's Wake*, 114(1) ENV'T HEALTH PERSP. A32, A35 (Jan. 2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1332683/ [https://perma.cc/UC6F-BLTB].

107. DEEP S. CTR. FOR ENV'T JUST., *supra* note 87, at 25–26.

108. *Id*. at 28.

109. *Id*. at 26; Alex Woodward, *How 'Redlining' Shaped New Orleans Neighborhoods—Is It Too Late to Be Fixed?*, GAMBIT (Jan. 21, 2019), https://www.nola.com/gambit/news/article_215014ce-0c15-5917-b7738d1d2fdaa655.html [https://perma.cc/J87C-8K7S].

110. La. H.B. 727.

111. "A geographic information system (GIS) is a system designed to capture, store, manipulate, analyze, manage, and present all types of geographical data. The key word to this technology is Geography—this means that some portion of the data is spatial." *Mapping and Geographic Information Systems (GIS): What is GIS?*, UNIV. WISCONSIN-MADISON LIBR., https://researchguides.library.wisc.edu/GIS [https://perma.cc/BRY2-6CVB].

or "block group" and density of pipelines and proximity to pipelines.[112] The analysis included St. James, St. Charles, and St. John the Baptist Parishes—three predominately Black parishes of Cancer Alley—and used LaFourche Parish, a neighboring parish with a Black population similar to the national average, as a control. Utilizing census data and natural gas pipeline data available through the Energy Information Administration, she found a strong correlation between the density of natural gas pipelines and the percentage of individuals who self-identified as "Black" in the 2010 census.[113]

Figure 1 shows the high density of pipelines throughout the parishes of Cancer Alley and the adjacent LaFourche parish to the South. Although there is a heavy concentration of natural gas pipelines throughout the region, the Black communities inside the three parishes generally shoulder a greater density.[114] In St. James Parish in particular, there was a strong correlation between the percentage of Black residents in a block group and proximity to a pipeline.[115]

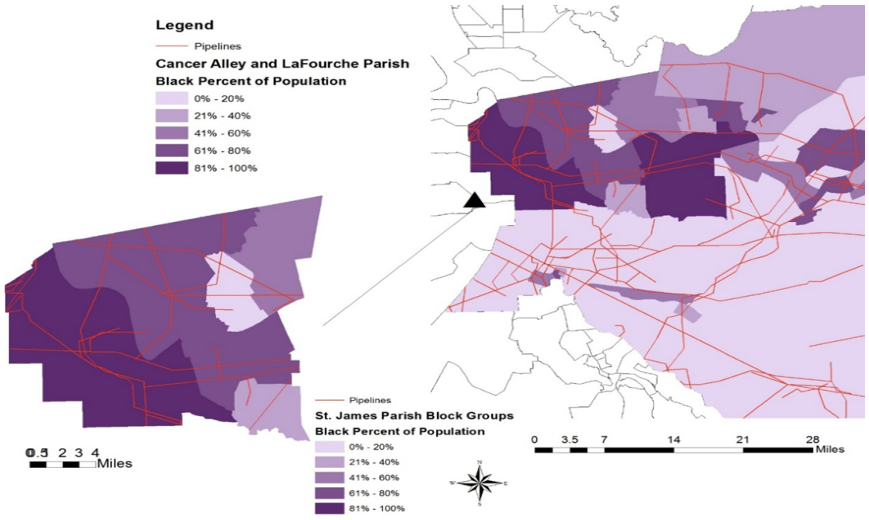

Figure 1. Percentage of Black residents and natural gas pipelines in St. James, St. Charles, St. John the Baptist, and LaFourche counties (Source : Brianna Cunliffe using Census and EIA data)

112. Brianna Cunliffe, *Criminalizing Protest, Undermining Resilience: The Impacts of Critical Infrastructure Laws Along Racial Lines in the Communities of Cancer Alley, LA* 7 (Dec. 15, 2020) (B.A. Research Paper for GIS and Remote Sensing course at Bowdoin College) (on file with the *Columbia Human Rights Law Review*).

113. *Id.* at 7.

114. *Id*.

115. *Id*. at 8–9.

However, the critical infrastructure laws criminalize protests and gatherings not just immediately above the pipelines but also in their proximity. To understand the risk of being in the proximity of pipelines, Cunliffe looked specifically at St. James Parish and analyzed the percentage of block groups' land area within one-quarter and one-half mile of a pipeline related to the block group's percentage of Black residents (Figure 2). In the words of Cunliffe,

> Figure [3] display[s] the troubling extent to which all residents of St. James Parish are impacted by these critical infrastructure laws. Of its population of 21,096, at least 10,184 residents live within 0.5 miles of a pipeline, with many more likely commuting, working, shopping or recreating in areas that fall within these hazard zones.[116]

In the block group with the highest percentage of Black residents, nearly half of the land was within half a mile of natural gas pipelines.[117] Or, in the words of Cunliffe, "close to half of the land within this community is land on which residents risk a felony conviction for any act of protest."[118]

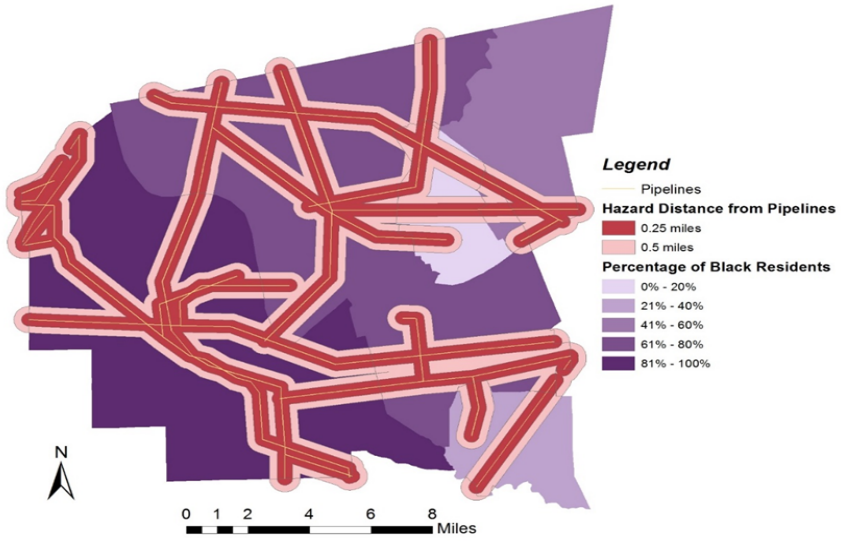

Figure 2. The Percentage of Black Residents and hazard distance to the network of pipelines (Source: Brianna Cunliffe using Census and EIA data)

116. *Id*. at 8.
117. *Id*.
118. *Id*.

Cunliffe determined the pipeline density of the region by dividing the total pipeline length by the block group's total area. This is measured on a scale that ranged from zero to one, with zero as no pipeline density and one indicating a 1:1 ratio between miles of pipeline and the area of the block group. In St. James Parish, the block group with the highest percentage of Black residents (90%) had a pipeline density of 0.67, while a majority white block group had a pipeline density of 0.43.[119] The correlation between higher pipeline density and a higher percentage of Black residents held throughout the analyzed parishes, with a few exceptions.[120]

Block Group	% Black Residents	Pipeline Density
405	90.5%	0.67
406	68.9%	0.51
404	61.4%	0.78
402	48.1%	0.56
401	47.8%	0.43
407	36.5%	0.24
403	18.1%	0.71

Table 1. Block Groups' percentage of Black residents and pipeline density, in descending order of percentage of Black residents (Source: Brianna Cunliffe using Census and EIA data)

While this analysis is illustrative, it is limited in scope, and more analysis is needed. First, this analysis only measures demographics related to natural gas pipelines, which is but one of several types of infrastructure protected by Louisiana law. Other GIS analysis by the Deep South Center for Environmental Justice has shown that, in Cancer Alley, the density of other toxic pollution sources are correlated with race and that the pollution sources increase as the number of Black residents increases.[121] Second, the

119. *Id*. at 9.
120. *Id*. at 10.
121. DEEP S. CTR. FOR ENV'T JUST, *supra* note 87, at 2; *see also* Alejandra Borunda, *Where Are the U.S.'s Natural Gas Pipelines? Often in Vulnerable Communities*, NAT'L GEOGRAPHIC (June 4, 2021), https://www.nationalgeographic.com/environment/article/where-are-the-us-natural-gas-pipelines-often-in-vulnerable-communities?

analysis does not reveal where in the "functional life of the community these restrictions are in effect."[122] Because the analysis does not show if the pipelines cross through primarily "backyards or . . . Main Street," it is not clear what types of protest actions would be criminalized.[123] Further, the percentage of Black residents is a blunt tool to measure the impact of these laws on the disruption of Black protests and speech, as protests, like the pipelines, cross through whiter communities sandwiched between Black communities.[124]

Nonetheless, with this analysis, combined with other studies of Louisiana's industrial corridor, it is clear that Black communities are pockmarked with locations where protest, regardless of its content, is a felony. This, combined with disproportionate policing of Black communities and Black bodies,[125] creates a situation ripe for the denial of First Amendment rights for Black people in the industrial corridors of Louisiana.

III. The Current Legal Framework Does Not Offer Relief for the Denial of Rights Based on Racial Geography

Victims of environmental racism and its many impacts—including censorship by critical infrastructure laws—have few options for legal recourse. As state statutes, critical infrastructure laws can be eliminated either through the political process or through the courts. In Louisiana, a state with a pro-industry legislature[126] and a long history of anti-Black legislation,[127] federal courts may be the most attractive option for holding

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[https://perma.cc/3WFF-YGE7] ("Counties in the most vulnerable quartile have an average of 12.1 miles of pipeline per 100 square miles.").

122. Cunliffe, *supra* note 111, at 12.

123. *Id*.

124. *Id*. at 10–11.

125. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities [https://perma.cc/64ET-UTW2] ("In 2016, black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population."); *see also Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ [https://perma.cc/2JFW-VNKJ] ("A Black person is five times more likely to be stopped without just cause than a white person.").

126. *Analysis: Business Gains Influence in Louisiana Legislature*, WBRZ (June 14, 2020), https://www.wbrz.com/news/analysis-business-gains-influence-in-louisiana-legislature [https://perma.cc/F385-UPNV]; Mark Ballard, '*It's Unprecedented': This Fresh Faced Louisiana Legislature Is More Conservative than Ever*, THE ADVOCATE (Nov. 17, 2019), https://www.theadvocate.com/baton_rouge/news/politics/elections/article_0db3d712-0997-11ea-bda7-2355c74f8b57.html [https://perma.cc/FYB9-VMK8].

127. Nikki Brown, *Jim Crow & Segregation*, 64 PARISHES, https://64parishes.org/entry/jim-crowsegregation [https://perma.cc/6XNT-EVQ4]; Germaine A. Reed, *Race*

the state government accountable. However, Fourteenth and First Amendments case law and doctrine currently foreclose claims based on racialized geography. Although environmental racism, and even racially-charged anti-protest laws, have a long history in the United States, courts seldom acknowledge these issues, let alone grant victims redress.

A. Equal Protection Does Not Protect Against Environmental Racism

Ever since *Washington v. Davis*[128] and *Alexander v. Sandoval*,[129] Equal Protection claims for victims of environmental racism have been unsuccessful.[130] In *Davis*, the Supreme Court ruled that challenges to a law or policy under the Equal Protection Clause must show evidence of an intent to discriminate, not just evidence of a disproportionate impact on a protected group.[131] *Davis* and subsequent decisions mark the Court's "embrace of a highly formal interpretation of the Equal Protection Clause [that] has significantly undermined its effectiveness as a safeguard of substantive equality."[132] This has left those who wish to challenge environmental racism with few legal options.

In Professor Elise Boddie's article, "Racial Territoriality," Boddie describes the failure of the Equal Protection clause to address how the racialization of space creates and reinforces systems of inequality.[133] During the Burger and Rehnquist Courts, the focus of the Supreme Court switched from anti-subordination—striking down laws that had the potential to create or reinforce substantive racial inequality—to anti-classification, in which the court only struck down laws that explicitly discriminated on the basis of a protected characteristic.[134] Boddie explains how *Village of Arlington Heights v. Metropolitan Housing Development Corp* exemplified the post-*Davis* era of the Court's failure to recognize racialized geography.[135] Although Arlington

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Legislation in Louisiana 1864–1920, 6.4 L.A. HISTORY: THE J. OF THE L.A. HISTORICAL ASS'N. 375, 383–84 (1964).

128. Washington v. Davis, 426 U.S. 229, 229 (1976).

129. Alexander v. Sandoval, 532 U.S. 275, 291 (2001).

130. Sacred B. Huff, *Overcoming Environmental Racism: A Lesson from the Voting Rights Act of 1965*, 11 GEO. WASH. J. ENERGY & ENV'T. L. 22, 22 (2020).

131. *Davis*, 426 U.S. at 239.

132. Genevive Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2123 (2019).

133. Boddie, *supra* note 11.

134. *Id.* at 413.

135. *Id.* at 414 ("[T]he village was virtually entirely white: Only twenty-seven of its over 64,000 residents were black. Indeed, evidence in the record indicated that it was the most racially isolated municipality of its size in the region.").

Heights was the whitest municipality in its region, the "Village's refusal to rezone a property to accommodate racially integrated multifamily housing," thus maintaining its predominately white population, was not found to violate the Equal Protection Clause.[136] The Court held that in rare cases, disparate impact that is "unexplainable on grounds other than race" could be sufficient circumstantial evidence of discriminatory intent.[137] However, usually disparate impact would be insufficient to demonstrate discriminatory intent. Although "[a] showing of disparate impact, for example, similar to that found in *Yick Wo v. Hopkins* or *Gomillion v. Lightfoot* could suffice to meet a plaintiff's burden," the level of disparate impact needed to show evidence of discriminatory intent is an almost impossibly high standard.[138] In *Bean v. Southwestern Waste Management Corp*, the Fifth Circuit affirmed that statistical evidence of the disparate impact of a new landfill near neighborhoods with majority racial-minority populations was not sufficient to show discriminatory intent.[139] The standard set by the Fifth Circuit in *Bean* would likely prevent a showing of discriminatory intent through statistical evidence of a law's disparate impact.

Other evidence, such as "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," "[t]he specific sequence of events leading up to the challenged decision," and legislative history could all demonstrate discriminatory intent.[140] Although these options appear to create an opening for Equal Protection to be used to combat the negative effects of racial geography such as environmental injustice, in practice, they have been more of a hinderance. Instead, there remain significant hurdles to bringing an Equal Protection claim against Louisiana's critical infrastructure law. Although the initial decisions that created a racialized geography may have had clear racial animus, such as the creation of sharecropping economies and segregated residential zoning, decisions to locate environmental hazards within the racialized geography are unlikely to have explicit evidence of the "discriminatory purpose" described in *Davis*.[141] This is particularly relevant

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136. *Id.* at 415.

137. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

138. Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1278–79 (1998).

139. Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 678 (S.D. Tex. 1979), a*ff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986). Statistical evidence brought by plaintiffs included "the target area [having] the dubious distinction of containing 100% of the type I municipal landfills that Houston utilizes or will utilize; although it contains only 6.9% of the entire population of Houston," this area was "70% minority population." *Id.*

140. *Id.* at 267.

141. Huff, *supra* note 131, at 25; *see also* Nicholas C. Christiansen, *Environmental Justice: Deciphering the Maze of a Private Right of Action*, 81 MISS. L.J. 843, 870–73 (2012)

for the environmental racism issues inherent in the critical infrastructure laws. There is little evidence that the critical infrastructure laws were passed with any specific desire to limit the ability of protesters in Black communities to gather. Rather, floor debates in states with such laws focused on the desire to limit pipeline-focused protest.[142]

Disparate impact claims can be made through Title VI of the Civil Rights Act, but *Sandoval* has foreclosed the ability of private individuals to bring disparate impact Title IV claims.[143] In *Sandoval*, the Court ruled that private individuals or organizations may only bring claims alleging that a federally-funded policy has discriminatory intent and only federal agencies may bring claims alleging disparate impact.[144] Private parties may initiate an agency action alleging environmental racism and violations of Title VI by petitioning the Environmental Protection Agency ("EPA").[145] Yet, the EPA's Office of Civil Rights has rarely produced findings of disparate impact.[146] Even when such findings are made, the EPA often settles without consulting the community or complaining parties.[147] Nonetheless, Title VI only applies to federally funded programs, and since the critical infrastructure law is a criminal statute, not a policy that receives federal funding, Title VI does not apply.[148] The requirement of discriminatory intent for a finding of an Equal Protection violation essentially ignores the reality of racial geography and leaves communities without legal recourse.

B. The First Amendment Does Not Acknowledge Racial Geography nor Racial Censorship

Without the benefit of the Equal Protection Clause, plaintiffs challenging Louisiana's critical infrastructure law have had to turn to the First Amendment, which does not acknowledge how race shapes regulations of speech and place.[149] For example, plaintiffs like Sharon Lavigne are concerned that the critical infrastructure law would affect the ability of Rise

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(explaining the difficulty placed on the EJ Plaintiff to "affirmatively show racial animus behind these same types of decisions [land use, zoning, or permitting] . . . Consequently, environmental justice suits based on an equal protection theory almost consistently fail because of the EJ Plaintiffs inability to prove discriminatory intent.").

142. Oklahoma House, *supra* note 34.
143. Alexander v. Sandoval, 532 U.S. 275, 288 (2001).
144. *Id.*
145. Mizutani, *supra* note 86, at 382.
146. *Id*. at 384–85.
147. *Id.*
148. *Id.*
149. *See infra* Part III.B.

St. James to march and protest because her "community is overrun by industry and its infrastructure."[150]

The current legal framework for challenging critical infrastructure laws instead focuses on First Amendment case law, which is surprisingly silent on racially targeted infringement of freedom of speech. In *White Hat*, plaintiffs brought Fourteenth Amendment Due Process claims and First Amendment claims, neither of which discussed the disproportionate racial impact of the law.[151]

1. First Amendment Jurisprudence in General Does Not Acknowledge the Role of Race in Limiting Speech

The history of free speech and freedom of assembly jurisprudence is inextricably connected to the history of anti-Blackness in the United States and movements for the advancement of Black people—yet doctrine and case law do not explicitly discuss race. Professor Justin Hansford's article, "The First Amendment Freedom of Assembly as a Racial Project," traces the intertwined relationship of the freedom of assembly and race in the United States.[152] From the founding of the United States, the assembly of enslaved and free Black people was tightly regulated.[153] Slave codes were designed to prevent the "ever present" fear of Slave rebellion and insurrection.[154] Many states prohibited Black people from holding "any religious meetings" or attending "any gatherings whatsoever, upon threat of lashings, hangings, or torture."[155] After the abolition of chattel slavery, the rules restricting Black speech and assembly changed into facially neutral rules that granted broad discretion to law enforcement.[156] In response, during the Civil Rights Movement, the Court's protection of Black protesters strengthened rights to protest in public places and even on private property.[157] Unfortunately, the 1960s and 70s would be the high water mark of the protection of speech in public places.[158]

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150. Complaint at ¶¶ 22, 100, White Hat v. Landry, 475 F. Supp. 3d 532, No. 3:19-cv-00322 (M.D. La. 2020).

151. *Id.* at ¶¶ 109–37.

152. *See* Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685 (2018).

153. *Id.* at 692.

154. *Id.*

155. *Id.*

156. *See, e.g.*, LA. R.S. § 14:103.1 (Cum. Supp. 1962) (breach of peace statute in Louisiana at issue in *Cox v. Louisiana,* U.S. 536 (1965)).

157. TIMOTHY ZICK, SPEECH OUT OF DOORS 49–50 (2009).

158. *Id.*

Ironically, during the Civil Rights Movement, courts did not explicitly acknowledge that race, not just political viewpoint, was a primary motivator behind the laws that restricted speech. One of the formative cases incorporating the right to assemble, *NAACP v. Alabama ex rel. Patterson*,[159] challenged Alabama's repeated attempts to hinder the NAACP during the build-up to *Brown v. Board*, when the NAACP was soliciting potential plaintiffs for a suit to challenge school segregation.[160] An Alabama statute required the NAACP to disclose its membership list and the Court found this statute to violate the freedom of association implicit in the freedom of assembly.[161] Although the law clearly had discriminatory intent and was part of a coordinated campaign by states to hinder the activities of the NAACP, the law's attempts to specifically target Black people and those who supported their advancement are conspicuously absent from the opinion.[162] Rather, the Court objected to the requirements because membership in the NAACP is a constitutionally-protected political act or opinion.[163] It is possible the Court glossed over its unstated desire to discourage laws intended to hamper the Civil Rights Movement's many tactics, including litigation and protest. Instead of taking the opportunity to protect the First Amendment rights of racial minorities, the Court essentially substituted race with political opinion.[164]

Similarly, in *Cox v. Louisiana*, the Supreme Court ruled that Louisiana's "breach of peace" statutes could not be used to criminalize peaceful protests.[165] Cox, a preacher, had organized a 1,500-person rally against segregation and discrimination in front of the courthouse, a space the town approved for the demonstration.[166] Louisiana argued that the peaceful protest was a riot, simply because it involved 1,500 Black people cheering, singing, and listening to Cox's entreaties to participate in sit-ins of nearby segregated restaurants.[167] The sheriffs argued that they feared violence.[168]

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159. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

160. *Id.*

161. *Id.* at 466; *see also* Ashley M. Eick, Note, *Forging Ahead from Ferguson: Re-Evaluating the Right to Assemble in the Face of Police Militarization*, 24 WM. & MARY BILL OF RTS. J. 1235, 1247 n.93 (2016) (describing the Supreme Court's freedom of association analysis in *Patterson*).

162. *Patterson*, 357 U.S. 449 (1958).

163. *See id.* at 462 ("Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs [also violates the right to association]").

164. *Id.*

165. Cox v. Louisiana, 379 U.S. 536, 559 (1965).

166. *Id.* at 539–41; Karen Aichinger, *Cox v. Louisiana (1965)*, THE FIRST AMENDMENT ENCYCLOPEDIA, FREE SPEECH CENTER MIDDLE TENNESSEE UNIVERSITY, (2009) https://www.mtsu.edu/first-amendment/article/183 [https://perma.cc/3HK2-8LCA].

167. *Cox*, 379 U.S. at 545–50.

168. *Id.* at 549 n.12.

However, the Court recognized that it was not the protesters themselves who were a risk of violence, but rather segregationist counter-protesters.[169] The Court also found that the law was an unconstitutionally overbroad limitation on First Amendment rights. [170] The Court acknowledged that such restrictions on the right to protest may "strike at prejudices and preconceptions," and reinforce the ideas of the "legislatures, courts, or dominant political or community groups." [171] However, it did not state outright that this law, and laws similar to it, are part of a long tradition of criminalizing and intimidating Black speech through institutional and individual racism.[172]

The parallels between the situation presented by Louisiana's disturbing the peace statute and the critical infrastructure statutes, as well as police and military violence generally employed to silence Black protest, are hard to ignore. Such limits on free speech are justified by ideas of security and order maintenance, and have a likelihood, if not certainty, of being employed in a manner that will disproportionately impact Black speech. However, instead of acknowledging that the laws target the speech associated with particular racial groups, the focus continues to remain on political viewpoints.

2. Place, Race, and the First Amendment

Place is critical to protest and the corresponding rights of free speech and freedom of assembly, yet the First Amendment doctrine does not acknowledge the role of race in place. The right to physically protest in a specific location is an amalgamation of the free speech and freedom of assembly clauses of the First Amendment.[173] Protest speech is a particularly important vehicle for political and social change among marginalized groups, like Black communities in Louisiana's industrial corridors.[174] Historically, protest and speech in public spaces have been the least expensive and most accessible options for disseminating political messages and airing

169. *Id.* at 550.
170. *Id.* at 551.
171. *Id.* (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949)).
172. *Id.*
173. Eick, *supra* note 158, at 1247.
174. *See, e.g.*, Jamiles Lartey & Oliver Laughland, *'They've Been Killing Us for Too Long': Louisiana Residents March in Coalition Against 'Death Alley'*, THE GUARDIAN (May 30, 2019), https://www.theguardian.com/us-news/2019/may/30/toxic-america-louisiana-residents-march-against-polluting-plant [https://perma.cc/2SSL-Z93Y].

grievances.[175] Furthermore, protest has played a critical role in fighting environmental racism and injustice.[176]

While discussing the role of place in the First Amendment, courts have yet to acknowledge the realities of racialized geography and environmental racism. In Timothy Zick's "Out of Doors", he explores the role of place in restrictions on protest speech.[177] He observes the importance of public spaces to protest and movements and how "spatial restrictions can limit or extinguish the benefits often associated with material public places. Governments have historically used places to exert disciplinary and sometimes repressive power over persons and groups."[178] Despite the significant potential of governments to squelch minority opinions through spatial restrictions on protests, courts generally grant states, counties, and municipalities a significant amount of deference in restricting where a group might demonstrate.[179]

After the high watermark of First Amendment rights during the Civil Rights Movement in the 1960s and 70s, the 80s gave way to a more conservative view of public protests by categorizing them within the "public forum doctrine."[180] This divided the United States into different categories of places and determined the strength of a citizen's First Amendment rights based on that categorization. Restrictions on speech in "traditional" public fora, such as the town square or Main Street, were to be held to the highest level of scrutiny, and restrictions everywhere else simply had to be

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175. Zick, *supra* note 155, at 3–44.

176. *See, e.g.*, *Hearing on Building a 100 Percent Clean Economy: The Challenges Facing Frontline Communities Before the S. Comm. on Env't & Climate Change*, 116th Cong. (2019) (statement of Sharon Lavigne, President, RISE St. James), https://energycommerce.house.gov/committee-activity/hearings/hearing-on-building-a-100-percent-clean-economy-the-challenges-facing/ [https://perma.cc/QM6T-7K77] (describing the role of protest and grassroots advocacy in her work to protect her community); David J. Mitchell, *After March Against Amendment 5 Stymied in Gramercy, RISE St. James Challenges Parade Law*, THE ADVOCATE (Nov. 16, 2020), https://www.theadvocate.com/baton_rouge/news/article_a3d56172-2852-11eb-bad6-8753f3853d80.html [https://perma.cc/VE3K-4KS4] (describing how an anti-protest ordinance in the town of Gramercy hindered Rise St. James' advocacy against amendment 5, which would exempt polluting industries from property taxes); Nicholas Kusnetz, *In Louisiana, Stepping onto Oil and Gas Industry Land May Soon Get You 3 Years or More in Prison*, INSIDE CLIMATE NEWS (Jun. 10, 2020), https://insideclimatenews.org/news/10062020/louisiana-petrochemical-plant-environmental-justice/ [https://perma.cc/7KRZ-F22X] (describing the impact of the Louisiana critical infrastructure law on environmental justice protesters, including Sharon Lavigne of Rise St. James).

177. Zick, *supra* note 155, at 4.

178. *Id.*

179. *Id.* at 57.

180. *Id.* at 53.

"reasonable" and not discriminate based on the viewpoint of the speaker.[181] Notably, there is no requirement for governments to maintain spaces of public fora with unlimited rights to speech, and supposedly content-neutral regulations of the "time, place, and manner" of speech are permitted.[182] Additionally, courts have been rigid in their understanding of "traditional public forum" and unwilling to update the category to include modern, important, physical spaces, such as shopping malls and airports.[183]

Because critical infrastructure laws are not restrictions on speech to specific places categorized as "public fora," they would be considered "time, place, and manner" restrictions. Time, place, and manner restrictions are facially neutral laws restricting when a protest or other expression of free speech may occur, wherever it may occur. These laws must pass a three-part test laid out in *Ward v. Rock Against Racism*: 1) the regulation must be content-neutral; 2) the regulation must be narrowly tailored to serve a government interest; and 3) the regulation must leave open ample alternatives for communicating the speaker's message.[184] Cases primarily turn on the content neutrality prong, and courts rarely invalidate laws on the narrow tailoring or alternatives prongs.[185]

As a regulation on place (as opposed to time or manner), the critical infrastructure laws are particularly restrictive.[186] This is in part because place is often a powerful part of protest, such as a choice to protest outside a government building or on the proposed route of a pipeline—yet courts "are not required to, and rarely do, inquire as to the physical, social, or expressive 'adequacy' of alternative places . . . courts generally consider public places to be more or less fungible insofar as speakers are concerned."[187] This is particularly troubling in the context of racialized geography. When the presence of hidden pipelines renders nearly half a community off-limits for protest, the disproportionate concentration of critical infrastructure suspends constitutional rights for the exact populations that rely so heavily on these rights to have their voices heard.

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181. *Id.* at 54.
182. *Id.*
183. *Id.* at 56.
184. Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989); Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions#:~:text=CC%20BY%203.0)- [https://perma.cc/Q83P-BUEB] (describing time, place, and manner doctrine and its origins).
185. Zick, *supra* note 155, at 56.
186. *Id.*
187. *Id.*

IV. Options for Acknowledging Racialized Geography

Racialized geography is an obvious fact of life to those who live it, with broad sweeping effects ranging from health outcomes to abilities to exercise constitutionally protected rights. Yet, courts almost entirely ignore racialized geography. Critical infrastructure laws demonstrate the need for a doctrinal change to bring courts and the law in line with the realities of the people they govern. In some ways, the critical infrastructure laws embody the despotic hypothetical imagined by First Amendment scholar Michael Kagen:

> The clever dictator would need to be wary of the overlap between free speech and the Equal Protection Clause. Since racial and gender classifications are suspect under the Equal Protection Clause, the clever censor would search for other categories that accomplish the similar goals while not triggering heightened scrutiny.[188]

By making assembly illegal in proximity to industrial infrastructure, which is more prominent in Black communities, critical infrastructure laws are that "other" facially neutral category. However, because courts "treat[] race as a characteristic only of individuals . . . law tends either to downplay or to overlook the racial identifiability . . . of [place]."[189] Without recognition of racial geography, Equal Protection and First Amendment precedent miss a critical part of the historical experience of racial discrimination and anti-Blackness.[190]

The following Part suggests how racialized geography may be incorporated into existing Equal Protection law and First Amendment law. Equal Protection law may be addressed by considering the history of racially exclusionary law as it pertains to land and through the use of the historical background of a decision as evidence of discrimination. First Amendment law could be addressed by incorporating a consideration of race into time, place, and manner doctrine. Additionally, First Amendment law may incorporate racialized geography into all three steps of time, place, manner analysis, particularly in the third step, in which courts analyze the replaceability of one place for another. Considering the racial history of a place may demonstrate that places deemed inappropriate for protest due to the presence of critical infrastructure may not be alternatives places for protest because an entire community is riddled with such infrastructure due

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188. Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42.3 FLA. ST. U. L. REV., 765, 777–78 (2017).

189. Boddie, *supra* note 11, at 405.

190. *Id.* at 404.

to the impact of racism on its history, thus placing critical infrastructure law in conflict with the First Amendment.

A. History of Land-Based Discrimination as Evidence for Equal Protection Claims

Although the inclusion of disproportionate impact analysis in the Equal Protection framework would create a vital opening for environmental racism claims, private parties would need *Washington v. Davis* overturned to take any action.[191] Yet, *Arlington Heights*, long considered a limiting case for Equal Protection claims, may offer an opening. "The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," is one way to demonstrate invidious discriminatory intent per *Arlington*.[192] I argue that analyzing the historical background of a piece of land's history demonstrates a string of racially invidious decisions that established Louisiana's racialized geography today. Decisions that further entrench inequalities, such as the disproportionate siting of critical infrastructure in the predominately Black communities shaped by slave codes and Jim Crow, could provide evidence of an Equal Protection violation.

Although the text of *Arlington* itself does not define what constitutes a sufficient historical background of intentional racial discrimination to show a violation of the Equal Protection Clause, it lists several cases as examples of what would constitute a successful Equal Protection claim.[193] Those cases, particularly the cases related to school desegregation and bussing, provide a potential foothold for recognizing the role of history and racial geography as a means to a successful Equal Protection claim against environmental racism and even critical infrastructure laws.

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191. Washington v. Davis, 426 U.S. 229, 239–45 (1976); Huff, *supra* note 131.

192. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

193. Lane v. Wilson, 307 U.S. 268 (1939) (finding that a facially neutral restriction on voting registration violated the Equal Protection Clause given the history of the state's past discriminatory voter registration laws); Griffin v. Sch. Bd., 377 U.S. 218 (1964) (holding that a county policy that dis-established public schools and then deputized segregated private schools to educate the county's children was held in violation of Equal Protection, in part because, in practice, it maintained the county's historical practice of invidious discrimination through segregated school systems.); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949) (finding a violation of Equal Protection when voter registration laws were applied in a discriminatory manner due to a confluence of disparate impact, racist comments by private individuals at the time of passage, and the historical context of the law was a that the facially neutral law was motivated by racial animus); Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 207 (1973) (finding a school integration program to be a violation of the Equal Protection Clause because the districting divided school districts along racial lines).

Because school districts, like industrial zoning, are determined by geography, efforts to desegregate post-*Brown v. Board* were often frustrated by racial geography and the legacy of past discriminatory actions. Thus, in the 1970s, the Court considered contextual history to determine if school zoning strategies were motivated by racial animus, employing racial geography to effectuate desegregation.[194] In *Keyes v. School District. No. 1, Denver, Colorado*,[195] the Court found that historical tendencies were relevant because of the "well-settled evidentiary principle that the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent."[196] When the school district lines were drawn by using facially neutral boundaries (in *Keyes*, a six-lane highway) that distinguished white from Black neighborhoods, the decision had to be viewed within the context of a history of segregation. [197] The Court then overturned the district and appellate court's determinations that the explicitly anti-Black policy decisions were made too long ago to be relevant to the current action: "We reject any suggestion that remoteness in time has any relevance to the issue of intent."[198]

Of course, the Rehnquist and Roberts Courts ended the bussing and desegregation efforts as ordered by the Warren Court.[199] However, these

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194. *See Griffin*, 377 U.S. at 231 (providing an example of the Court considering contextual history to the determine the discriminatory intent of school zoning strategies).

195. *Keyes*, 413 U.S. at 207.

196. *Id*. at 207–08 (internal quotations omitted).

197. *Keyes*, 413 U.S. at 210 ("[T]o say that a system has a 'history of segregation' is merely to say that a pattern of intentional segregation has been established in the past."); *see also* Davis v. Bd. of Sch. Comm'rs of Mobile Cnty., 402 U.S. 33, 36 (1971) (holding that school districts divided by the same "major [north]-south highway" which served as a barrier between Black and White neighborhoods would need additional remedies, such as bussing, to desegregate the school system).

198. *Keyes*, 413 U.S. at 210–11 ("If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'").

199. *See, e.g.*, Bd. of Ed. of Oklahoma City v. Dowell, 498 U.S. 237, 248 (1991) (ruling that school desegregation decrees are not meant to operate "in perpetuity," and that if a good faith effort had been made to eliminate *de jure* discrimination in schools, the school board may be entitled to the end of its desegregation decree); Freeman v. Pitts 503 U.S. 467, 491–92 (1992) (finding that school systems may exit their desegregation decrees with a sufficient "consistent pattern of lawful conduct directed to eliminating earlier violations. And, with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision."); Missouri v. Jenkins, 515 U.S. 70, 95 (1995) (finding that the District Court could not rely "on 'white flight' as a

cases did not invalidate the legal reasoning of *Keyes* and its brethren. The connection between current de facto segregation with de jure acts in the distant past may still be used as evidence of intent, as well as the role of geography.[200] Rather, this line of cases limited the duration of the remedies designed to address Equal Protection violations that a court can mandate.[201]

If *Washington v. Davis* is not overturned, an alternative to disparate impact analysis would be to go deep into the history of the land where the story of racial animus was codified into law. Common sense tells us that the siting of "critical infrastructure" places a burden on Black residents, not simply by happenstance, but because decisionmakers prioritize Black residents' health less than their more politically powerful white counterparts. The construction of racial geography was an important tool of oppression during the era of slavery and beyond. Much like slave codes defined how Black southerners could gather and speak, it determined where they could be: "[l]aw was integral to maintaining this spatial system."[202] This history is not unique to Cancer Alley. After the abolition of slavery, these preexisting racial geographies that had been defined by the slave codes were formalized by Jim Crow in the South and by municipal ordinances establishing white and Black blocks across the country. These practices were reinforced by the Federal Housing Administration's requirement of segregation as a condition for practices throughout the country in its loan guaranteeing policy.[203] These were not facially neutral policies and their impacts did not disappear with the ruling of *Brown v. Board*. Instead, without a nation-wide targeted effort to undo these wrongs, they persist and create the conditions seen in Cancer Alley. Thus, an Equal Protection challenge to critical infrastructure laws, or any other facially neutral law that relies on a feature of racialized geography, might trace the chain of title of the land of communities facing environmental racism to demonstrate the role of racially-discriminatory laws in racial geography today.

Evidence of a history of the racial categorization of land might succeed in demonstrating discriminatory intent under *Arlington Heights*

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justification for a permissible expansion of its intradistrict remedial authority through its pursuit of desegregative attractiveness").

200. Price v. Austin Indep. Sch. Dist., 945 F.2d 1307, 1314 (5th Cir. 1991) (upholding *Keyes* analysis in determining impermissible school segregation before there has been a finding of "unitariness"— when a "school district that has completely remedied all vestiges of past discrimination."); *see also* James v. Cleveland Sch. Dist., No. 4:19-CV-66-DMB-RP, 2021 U.S. Dist. LEXIS 142536, at *57 (N.D. Miss. July 30, 2021) (citing *Price* and upholding validity of *Keyes* in cases when a district is not claimed "unitary").

201. *See* Huff, *supra* note 187, at 25 (describing the bounds of "discriminatory purpose" as used by the Supreme Court in Equal Protection cases).

202. Boddie, *supra* note 11, at 427.

203. *Id.* at 428; Rothstein, *supra* note 89, at 64–67.

where evidence of disparate impact fails. Unlike disparate impact, which in these instances, would have to rely on statistics to create the inference of racial animus, the historical approach uses real examples of racially motivated policy and argues that their influence persists to create a situation of unequal protection of modern laws. Such a widening of the timeline is permitted by *Keyes*, if not encouraged.[204] Efforts to "fix" *Washington v. Davis* focused on disparate impact and social science, describing the present, are theoretically vulnerable to claims of "reverse racism." However, by rooting an analysis in the history of the space, the power dynamics in which white legislatures and municipalities sought to exclude Black residents from white spaces are impossible to ignore and the counterfactual in which Black people utilize power to exclude whites becomes a fanciful alternative history.[205] Therefore, the historical approach is unlikely to be co-opted by white supremacist groups that seek to attack institutions and policies that benefit Black and other disadvantaged racial groups—as the historical record is unlikely to show an intent to disadvantage or harm the white citizens who had been excluded.[206]

Through chain of title and history, land tells its own story of racially-motivated law and policy. In Cancer Alley, it might tell the history of racial covenants, sun-down ordinances,[207] the Reconstruction-era triumph of freed Black people purchasing land for their own communities, and of plantations where Black people endured slavery. These laws and realities created the conditions in which Black Louisianans are concentrated in areas where they have little say over their local governance, and due to systemic racism, are economically and politically dispossessed. Industry and local politicians take advantage of the legacy of those policies in modern residential segregation, savvily zoning and locating critical infrastructure in Black communities. If advocates and courts take *Arlington Heights'* suggestion to use historical evidence seriously and expand their time horizon when seeking evidence of discriminatory intent for an Equal Protection case against a facially neutral

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204. Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 211 (1973) ("[A] connection between past segregative acts and present segregation may be present even when not apparent . . . close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.").

205. Boddie, *supra* note 11, at 461 ("[I]n the land of make believe—where blacks have the bulk of institutional power . . . should it be . . . unlawful for blacks to exclude whites from identifiably black spaces? . . . *of course*, if we were in the land of make believe. But we are not. History and spatial context matter.") (internal quotations omitted).

206. *Id.*

207. Sun-down ordinances criminalized the presence of Black people in certain areas after sunset. JAMES W. LOWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 3–4 (2005).

law or policy, like the critical infrastructure laws, courts may finally provide a route for Equal Protection claims that recognize the role of place in the experience of racial disparities.

This alternative reading of *Arlington Heights*—using the history of the land and laws that created racial geography as evidence of discriminatory intent—could sidestep *Washington v. Davis* altogether by not relying on disparate impact and allowing for Equal Protection claims in cases of environmental discrimination. Discriminatory intent may be found by expanding the timeline to consider the underlying structures that created the disproportionate impact as a result of discriminatory decisions like redlining and segregation. This re-tooling of the framework can help those fighting individual instances of environmental racism, and potentially help with secondary environmental racism issues like critical infrastructure laws, where these laws deny key rights based on the effects of racial geography. Critics may argue that this approach will find the discriminatory intent too remote. Although the time of slavery and redlining may seem remote, those discriminatory policies and decisions persist. In the words of Elise Boddie, "this country's racial hierarchy has depended . . . on the maintenance of racially distinct spatial territories across neighborhoods . . . ."[208] Further, as Ariela Gross describes, a break in the "the chain of causation between slavery and contemporary inequality" is to misunderstand the role of history in modern racial subordination.[209]

There is hope that courts may be receptive to a historical, land-based approach to Equal Protection claims against critical infrastructure laws. A challenge to the enforcement of Louisiana's critical infrastructure law successfully employed the racial history of the land. On Juneteenth 2020, Sharon Lavigne and other members of the community near the enslavement-era burial ground at the site of the proposed Formosa Plastics plant held a prayer service. In the lead-up to this prayer service, Ms. Lavigne and other community members received threats from Formosa that she and the others would be arrested if they were to enter the burial ground again.[210] Because the burial ground had a pipeline running through it and

208. Boddie, *supra* note 11, at 425.

209. Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96.1 CALIF. L. REV. 283, 288 (2008).

210. Petition for Temporary Restraining Order at ¶¶ 23–24, Rise St. James & Sharon Lavigne v. FG LA, LLC, No. 20-C-192 (23d Dist. Ct. La., June 15, 2020), *writ denied*, (5th Cir. Ct. La. June 18, 2020), https://ccrjustice.org/sites/default/files/attach/2020/06/RISE%20TRO%20Memo%20Order%206.15.20.pdf [https://perma.cc/RJG3-5JJK] ("During several of these visits, St. James Parish Sheriff's deputies [had] arrived within minutes. On Plaintiff Lavigne's last visit, Sheriff's deputies advised Plaintiff Lavigne that the owner did not authorize her presence there and she could not visit the gravesite.").

was the proposed site of construction of a petrochemical plant, Ms. Lavigne and the other worshippers would also be at risk of felony charges. However, the CCR successfully argued for a temporary restraining order ("TRO") from Formosa calling the police on Ms. Lavigne and her fellow worshippers on Juneteenth. Although the court's TRO did not explain its reasoning,[211] CCR rooted its arguments in the impact of the history of enslavement and racial subjugation on the lives and culture of those who wished to observe Juneteenth among the graves of their ancestors and in the presence of a pipeline. [212] The same narrative might find sympathetic ears in other challenges against critical infrastructure laws.[213]

B. Time, Place, and Manner Analysis Should Have a More Robust Consideration of Racial Geography

Unlike the Equal Protection Clause, First Amendment doctrine already acknowledges place. However, this understanding of place requires a refinement to include an understanding of racial geography. As demonstrated by the density of pipelines in St. James Parish, certain areas and neighborhoods are so wrought with places that may justify speech restrictions, that it may amount to the suspension of First Amendment rights for an entire region or population.

Such a racially centered approach has some legal support from anti-subordination dicta of key cases. Courts have articulated that "freedom of speech means not only that one possesses some quantum of liberty to speak but that one has the same liberty to speak as do others."[214] In *Police Department of Chicago v. Mosley*, Justice Marshall described the establishment of "equality of status in the field of ideas" as a goal of the First Amendment.[215] In *Martin v. City of Struthers*, Marshall built off this idea by indicating a need for greater scrutiny of laws that impacted the methods of

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211. The grant of the TRO simply stated that "immediate and irreparable injury will occur to the constitutional and legal rights of plaintiffs by virtue of being prevented by [Formosa Plastics] from accessing the Buena Vista Plantation Cemetery to conduct a prayer ceremony on . . . June 19, 2020 (Juneteenth)." Rise St. James v. Formosa Plastics, No. 20-C-192 (23d Dist. Ct. La., June 15, 2020), *writ. denied*, (5th Cir Ct. La. June 18, 2020).

212. Petition for Temporary Restraining Order at ¶ 37, Rise St. James v. Formosa Plastics, No. 20-C-192 (23d Dist. Ct. La., June 15, 2020) ("The cultural origins of African American residents of St. James whose families have resided there for generations are undoubtedly rooted in the history of slavery. Historic burial sites, dating from that era, once believed lost to history are meaningful connections to and reminders of that past.").

213. *Id.* at ¶ 21 ("By contrast, people enslaved on the Buena Vista Plantation had no choice in where they were lived, or where they were buried . . . .").

214. Lakier, *supra* note 130, at 2123.

215. Police Dep't of City of Chi. V. Mosley, 408 U.S. 92, 96 (1972); Lakier, *supra* note 130, at 2124.

speech that are "essential to the poorly financed causes of the little people."[216] In essence, this case applied scrutiny on the basis of disparate impact: a facially neutral statute preventing door-to-door campaigning was impermissible because it would have a disparate impact on the speech of disadvantaged groups.[217] Although race was not an explicit part of these discussions, this disparate impact approach to the First Amendment would continue until the 1970s, when First Amendment—like Equal Protection—jurisprudence shifted towards concerns of more formalistic, facially discriminatory regulations.[218]

Further, in *Marsh v. Alabama*, the Court was willing to recognize the reality of the disparate impact of an economic geography: a company town. Justice Black noted that "[m]any people in the United States live in company-owned towns."[219] By finding that a private actor's regulations against pamphletting on company land would sufficiently disrupt the residents of the company town's ability to "act as good citizens," the Court was willing to extend constitutional limitations on governments to private actors which effectively serve as municipalities.[220] *Marsh* represents a framework to consider the on-the-ground realities of geographic features when assessing the replaceability of a space. Simply because the town was privately owned, "[t]here is no more reason for depriving [residents] of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen."[221]

The parallels of *Marsh* to the pipeline- and industry-infested neighborhoods of Cancer Alley are hard to ignore. Cancer Alley is shaped by histories of slavery, Jim Crow, segregation, and continued disinvestment and governmental neglect. A facially neutral statute effectively deprives residents of those same "liberties guaranteed by the First and Fourteenth Amendments."[222] If courts are willing to harken back to the approach of *Marsh*, there could be grounds to recognize censorship of Black communities on the basis of environmental racism and racial geography. This may be accomplished through all three prongs of time, place, and manner analysis. The first prong—whether the rule is content neutral—could present an opportunity to turn the Court's previous equating of race with a particular viewpoint on its head. If the rule has the potential to have an impact on the

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216. Martin v. City of Struthers, Ohio, 319 U.S. 141, 146 (1943); Lakier, *supra* note 130, at 2125.
217. Lakier, *supra* note 130, at 2125.
218. *Id.* at 2127.
219. Marsh v. State of Ala., 326 U.S. 501, 508 (1946).
220. *Id.* at 508–09.
221. *Id.*
222. *Id.*

speech of a racial group through its effect on racialized geography (like that of Cancer Alley), it is not content neutral. The second prong—that the rule must be narrowly tailored to serve a government interest—can also acknowledge racialized geography. In the case of the critical infrastructure law, it is so broad as to render huge swaths of neighborhoods and regions without the protections of the First Amendment due to the region's high burden of critical infrastructure. Finally, and perhaps most powerfully, a stronger third prong could bring racialized geography into First Amendment jurisprudence. If the court builds off the holding in *Marsh* and recognizes that not all places are substitutable for each other, it may open the door to recognizing that racial geography has left Black neighborhoods in industrial corridors full of polluting, critical infrastructure. The court may find critical infrastructure laws render Black residents who may wish to protest and assemble within their communities with few alternatives to exercise their rights, thus in violation of time, place, and manner First Amendment doctrine.[223]

CONCLUSION

The evolution of Equal Protection and First Amendment law from equalizers of opportunity for marginalized groups to mere drafting guides has created a situation in which the very real experiences of individuals and communities are ignored by constitutional law. The land of the United States tells the history of race in America, and its continued relationship with the law maintains old patterns of racism and anti-Blackness. In Cancer Alley, and across the country, industrial build-up now sits in the seats of former slave plantations, freed-Black communities, and neighborhoods segregated by Jim Crow. The very land upon which Black communities sit has been weaponized against its own people. These communities are home to multigenerational families who can trace their histories and culture back centuries—a source of pride to their residents.[224] Yet, because of the invasion of pipelines, chemical plants, and industrial facilities, not only has their air and water become toxic, but their ability to protest the occupation of their communities is compromised. By making protest on or near these ubiquitous community features serious felonies, the Louisiana government has the tools it needs to silence Black speech and those affected have little recourse. This

223. *See generally* Lakier, supra note 130, at 2155 ("[I]f courts were to treat the 'ample alternative channels of communication' . . . as a stringent constraint on the government's powers rather than a parchment barrier . . . one consequence would be to make it considerably harder to justify . . . content-neutral devices that modern municipalities commonly employ to corral dissent at major political events.").

224. *See, e.g.*, DEEP S. CTR. FOR ENV'T JUST, *supra* note 87, at 16–19.

development is also troubling because it creates a dangerous template by which ill-intentioned actors may target racially segregated communities based on the secondary features, such as increased industrial build-up, that define them. Actors and institutions that wish to quiet dissent and the rights of marginalized peoples are sophisticated enough to not explicitly state their discriminatory intent or their desire to silence their opponents. It is past time that courts recognize the reality millions of people live every day and listen to the stories that the land and its people will tell.