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Environmental Racism, Amerian Exceptionalism, and Cold War Human Rights

Carmen G Gonzalez

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Environmental justice has become the rallying cry of groups and individuals disparately burdened by environmental degradation.[1] From protests by local communities against chemical plants, refineries, and other polluting facilities to the demands of indigenous peoples in the Arctic and the Pacific for climate justice, environmental justice struggles in both the Global North and the Global South are increasingly adopting the language of human rights.[2] National and international tribunals have concluded that inadequate environmental protection may violate the rights to life, property, health, water, food, privacy; the collective rights of indigenous peoples to their ancestral lands and resources; and the right to a healthy environment.[3]

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[1] *See* Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues, in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 1, 13 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, and Jona Razzaque, eds. 2015).

[2] *See* Julian Agyeman et al., *Joined-up Thinking: Bringing Together Sustainability, Environmental Justice, and Equity, in* JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 10–11 (Julian Agyeman et al., eds., 2003); Carmen G. Gonzalez , *Bridging the North-South Divide: International Environmental Law in the Anthropocene,* 32 PACE ENV'T L. REV. 407, 421 (2015); CLIFF RECHTSCHAFFEN, EILEEN GAUNA, & CATHERINE O'NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 429–32 (2009).

[3] *See generally* DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2012); John H. Knox, *Climate Change*

While social justice struggles with an environmental dimension can be found throughout history, the discourse of environmental justice emerged in the United States in the 1980s in response to the disproportionate concentration of environmental hazards in low-income communities and communities of color.[4] Study after study confirmed that undesirable land uses (such as polluting industries and hazardous waste disposal facilities) are concentrated in neighborhoods populated by racial and ethnic minorities, and that Latinos and African Americans bear the greatest disproportionate impact.[5] Even though income is also correlated with undesirable land uses, race continues to be the strongest predictor of proximity to environmental hazards in the United States.[6] Environmental justice scholars and activists coined the terms "environmental racism" to describe these stark racial disparities in exposure to environmental pollution.[7]

Communities of color in the United States have attempted, without success, to use national antidiscrimination laws to address environmental racism. The U.S. Supreme Court has interpreted constitutional and statutory antidiscrimination laws to require proof of discriminatory intent, making it nearly impossible for plaintiffs to prevail.[8] In most instances, the inequitable distribution of environmental hazards can be traced not to purposeful or intentional conduct but to historic zoning, housing, and lending practices that have segregated low-income African Americans and Latinos and deprived them of the economic and political influence to resist the siting of polluting industry in their neighborhoods.[9] However, simply pointing to a pattern or history of exclusion from housing, employment, and other opportunities is not

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and Human Rights Law, 50 VA. J. INT'L L. 163, 168–78 (2009); SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW AND POLICY (2008); Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1, 11–12 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

[4] *See* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 19–33 (2001); Robert D. Bullard, *Environmental Justice in the Twenty-first Century*, *in* THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 19, 19–25 (Robert D. Bullard ed., 2005).

[5] *See* Alice Kaswan, *Environmental Justice and Environmental Law,* 24 FORDHAM ENV'T L. REV. 149, 151 (2012–2013); COLE & FOSTER, *supra* note 4, at 55, app. at 167–83 (An Annotated Bibliography of Studies and Articles that Document and Describe the Disproportionate Impact of Environmental Hazards by Race and Income); DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 33–41 (2014) (summarizing the empirical studies on race and exposure to pollution).

[6] *See* Kaswan, *supra* note 5, at 151; COLE & FOSTER, *supra* note 4, at 55.

[7] *See* COLE & FOSTER, *supra* note 4, at 54–74; Eileen Gauna, *Environmental Law, Civil Rights and Sustainability: Three Frameworks for Environmental Justice,* 19 J. ENV'T & SUSTAINABILITY L. 34, 38 (2012); *see generally* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993); RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (Bunyan Bryant & Paul Mohai eds., 1992).

[8] *See* Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK 3, 6–8 (Michael B. Gerrard & Sheila R. Foster eds., 2009).

[9] *See* COLE & FOSTER, *supra* note 4, at 63–70.

sufficient to establish racial discrimination under this narrow interpretation of U.S. law.[10]

Native Americans have also been subjected to disparate environmental burdens, particularly from resource extractive industries.[11] However, Native communities are different from other environmental justice communities due to the unique status of American Indians as self-governing tribes and to their distinct legal, cultural, and religious ties to their lands and other natural resources.[12] Environmental justice in the tribal context is inextricably linked with the struggle for self-determination, tribal sovereignty, and the right to be consulted about activities outside Indian reservations that may affect Native lands and resources.[13] Regrettably, federal agencies have frequently disregarded the treaties, laws, and executive orders designed to protect the lands, resources, and the cultural rights of Native communities.[14]

Having exhausted domestic legal remedies or having concluded that these remedies are futile, communities subjected to environmental injustice have begun to seek redress through the Inter-American human rights system, alleging that the United States has violated its human rights obligations under the American Declaration of the Rights and Duties of Man.[15] Only a handful of environmental justice cases from the United States have been filed before the Inter-American Commission on Human Right (IACHR), and all but one have been brought by members of Native American tribes.[16] This Article

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[10] *See* Washington v. Davis, 426 U.S. 229 (1976).

[11] *See* COLE & FOSTER, *supra* note 4, at 26–27.

[12] *See* RECHTSCHAFFEN, GAUNA, & O'NEILL, *supra* note 2, at 107. *See also* Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343, 347, 368 (2017).

[13] *See* Kronk Warner, *supra* note 12, at 368–69; *see also,* RECHTSCHAFFEN, GAUNA, & O'NEILL, *supra* note 2, at 107–38; Judith V. Royster, *Native American Law, in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK 199, 199–214 (Michael B. Gerrard & Sheila R. Foster eds., 2009).

[14] *See* RECHTSCHAFFEN, GAUNA, & O'NEILL, *supra* note 2, at 136–37.

[15] *See* American Declaration of the Rights and Duties of Man, OEA/Ser.L.N./I.4Rev (1948) [hereinafter American Declaration].

[16] Native American tribes have filed IACHR petitions against the United States in the following cases: *Mary & Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V./II.117, doc. 1 rev. 1 (2002) (alleging that the U.S. government violated the petitioners' right to property and equality by making ancestral indigenous lands available for gold mining and the storage of radioactive waste); *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (Inuit Petition), Dec. 7, 2005, http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (alleging that the failure of the U.S. government to curb its greenhouse gas emissions threatened the Inuit petitioners' right to life, health, livelihood, and culture); *Eastern Navajo Diné Against Uranium Mining v. United States* (Navajo Petition), May 13, 2011, http://nmenvirolaw.org/images/pdf/ENDAUM_Final_Petition_with_figures.pdf (alleging that the U.S. government violated the petitioners' right to life, health, property, and cultural and religious integrity by failing to regulate uranium mining near Navajo lands, failing to remediate abandoned uranium mines, and approving new mines that will contaminate Navajo lands). The

focuses on *Mossville Environmental Action Now v. United States,* the first environmental racism case by African Americans before the IACHR.[17] The case has been deemed admissible and is awaiting a determination on the merits.[18]

The decision to use international human rights law to challenge environmental injustice is curious in light of long-standing U.S. hostility to international law. Ever since the publication of Alexis de Tocqueville's *Democracy in America*, the American experience has been depicted as "exceptional"—unique and essentially different from other countries.[19] The United States portrays itself as a "beacon of liberty, democracy and equality of opportunity to the rest of the world,"[20] and refuses to bind itself to international human rights instruments on the ground that its legal system offers its population greater protection than international law.[21] Out of the nine core human rights treaties negotiated in the last several decades under the auspices of the United Nations, the United States is a party to only three: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Covenant on Civil and Political Rights (ICCPR); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[22]

IACHR ruled in favor of the petitioners in the Dann case. The Inuit petition was deemed inadmissible and was therefore not evaluated on the merits. The Eastern Navajo Dine case is awaiting a determination on admissibility. On December 2, 2016, the Native American tribes protesting the Dakota Access Pipeline (DNAPL) filed a request for precautionary measures before the IACHR seeking denial of the construction easement for the pipeline, a full environmental impact statement in consultation with the tribes, clear rules for social and environmental impact assessments of activities that may affect indigenous peoples, and immediate action to guarantee the safety of those engaging in peaceful prayer and protest concerning the DNAPL just outside Cannon Ball, North Dakota. *See* Request for Precautionary Measures Pursuant to Article 25 of the IACHR Rules of Procedure Concerning Serious and Urgent Risks of Irreparable Harm Arising Out of Construction of the Dakota Access Pipeline, Dec. 2, 2016, http://www.eenews.net/assets/2016/12/09/document_pm_03.pdf.

[17] *See Mossville Env't. Action Now v. United States,* Admissibility, Report No. 43/10 (InterAm. Comm'n H.R. Mar. 17, 2010) [hereafter Mossville Admissibility Report] (finding admissible the petitioners' claim that the siting of polluting industry in their community violated their right to equality and to privacy and family life).

[18] *See id.*

[19] *See* Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case,* 82 CHI. KENT L. REV. 393, 393–94 (2007).

[20] *See* Natsu Taylor Saito, *Human Rights, American Exceptionalism, and the Stories We Tell,* 23 EMORY INT'L L. REV. 41, 43 (2009) (quoting law professor Steven Calabresi, one of the founders of the neoconservative Federalist Society); Daniel Bell, *The End of American Exceptionalism*, 41 NATIONAL AFFAIRS 193 (1975) (describing the elements of American exceptionalism).

[21] *See* Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 428 (2002).

[22] *See* Margaret Huang, *"Going Global": Appeals to International and Regional Human Rights Bodies*, *in* BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS 105, 111 (Cynthia Soohoo, Catherine Albisa, & Martha F. Davis eds., 2008). The six core human rights treaties to which the United States is not a party are the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of

This Article examines the ways in which American exceptionalism and the Cold War influenced the reception in the United States of international human rights law—particularly antidiscrimination law. Using *Mossville* as a case study, it deploys this analysis in order to assess the promise and the peril of international human rights law to challenge environmental racism.

The Article proceeds in three parts. Part I discusses the prominent role of international law in U.S. courts from the founding of the Republic until the Second World War. Part II examines how the Cold War stigmatization of human rights activism as subversive and Soviet-influenced resulted in a dramatic retreat by the United States from international human rights law and institutions. Part III presents the Mossville case study, evaluates the petitioners' claims, and discusses the consequences of a decision by the IACHR favorable to the petitioners.

The Article concludes that American exceptionalism established the foundation for U.S. disengagement with international human rights law, but that Cold War politics struck the decisive blow by equating human rights and the United Nations with efforts to subvert American democracy. Substantively, international human rights law is far superior to U.S. domestic law as a means of addressing environmental racism. However, its utility is constrained by legal doctrines developed over time but reinforced during the Cold War that restrict the enforcement of international human rights law in U.S. courts. Despite these constraints, a victory for the Mossville petitioners before the IACHR could be deployed by environmental justice activists as part of a larger strategy to name, shame, and cajole the United States into reforming its laws and policies.

I. INTERNATIONAL LAW IN U.S. COURTS BEFORE WORLD WAR II

In the decades following the founding of the Republic, the United States eagerly participated in the development and implementation of international law.[23] The Framers of the U.S. Constitution were concerned that violations of international law, by the states, could trigger wars, discourage trade, and undermine the reputation of the United States.[24] In order to ensure compliance

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Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the International Convention for the Protection of All Persons From Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities (CRPD). *Id*. at 110. Although the CRPD is modeled on the Americans With Disabilities Act, the U.S. Senate narrowly rejected the treaty in 2012. *See* Rosalind S. Helderman, *Senate Rejects Treaty to Protect Disabled Around the World,* WASH. POST (Dec. 4, 2012), https://www.washingtonpost.com/politics/senate-rejects-treaty-to-protect-disabled-around-the-world/2012/12/04/38e1de9a-3e2c-11e2-bca3-aadc9b7e29c5_story.html?utm_term=.f89d1ac245bf. Opponents argued that the treaty would relinquish U.S. sovereignty to a U.N. committee charged with overseeing implementation. *Id.*

[23] Mark W. Janis, *Dred Scott and International Law*, 43 COLUM. J. TRANSNAT'L L. 763, 808 (2005).

[24] Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1110 (1992).

with international law, the United States made treaties, federal statutes, and the Constitution, the supreme law of the land, enforceable by individuals in U.S. courts.[25] The Supremacy Clause of the U.S. Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[26]

Article III of the U.S. Constitution explicitly grants the federal judiciary the authority to implement treaties by stating that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties[.]"[27] Additionally, federal courts are authorized to apply customary international law to adjudicate disputes and provide legal rights to private parties.[28] As explained by Justice Horace Gray, in his *Paquete Habana* opinion, "[i]nternational law is part of our law . . . . [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[29]

From the dawn of the Republic until World War II, the United States applied international law as a part of U.S. law through a series of federal court cases initiated by private parties to enforce treaties and customary international law.[30] The Supreme Court recognized that U.S. law was built upon concepts and principles derived from international and foreign law, and took into account legal developments outside the United States to interpret the U.S. Constitution.[31] During the 18th and 19th centuries, U.S. courts borrowed substantially from foreign sources to guide constitutional interpretation.[32]

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[25] *Id.* at 1108–09.

[26] U.S. CONST. art. VI, cl. 2.

[27] U.S. CONST. art III, § 2, cl. 1.

[28] *See generally* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7–11 (2003); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205 (2008); *see also* David Sloss, Michael D. Ramsey, & William S. Dodge, *International Law in the U.S. Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 1, 27–37, 49–50 (David Sloss, Michael D. Ramsey, & William S. Dodge eds., 2011) (discussing the U.S. Supreme Court's application of customary international law to a variety of disputes, including U.S. relations with Indian tribes, controversies between states, and maritime disputes).

[29] The Paquete Habana, 175 U.S. 677, 700 (1900).

[30] *See* PAUST, *supra* note 28, at 235, 293–96.

[31] *See* Cleveland, *supra* note 19, at 449–51.

[32] *See* Paul Finkelman, *When International Law Was a Domestic Problem,* 44 VAL. U. L. REV. 779, 781–88 (2010).

Some of these borrowings expanded human rights (such as the right to a jury trial)[33] while others contracted human rights (such as the recourse to international law to justify the taking of Native American lands).[34] In short, as legal historian Paul Finkelman recognizes, "the United States has a long tradition of applying foreign law involving human rights to our domestic law."[35]

Over time, U.S. courts developed doctrines to address conflicts between international and domestic law, which gradually eroded the primacy of international law. First, in the event of conflict between the U.S. Constitution and a treaty, courts are required to apply the Constitution even if the application violates international law.[36] Second, while federal statutes should be interpreted in a manner consistent with international law, the "last in time" will prevail if there is a direct conflict between a treaty and a statute.[37] The last in time rule places treaties on the same footing as statutes and authorizes Congress to abrogate treaties by adopting conflicting legislation, provided that the legislative intent to override the treaty is clear and none of the exceptions to the last in time rule apply.[38] States do not have the authority to violate or abrogate treaties.[39] Instead, the treaty supremacy rule provides that treaties supersede conflicting state laws.[40]

United States courts also distinguish between "self-executing" treaties, which do not require implementing legislation to become effective, and "non-self-executing treaties," which do require such legislation.[41] Before World War II, U.S. courts seldom invoked the distinction between self-executing and non-self-executing treaties and did not apply it to the treaty supremacy rule, which was interpreted to give *all* treaties primacy over conflicting state law.[42] After World War II, the distinction between self-executing and non-self-executing treaties became extremely important because the United States sought to evade judicial scrutiny of its compliance with human rights treaties by declaring them non-self-executing.[43]

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[33] *See id.* at 785–86.

[34] *See id.* at 782.

[35] *Id.* at 779.

[36] *See* PAUST, *supra* note 28, at 99.

[37] *See id.* at 100–01.

[38] *See id.* at 100–07 (discussing the last in time rule and its exceptions).

[39] *Id.*

[40] *Id.* at 115–16.

[41] *See* DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 130 (2016); Vazquez, *supra* note 24, at 1128–30 (discussing the judicial enforcement of self-executing and non-self-executing treaties).

[42] *See id.* at 129, 173.

[43] *See* infra notes 114–28 and accompanying text.

Finally, race and race relations played an important role in the United States' early engagement with international law.[44] Prior to the civil war, international law doctrines and concepts arose in litigation over fugitive slaves, free blacks entering southern states, and slaves brought to free states by their masters.[45] One of the most significant clashes between American exceptionalism and international law was the *Dred Scott* case of 1857, in which an African American man sued his nominal owner in federal court alleging, among other things, that the time he had spent in free states rendered him a free man.[46] At the time of this groundbreaking case, international law, as well as the law of European countries like Britain and France, prohibited slavery.[47] The two dissenting justices in *Dred Scott* employed international law to conclude that Dred Scott was both a citizen of Missouri and a free man.[48] However, for the majority, "international law posed a threat to the increasingly unpopular U.S. practice of slavery."[49] Justice Taney, in language echoed by more modern American judges, explicitly rejected the application of international legal rules because the "law of nations [could not stand] between the people of the United States and their Government[.]"[50] Contemporary advocates of American exceptionalism have likewise premised their rejection of international law on the alleged superiority of the U.S. legal system.[51]

Nearly a century after *Dred Scott*, at the height of the Cold War, the clash between international law and racial subordination would provoke a dramatic retreat by the United States from international human rights law and institutions. This retreat is described in Part II below.

II. COLD WAR HUMAN RIGHTS

Prior to the Cold War, President Franklin D. Roosevelt articulated a vision of international peace and security premised on human rights and the Four Freedoms: freedom of speech, freedom of religion, freedom from want, and

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[44] *See* NATSU TAYLOR SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW 4, 85–105 (2010) (discussing the role of international law in the United States' relationship with American Indians and African slaves); *see generally International Norms and Politics in the Marshall Court's Slave Trade Cases,* 128 HARV. L. REV. 1184 (2015); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence Racing American Foreign Policy*, 94 AM. SOC'Y INT'L PROC. 260 (2000); Ediberto Román, *Race as the Missing Variable in Both the Neocolonial and Self-Determination Discourses*, 93 AM. SOC'Y INT'L L. PROC. 226 (1999).

[45] *See* Finkelman, *supra* note 32, at 789–821.

[46] *See* Dred Scott v. Sandford, 60 U.S. 393, 399 (1857).

[47] Janis, *supra* note 23, at 771.

[48] Dred Scott, 60 U.S. at 534.

[49] Janis, *supra* note 23, at 808.

[50] Dred Scott, 60 U.S. at 451.

[51] Janis, *supra* note 23, at 810.

freedom from fear.[52] Roosevelt championed socioeconomic rights and asserted that these rights should be available to all "regardless of station, race, or creed."[53] African-American leaders embarked on a campaign to ensure human rights, including racial equality and economic rights, would be included in the Charter of the United Nations ("U.N. Charter") in order to "break the back of white supremacy, ensure a just peace, and implement the Four Freedoms."[54] Legislators from southern states, such as Texas and Mississippi, bitterly opposed a strong U.N. Charter with human rights guarantees that might undermine state-mandated race discrimination.[55] In hopes of securing popular support for the post-war legal architecture, the U.S. State Department agreed to include the National Association for the Advancement of Colored People (NAACP) and more than forty other non-governmental organizations as official consultants to the U.S. delegation during the U.N. founding conference in San Francisco.[56] When these consultants pressed for a human rights commission to oversee compliance with the U.N. Charter's requirement that states promote human rights without discrimination on the basis of race, sex, language, or religion, the United States developed a plan to appease southern legislators while avoiding an open rift with the consultants.[57] The United States proposed a clause stipulating that"[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[58] The compromise worked, and the United States proceeded to ratify the Charter.[59] While other countries complained that this domestic jurisdiction clause eviscerated the Charter's protections, the Soviet delegation fully endorsed the U.S. proposal.[60] The United States succeeded in shielding racial segregation, Japanese internment, and other human rights abuses from U.N. scrutiny.[61]

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[52] *See* Hope Lewis, *"New" Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework*, *in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 103, 108–09 (Cynthia Soohoo, Catherine Albisa, & Martha F. Davis eds., 2008).

[53] *See id.* at 109.

[54] CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN-AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, 30 (2003); *see also* U.N. Charter,1 UNTS XVI, 1976 YBUN 1043, 59 Stat 1031 (1945).

[55] *See* Carol Anderson, *A "Hollow Mockery": African Americans, White Supremacy, and the Development of Human Rights in the United States*, *in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 78–79 (Cynthia Soohoo, Catherine Albisa, & Martha F. Davis eds., 2008).

[56] ANDERSON, *supra* note 54, at 40.

[57] *See id.* at 46–48

[58] *See* SLOSS, *supra* note 41, at 244.

[59] *See id.* at 2.

[60] *See* ANDERSON, *supra* note 54, at 48–50.

[61] *See id.* at 46, 50.

As the Cold War intensified, human rights became an important arena of struggle between the United States and the Soviet Union. The United States took aim at the Soviet Union's ruthless suppression of freedom of the press and civil liberties, and the Soviet Union counter-attacked by highlighting the discrimination and extra-legal violence directed at racial minorities in the United States.[62] U.S. government officials increasingly saw the country's racial problems as tarnishing its image abroad, particularly among newly-independent African and Asian nations.[63] Those who used human rights law to expose the glaring racial inequities in the United States were classified as traitors and Kremlin propagandists.[64]

A. International Human Rights at the United Nations: The U.N. Human Rights Petitions

In 1947, the NAACP decided to challenge American racism by petitioning the United Nations Commission on Human Rights (UNCHR) to examine systemic racial discrimination in the United States.[65] The 200-page petition, *An Appeal to the World,* carefully documented state-sponsored racial discrimination in education, housing, employment, and health care.[66] The United States refused to introduce the petition at the U.N. because it would cast the country in a negative light.[67] Despite its earlier opposition to U.N. review of national compliance with human rights obligations, the Soviet Union pressed for the inclusion of the petition on the U.N. agenda.[68] The American diplomatic corps, after extensive procedural wrangling, prevented the U.N. from taking action on the petition.[69] Furthermore, Eleanor Roosevelt, who chaired the UNCHR,[70] personally berated the NAACP leadership for playing into the hands of the Soviet Union and threatened to resign from the NAACP Board of Directors.[71] While she was persuaded to remain on the NAACP Board, the NAACP ultimately abandoned its international human rights strategy and

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[62] *See id.* at 81–82.

[63] *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 23, 29–39 (2000); Derrick A. Bell Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[64] *See* ANDERSON, *supra* note 54, at 5–6.

[65] *See id.* at 84.

[66] *See (1947) W.E.B. DuBois, "An Appeal to the World: A Statement of Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress"*, BLACK PAST, http://www.blackpast.org/1947-w-e-b-dubois-appeal-world-statement-denial-human-rights-minorities-case-citizens-n#sthash.BpFVyCMy.dpuf (last visited Feb. 2, 2017).

[67] *See* DUDZIAK, *supra* note 63, at 45.

[68] *See* ANDERSON, *supra* note 54, at 108–10; SLOSS, *supra* note 41, at 187.

[69] *See* ANDERSON, supra note 54, at 110–11.

[70] *See* SLOSS, *supra* note 41, at 185.

[71] *See* ANDERSON, *supra* note 54, at 110–12.

collaborated with the Truman administration's efforts to present a positive image of race relations in the United States in order to counter the Soviet Union's allegations of widespread racial discrimination.[72]

Other organizations, however, remained committed to the use of U.N. mechanisms in the struggle for human rights. In 1951, the Civil Rights Congress (CRC), a radical civil rights organization, submitted a petition to the UNCHR titled *We Charge Genocide.*[73] The petition alleged that the U.S. government had violated the Convention on the Prevention and Punishment of the Crime of Genocide by failing to prevent mass lynching of African Americans and causing thousands of deaths each year due to inadequate jobs, health care, education, and housing.[74] The U.S. government denied the allegations, emphasized that it had not ratified the Convention, and unleashed a campaign of harassment against the CRC's leadership.[75] In the end, the United Nations took no action on the petition.[76]

Although the United Nations failed to evaluate the merits of the NAACP and CRC petitions, the petitions did succeed in arousing worldwide interest in race relations in the United States and exerting pressure for reform.[77] In order to present a story of racial progress in its Cold War rivalry with the Soviet Union and to redeem its image in the eyes of Third World nations emerging from colonialism, the United States took significant measures toward racial justice, including executive orders prohibiting racial discrimination in the military, judicial decisions declaring racial segregation unconstitutional, and civil rights and voting rights legislation.[78] For example, the Cold War imperative to depict American democracy as superior to Soviet Communism profoundly shaped[79] the U.S. Supreme Court's landmark ruling in *Brown v. Board of Education*, which held that segregated schools are inherently unequal and violate the Equal Protection Clause of the U.S. Constitution.[80] International law also influenced the decision. The arguments presented by the parties in the Supreme Court briefs in *Brown* and related civil rights cases

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[72] *See id.*; DUDZIAK, *supra* note 63, at 63–65.

[73] *See We Charge Genocide (1951): The Historic Petition to the United Nations for Relief from the Crime of the United States Government Against the Negro People,* BLACK PAST, http://www.blackpast.org/we-charge-genocide-historic-petition-united-nations-relief-crime-united-states-government-against (last visited Feb. 2, 2017).

[74] ANDERSON, *supra* note 54, at 180. The Genocide Convention was adopted by the U.N. General Assembly on December 9, 1948, and became effective in January 1951. The United States, signed the Convention on December 11, 1948, but did not ratify it until November 4, 1988. *Id.*

[75] *See* ANDERSON, *supra* note 54, at 180, 195, 202.

[76] *See* DUDZIAK, *supra* note 63, at 66.

[77] *See id*. at 44–45; Lewis, *supra* note 52, at 117.

[78] *See generally* DUDZIAK, *supra* note 63, at 79–114, 203–48; Bell, *supra* note 63.

[79] *See* DUDZIAK, *supra* note 63, at 90–114; SLOSS, *supra* note 41, at 245–46; Bell, *supra* note 63, at 524.

[80] *See Brown v. Board of Education,* 347 U.S. 483 (1954).

forced the justices to recognize that the U.S. Constitution had previously been interpreted to permit forms of racial discrimination expressly prohibited by the U.N. Charter and the Universal Declaration of Human Rights.[81] While the *Brown* decision did not explicitly address international law, one scholar has persuasively argued that the moral force of the U.N. Charter's anti-discrimination provisions may have motivated the Supreme Court to reinterpret the U.S. Constitution to repudiate state-mandated racial segregation.[82] In so doing, the Supreme Court justices not only avoided embarrassing the United States in its conduct of foreign relations, but also maintained their faith in American exceptionalism by demonstrating that the U.S. Constitution was consistent with evolving international human rights standards.[83]

The NAACP and CRC petitions also inspired oppressed and subordinated peoples throughout the world and reinvigorated efforts to draft legally binding human rights treaties with mechanisms for human rights monitoring and review.[84] One of the most important of these treaties was the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which was adopted in 1965.[85] Recognizing the link between racial discrimination and colonialism, the newly independent nations of Africa collaborated with their Asian, Latin American, and Communist bloc counterparts to demand a treaty outlawing racial discrimination.[86] Eager to demonstrate its progress on racial equality after the passage of major civil rights and voting rights legislation, the United States embraced the treaty.[87] The CERD is noteworthy for several reasons. First, it encompasses both purposeful discrimination as well as conduct with discriminatory impact.[88] Second, the treaty prohibits discrimination in the enjoyment of civil and political rights as well as economic, social, and cultural rights, including the

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[81] *See* SLOSS, *supra* note 41, at 247.

[82] *See id.* at 248.

[83] *See id.* at 245–48. Professor Derrick Bell refers to this alignment of African-American and white interests as the interest convergence dilemma. As he explains: "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior social status of middle and upper class whites." Bell, *supra* note 63, at 523.

[84] *See* Lewis, *supra* note 52, at 117.

[85] *See* International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

[86] *See* STEVEN L.B. JENSEN, THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION AND THE RECONSTRUCTION OF GLOBAL VALUES 106–07 (2016); ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE 269 (2008).

[87] *See* JENSEN, *supra* note 86, at 117–18.

[88] *See* CERD, *supra* note 85, art. 1(1).

rights to housing, public health, education, and employment.[89] Third, the CERD contains compliance mechanisms that influenced subsequent treaties, including periodic reporting by state parties on treaty implementation and a committee empowered to receive and consider complaints from individuals alleging violations of their rights under the treaty.[90] However, for the reasons explained in the next section, the United States did not ratify the CERD until 1994, and has not recognized the competence of the committee to hear individual complaints.[91] In addition, the United States placed conditions on its CERD approval, most notably the stipulation that its CERD obligations do not apply to private conduct except "as mandated by the Constitution and laws of the United States."[92]

The Cold War took a huge toll on African Americans critical of U.S. racial discrimination—particularly those who traveled overseas and challenged the government's official narrative of steadily improving race relations.[93] Many individuals, including Paul Robeson, W.E.B. DuBois, Louis Armstrong, and Josephine Baker, either had their passports confiscated or found they were under Federal Bureau of Investigation (FBI) surveillance.[94] Even African-American diplomat Ralph Bunche, winner of the 1950 Nobel Peace Prize, was investigated and eventually exonerated of disloyalty to the United States.[95] The NAACP, under United States government scrutiny for its human rights work, conducted a purge of suspected communists, rigged branch elections to oust left-leaning leaders, and shifted its strategy away from human rights advocacy at the U.N. and toward domestic civil rights litigation.[96] Tragically, the stigmatization of human rights activism as anti-American, Soviet-inspired, and even treasonous would ultimately deprive the movement for racial equality of international human rights doctrines and institutions to address not only civil and political rights, but also economic, social, and cultural rights.

More than sixty years after *Brown* and related cases dismantled state-mandated racial discrimination, the material conditions faced by many African-Americans remain dire. Public schools remain deeply segregated and

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[89] *See id.* art. 5.

[90] *See id.* arts. 8–16; *see also* NORMAND & ZAIDI, *supra* note 86, at 269–72.

[91] *See* U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, Oct. 21, 1994, 1830 U.N.T.S. 284, 285 [hereinafter U.S. Ratification of the CERD]; Daniel H. Wolf, *An Extraordinary Facilitator: The Voting Rights Act and U.S. Adherence to International Human Rights Treaty Obligations,* 31 U. PA. J. INT'L L. 1149, 1162 (2010).

[92] *See* U.S. Ratification of the CERD, *supra* note 91, at § I, ¶ 2.

[93] *See generally* JAMES ZEIGLER, RED SCARE RACISM AND COLD WAR BLACK RADICALISM (2015).

[94] *See* DUDZIAK, *supra* note 63, at 61–76.

[95] *See* ANDERSON, *supra* note 54, at 258–61; Asle Sveen, *Ralph Bunche: U.N. Mediator in the Middle East, 1948-1949*, NOBEL PRIZE (Dec. 9, 2006), https://www.nobelprize.org/nobel_prizes/peace/laureates/1950/bunche-article.html.

[96] *See* ANDERSON, *supra* note 54, at 167, 173–74; DUDZIAK, *supra* note 63, at 65–67.

underfunded.[97] Economic inequality continues to limit the aspirations and opportunities of many African Americans.[98] The incarceration of African Americans has skyrocketed.[99] Racial disparities in health have resulted in a black-white mortality gap that remains unchanged since 1960.[100] Persistent housing segregation and zoning ordinances that favor wealthier communities have resulted in the concentration of polluting industries in poor and minority neighborhoods, such as Mossville, Louisiana.[101] The following section examines the evisceration of international human rights law as a tool to challenge these and other inequities.

B. International Human Rights Law in the United States

In addition to restricting racial justice advocacy by African Americans at the United Nations, the Cold War produced a series of doctrines that limit the enforceability of international human rights law in the United States more generally. Before examining these doctrines, it is useful to briefly describe the ways that Soviet-American rivalry shaped the evolution of international human rights law.

Under the leadership of Eleanor Roosevelt, the United States played a key role in the drafting of the Universal Declaration of Human Rights, which recognizes civil and political rights as well as economic, social, and cultural rights.[102] By the beginning of the Cold War, however, the United States became distinctly unfriendly to social and economic rights, perceiving that they might require redistribution of wealth from affluent elites to millions of poor, disenfranchised Americans.[103] The Soviet Union was equally wary of civil and

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[97] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-345, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 12 (2016), http://gao.gov/assets/680/676745.pdf (finding that the number of high-poverty schools and the percentage of schools comprised of mostly African Americans or Latinos more than doubled between the 2000–2001 and 2013–2014 academic year).

[98] *See* Joshua Holland, *The Average Black Family Would Need 228 Years to Build the Wealth of a White Family Today,* THE NATION (Aug. 8, 2016), https://www.thenation.com/article/the-average-black-family-would-need-228-years-to-build-the-wealth-of-a-white-family-today.

[99] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS (2010).

[100] *See* David Satcher et al., *What if We Were Equal? A Comparison of the Black-White Mortality Gap in 1960 and 2000,* 24 HEALTH AFF. 459 (2005). *See also* Jennifer Orsi et al., *Black–White Health Disparities in the United States and Chicago: A 15-Year Progress Analysis,* 100 AM. J. PUB. HEALTH 349–56 (2010) (concluding that black-white health disparities remained unchanged between 1990 and 2005).

[101] *See generally* TAYLOR, *supra* note 5, at 147–261.

[102] *See* SLOSS, *supra* note 41, at 182; Universal Declaration of Human Rights, G.A. res 217A (III), U.N. Doc A/810, at 71 (1948).

[103] *See* Lewis, *supra* note 52, at 116.

political rights that would restrict the state's ability to control the press and stifle political dissent.[104]

The Cold War stalemate between the United States and the Soviet Union resulted in the bifurcation of the proposed U.N. Covenant on Human Rights into two distinct treaties: the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[105] Despite this compromise, it took eighteen years to negotiate and draft the two covenants (1948–66), and they did not receive sufficient ratifications to enter into force until 1976; the U.S. ratified the ICCPR in the mid-1990s, but not the ICESCR.[106] One of the reasons for the United States' belated and limited ratification of human rights treaties was the political controversy generated by a 1950 California appellate case, *Fujii v. California.*[107]

As discussed previously, the United States' reluctance to ratify human rights treaties was partially due to apprehension that international legal institutions would challenge and expose U.S. racial hierarchies. A second motivation was American exceptionalism—the belief that the U.S. is unique in its commitment to freedom and equality and provides more robust protections of human rights than international law. In 1950, an important California case would exacerbate anxiety about the potential reach of international human rights law *in domestic courts* and challenge American exceptionalism.[108]

In *Fujii v. California,* a California appellate court struck down California's Alien Land Law because it discriminated against Japanese nationals in violation of the U.N. Charter's human rights provisions.[109] The decision ignited a political firestorm. First, the court's ruling suggested that the U.N. Charter could be enforced in U.S. courts to invalidate conflicting state laws.[110] Second, the decision implied that the United States might have abrogated the segregation laws of the southern states (and racially discriminatory laws in other states) in one fell swoop by ratifying the U.N. Charter.[111] Third, by

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[104] *See id.*

[105] *See id.* at 120.

[106] *See id.* at 121.

[107] *See* Fujii v. State of California, 217 P.2d 481 (Cal. Dist. Ct. App. 1950).

[108] *Id.*

[109] *See id.* The appellate court held that the statute, which prohibited Japanese nationals from owning land in California, violated articles 55 and 56 the U.N. Charter. *See* U.N. Charter arts. 55–56. Article 55 requires states to "promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. Charter art. 55. Article 56 requires states to take joint and separate action to achieve the purposes of Article 55. *See* U.N. Charter art. 56.

[110] *See* Cynthia Soohoo, *Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer, in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 71–72 (Cynthia Soohoo, Catherine Albisa, and Martha F. Davis eds., 2007).

[111] *See* SLOSS, *supra* note 41, at 2.

holding that the challenged legislation complied with U.S. equal protection law but violated the U.N. Charter, the decision made it apparent that international human rights law provided greater protection against racial discrimination than U.S. law, thereby casting doubt on American exceptionalism.[112]

While the California Supreme Court later vacated the *Fujii* decision,[113] the case (along with the U.N. petitions filed by the NAACP and the CRC) fueled opposition to the United Nations and to human rights law.[114] Determined to "rescue America and its children from the United Nations," conservative legislators (led by Republican Senator John Bricker of Ohio) proposed a constitutional amendment that would alter the process for domestic application of treaties.[115] In addition to the existing requirement that treaties be ratified by two thirds of the Senate, the proposed Bricker Amendment would require passage of implementing legislation approved by both houses of Congress before a treaty could be effective as domestic law.[116] Bricker's fear was that African Americans, Asian Americans, Latinos, Native Americans, and other disenfranchised minorities would use international human rights law in U.S. courts to challenge segregation, lynching, and other human rights abuses.[117] Concerned about the impact of the Bricker Amendment on the executive branch's authority to conduct foreign policy, the administration of President Dwight Eisenhower developed a compromise; in exchange for the defeat of the Bricker Amendment, the Eisenhower administration proposed to abandon the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and the Genocide Convention.[118]

Although the Bricker amendment was defeated by one vote in the U.S. Senate, the President's willingness to jettison major human rights treaties had a lasting effect on human rights advocacy in the United States, reinforcing the notion that international human rights law is somehow foreign, subversive, and dangerous.[119] The United States did not ratify the Genocide Convention until 1988.[120] In the mid-1990s, the United States finally ratified the International Covenant on Civil and Political Rights ("ICCPR"); the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"); and the International Convention on the

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[112] *See id.* at 4.

[113] *See* Fujii, 38 Cal. 2d 718 (1952).

[114] *See* Soohoo, *supra* note 110, at 73.

[115] Anderson, *A "Hollow Mockery," supra* note 55, at 85–86.

[116] *Id.* at 86; SLOSS, *supra* note 41, at 253.

[117] *See id.*; *See* Hope Lewis, *Race, Class, and Katrina: Human Rights and (Un)Natural Disaster*, *in* ENVIRONMENTAL JUSTICE IN THE NEW MILLENNIUM: GLOBAL PERSPECTIVES ON RACE, ETHNICITY, AND HUMAN RIGHTS 240 (Filomina Chioma Steady ed., 2009).

[118] *See* Anderson, *A "Hollow Mockery," supra* note 55, at 87.

[119] *See id.* at 88–89.

[120] *See* Soohoo, *supra* note 110, at 77.

Elimination of All Forms of Racial Discrimination ("CERD").[121] Most importantly, all three human rights treaties were approved with significant reservations, understandings, and declarations ("RUDs"), including declarations that the treaties were not self-executing and could therefore not be enforced by the executive branch until Congress passed implementing legislation.[122]

Before World War II, the distinction between self-executing and non-self-executing treaties was rarely raised by the U.S. Supreme Court in cases involving the judicial application of treaties.[123] After World War II, the U.S. government routinely deemed human rights treaties non-self-executing—even though this practice has been widely criticized by legal scholars as inconsistent with the U.S. Constitution and contrary to the objects and purposes of the treaties.[124]

Before World War II, the self-execution doctrine was regarded as distinct from the treaty supremacy rule, which provides that all treaties (whether self-executing or not) supersede conflicting state law and obligates federal and state courts to apply treaties whenever there is a conflict with state law.[125] After World War II, the treaty supremacy rule was subtly subsumed into self-execution doctrine.[126] Despite the plain language of the U.S. Constitution that "*all* Treaties shall be the supreme Law of the Land,"[127] courts were persuaded that non-self-executing treaties do not supersede conflicting state laws and are unenforceable in U.S. courts in the absence of implementing legislation.[128] This reinterpretation of the treaty supremacy rule gives states carte blanche to violate non-self-executing treaties (such as the CERD) and immunizes these violations from judicial scrutiny.

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[121] *See id.*

[122] *See* Lewis, *supra* note 52, at 122–23; *see also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,* 89 AM. J. INT'L L. 341 (1995) (describing and critiquing U.S. reservations, understandings, and declarations attached to human rights treaties).

[123] *See* SLOSS, *supra* note 41, at 129.

[124] *See* PAUST, *supra* note 28, at 361–75; *see generally* Henkin, *supra* note 122.

[125] *See* SLOSS, *supra* note 41, at 5.

[126] *See id.* at 7.

[127] *See* U.S. CONST. art. VI, cl. 2 (emphasis added).

[128] *See* SLOSS, *supra* note 41, at 7–8, 292–318 (describing the variety of non-self-execution doctrines and their evolution over time). The Supreme Court endorsed the reinterpretation of the treaty supremacy rule in 2008 in the case of *Medellin v. Texas,* 532 U.S. 491 (2008). While a full discussion of non-self-execution doctrines and treaty supremacy is beyond the scope of this Article, Professor David Sloss persuasively argues that the Supreme Court's decision erroneously conflated self-execution and treaty supremacy, and that the gradual transformation of the treaty supremacy rule was motivated, at least originally, by the need to preserve American exceptionalism in the face of clear evidence (the appellate court *Fujii* decision) that the United States was violating the anti-discrimination norms of the U.N. Charter. *See id.* at 323–26.

In sum, one legacy of the Cold War is U.S. estrangement from international human rights law. The United States has ratified only a handful of human rights treaties, and has attached RUDs that preclude vulnerable communities in the United States from enforcing these treaties in U.S. courts. The implications for victims of environmental racism are explored in the next section using the Mossville, Louisiana case study as an example.

III. THE MOSSVILLE CASE STUDY

Mossville, Louisiana is a town located approximately 211 miles west of New Orleans.[129] Founded by African Americans in the 1790s, Mossville grew as emancipated slaves settled in this once beautiful rural area.[130] Mossville possesses over forty miles of waterways, and its residents were historically able to sustain themselves by fishing, farming, and hunting.[131] Currently, Mossville's approximately 500 residents (375 households) are predominantly African-American.[132]

Beginning in the 1930s, a variety of government policies resulted in the gradual transformation of Mossville from a bucolic haven into a toxic nightmare.[133] Although Mossville covers only five square miles, fourteen industrial facilities located in or near Mossville currently discharge over four million pounds of toxic chemicals per year into the surrounding land, air, and water.[134] These fourteen facilities consist of four vinyl manufacturing plants, one coal-fired power plant, and nine petrochemical facilities.[135] Most recently the South African chemical giant SASOL has been constructing the largest chemical plant in the history of Louisiana in Mossville.[136]

The fourteen industrial facilities that discharge contaminants into Mossville's land, air, and water have had a severe negative impact on the local

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[129] *See* Route Map from Mossville, LA to New Orleans LA, DISTANCE BETWEEN CITIES, http://www.distancebetweencities.net/mossville_la_and_new-orleans_la/route (last visited Aug. 18, 2016).

[130] *See* Mossville Admissibility Report, *supra* note 17, at para. 9; *Mossville Envtl. Action Now v. United States*, Petition 242/05, Second Amended Petition and Petitioners' Observations on the Government's Reply Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America (Inter-Am. Comm'n H.R. June 23, 2008) at 1 [hereinafter Mossville Petition].

[131] *See* Mossville Admissibility Report, *supra* note 17, at para. 9; *see also Corporate "Guest" and "Good Neighbor": Sasol in Mossville*, 39 THE CORPORATE EXAMINER, no. 4., (2014) http://www.iccr.org/corporate-%E2%80%9Cguest%E2%80%9D-and-%E2%80%9Cgood-neighbor%E2%80%9D-sasol-mossville-0.

[132] *See* Mossville Admissibility Report, *supra* note 17, at 2, para. 9.

[133] *See id.* at 2–3, para. 9.

[134] *See id.* at 3, para. 11.

[135] *See* Mossville Petition, *supra* note 130, at 2.

[136] *See* Tim Murphy, *A Massive Chemical Plant Is Poised to Wipe This Louisiana Town Off the Map*, MOTHER JONES (Mar. 27, 2014, 5:00 AM), http://www.motherjones.com/environment/2014/03/sasol-mossville-louisiana.

community's quality of life. For example, Mossville residents have historically depended on local waterways for food and recreation;[137] these waters are now so contaminated with dioxin and other chemicals that U.S. state and federal regulatory agencies have warned residents not to eat fish from local waters and not to swim in these waters.[138] Additionally, many residents have historically relied on private wells to supply water for drinking, cooking, and bathing.[139] However, industrial discharges contaminated the local water supply causing many residents to now rely on bottled water.[140] In 1998, the Agency for Toxic Substances and Disease Registry ("ATSDR"), a federal agency, found that blood from twenty-eight Mossville residents had dioxin levels that were three times the national average.[141] A second ATSDR study concluded that fruits, vegetables, soils, and house dust in Mossville were heavily contaminated with dioxin.[142]

Mossville residents routinely contend with noxious odors, flaring smokestacks, frequent chemical accidents, and disruptive noise pollution.[143] For example, in March 2012, an accident at a chemical plant in nearby Westlake released a cloud of smoke and toxic chemicals into the air.[144] As a result of their proximity to numerous pollution-emitting industrial facilities, Mossville residents have experienced a variety of debilitating physical ailments (including respiratory, immune system, and digestive disorders) and also suffer from chronic stress and depression.[145] The presence of dioxin creates

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[137] *See* Mossville Petition, *supra* note 130, at 33.

[138] *See id.* at 64–66; *see generally* MOSSVILLE ENVTL. ACTION NOW, INC. ET AL., INDUSTRIAL SOURCES OF DIOXIN POISONING IN MOSSVILLE, LOUISIANA: A REPORT BASED ON THE GOVERNMENT'S OWN DATA (2007); LA. DEP'T OF HEALTH & HOSPS., PUBLIC HEALTH ASSESSMENT: REVIEW OF DATA FROM THE 2010 EPA MOSSVILLE SITE INVESTIGATION MOSSVILLE, CALCASIEU PARISH, LOUISIANA (2013), http://www.atsdr.cdc.gov/hac/pha/CalcasieuParishLA/Mossville_LA_PHA_Initial_Public_Comment_07-09-2013.pdf.

[139] *See* Mossville Petition, *supra* note 130, at 66.

[140] *See id.* at 66–67.

[141] *See id.* at 48.

[142] *See id.* at 47–48.

[143] *See* Mossville Admissibility Report, *supra* note 17, at para. 11.

[144] Jonathan Bachman, *Explosion at Louisiana Chemical Plant Kills 1, Injures 73* (June 13, 2013), http://www.reuters.com/article/us-chemicals-fire-idUSBRE95C0P120130613; PAUL ORUM ET AL., ENVTL. JUSTICE & HEALTH ALL. FOR CHEM. POL'Y REFORM, WHO'S IN DANGER? RACE, POVERTY, AND CHEMICAL DISASTERS (2014), http://www.comingcleaninc.org/assets/media/images/Reports/Who's%20in%20Danger%20Report%20and%20Table%20FINAL.pdf.

[145] Residents of Mossville experience ear, nose, and throat illnesses (such as burning eyes, nasal soreness, nose bleeds, and sinus and ear infections); nervous system disorders (such as headaches, dizziness, tremors, and seizures); cardiovascular disorders (including irregular heartbeat, stroke, heart disease, and chest pain); digestive system ailments (such as frequent vomiting, ulcers, frequent diarrhea, and jaundice); immune system problems (such as allergies, frequent colds, and hair loss); respiratory illnesses; urinary tract infections; and endocrine system disorders. *See*

a particular concern, because dioxin exposure is associated with cancer, damage to the reproductive system, impairment of the immune system, and disruption of the endocrine system.[146]

The disproportionate siting of polluting facilities in the historically African-American community of Mossville is consistent with national and state patterns, whereby hazardous industrial facilities operate in close proximity to communities predominantly populated by people of color.[147] This pattern is particularly evident in the state of Louisiana.

Mossville needs to be understood in its historical context.[148] From the 1870s until the civil rights victories of the 1950s and 1960s, racial discrimination was mandated by law and custom in the southern United States (including Louisiana), and was practiced in other states with or without specific legal authorization.[149] During this period, Mossville residents were denied the right to vote and denied the opportunity to participate in decisions that affected their own environment, community, and lives.[150] Local governments took advantage of the political and economic powerlessness of African Americans to attract polluting industries through generous tax benefits and lax environmental enforcement.[151]

Even though African Americans comprise only thirty-four percent of the state's population, eighty percent of African Americans in Louisiana live within three miles of an industrial facility that releases toxic chemicals.[152] Mossville is located in a county (Calcasieu Parish) where 73.6% of the population is white and only 24.6% of the population is African-American.[153] Nevertheless, the African Americans residing in Mossville live near industrial facilities that are among the dirtiest facilities in the United States according to EPA's Toxic Release Inventory, which compiles data from facility reports documenting chemical releases and waste transfers.[154]

State officials lured industry to Mossville and other areas by exempting manufacturing facilities from property taxes for ten-year periods, which could

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Mossville Admissibility Report, *supra* note 17, at 3, para. 10; Mossville Petition, *supra* note 130, at 73.

[146] *See* Mossville Admissibility Report, *supra* note 17, at para. 11.

[147] *See* Paul Mohai & Robin Saha, *Which Came First, People or Pollution? A Review of Theory and Evidence for Longitudinal Environmental Justice Studies,* 10 ENVTL. RES. LETTERS 1 (2015).

[148] *See generally* Beverly Wright, *Living and Dying in Louisiana's "Cancer Alley," in* THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 87 (Robert D. Bullard ed., 2005).

[149] *See id.* at 87; Mossville Petition, *supra* note 130, at 40.

[150] *See* Mossville Petition, *supra* note 130, at 40.

[151] *See* Wright, *supra* note 148, at 87–95.

[152] *See* Mossville Petition, *supra* note 130, at 78.

[153] *See id.* at 79.

[154] *See id.*

be extended indefinitely by expanding the facility.[155] This legislation turned Louisiana into a haven for polluting industries.[156] Industries operating in Calcasieu Parish have taken full advantage of this generous tax break. Calcasieu Parish ranks second among the sixty-four Louisiana parishes for the highest number of industries receiving the ten-year industrial tax exemption.[157]

Inadequate land use planning at the local level compounded the problem. Mossville is an unincorporated community unlike neighboring municipalities.[158] This means Mossville has no governmental authority to regulate industrial development or land use.[159] Instead, the Calcasieu Parish government makes land use planning decisions affecting Mossville and has repeatedly approved hazardous industrial development in and around the largely African-American Mossville community.[160] Furthermore, because Louisiana does not enforce its comprehensive land use planning statute, local governments have free rein to amend zoning classifications as the need arises without being constrained by a comprehensive plan.[161] Thus, it is not a coincidence that Louisiana is home to a disproportionate number of polluting industries, particularly in the region between Baton Rouge and New Orleans known as "Cancer Alley."[162]

A. U.S. Environmental and Antidiscrimination Law

U.S. environmental law has failed Mossville. Many of the toxic releases that plague the community are difficult to address under the federal environmental statutes.[163] U.S. environmental laws, such as the Clean Air Act and the Clean Water Act, aim to achieve an economically optimal level of pollution rather than a pollution-free environment.[164] For example, the Clean Water Act requires every polluting facility to obtain a permit before

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[155] *See* Oliver Houck, *This Side of Heresy: Conditioning Louisiana's Ten-Year Industrial Tax Exemption Upon Compliance with Environmental Law,* 61 TUL. L. REV. 289, 294 (1986).

[156] *See id.*

[157] *See* Mossville Petition, *supra* note 130, at 37.

[158] *See id.* at 1.

[159] *See* Mossville Admissibility Report, *supra* note 17, at para. 13.

[160] *See* id.

[161] *See* Laura F. Ashley, *Re-Building New Orleans: How the Big Easy Can Be the Next Big Example,* 55 LOY. L. REV. 353, 374–75 (2009).

[162] *See* RECHTSCHAFFEN, GAUNA, & O'NEILL, *supra* note 12, at 196; *see also* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 103–10 (2000).

[163] *See* Mossville Petition, *supra* note 130, at 24.

[164] *See* Gauna, *supra* note 7, at 48. *See generally* Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge Title VI of the Civil Rights Act of 1964 for Environmental Regulation,* 29 B.C. ENVTL. AFF. L. REV. 143 (2002).

discharging its effluent to the nation's waters.[165] The permits typically impose nationally uniform, technology-based effluent limitations for specific categories of industrial dischargers in order to prevent states from relaxing environmental standards to attract industry.[166] If there are numerous dischargers releasing pollutants to the same water body, water quality will be degraded despite compliance by each facility with technology-based standards[167]

To address these heavily polluted water bodies, the Clean Water Act requires states and tribes to impose additional water quality-based discharge limits on polluters to ensure that the water body is suitable for its designated use, such as public water supply, fishing, swimming, and agriculture.[168] However, water quality criteria often consist of "narrative criteria" (such as "free from toxicity") that are difficult to convert to numerical effluent limits. Further, water quality standards may vary considerably from state to state due to scientific uncertainty about the impact of water pollutants on humans and aquatic ecosystems.[169] Implementing this water quality-based safety net is also technically challenging, requiring state agencies to determine the total maximum daily load ("TMDL") of pollutants a water body can assimilate before exceeding water quality standards and then working backward to allocate this amount of pollution among existing dischargers.[170] In short, the Clean Water Act's health-based safety net has been challenging to implement,[171] and the U.S. Environmental Protection Agency continues to work with certain states, such as Louisiana, to promote compliance.[172]

Even the Clean Air Act, which adopts purely health-based National Ambient Air Quality Standards (NAAQS) for the most common air pollutants, may be insufficiently protective, because states are permitted to consider costs in deciding the mix of control strategies adopted to comply with these

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[165] *See* Clean Water Act § 402, 33 U.S.C. § 1342 (2006) (prohibiting the discharge of pollutants into the waters of the United States without a permit).

[166] *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 725–28 (2013) (explaining how technology-based effluent limitations are determined); Victor Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act),* 25 B.C. ENVTL. AFF. L. REV. 1, 13–14 (1997) (explaining that uniform federal standards were adopted to prevent a "race to the bottom").

[167] *See* RECHTSCHAFFEN, GAUNA, & O'NEILL, *supra* note 12, at 224.

[168] *See id.*; PERCIVAL ET AL., *supra* note 166, at 743–47.

[169] *See* PERCIVAL ET AL., *supra* note 166, at 744–46.

[170] *See* RECHTSCHAFFEN, GAUNA, & O'NEILL, *supra* note 12, at 224.

[171] *See id.*

[172] *See, e.g.*, EPA, RECORD OF DECISION FOR EPA ACTION ON LOUISIANA'S CLEAN WATER ACT 2014 § 303(D) LIST 1 (2014), https://www3.epa.gov/region6/water/npdes/tmdl/303d/la/la-2014-303d_decision_document.pdf (finding that Louisiana generally failed to meet its obligation to identify bodies of water that fail to meet water quality standards and require tighter restrictions on polluters).

standards.[173] For example, states can opt to improve air quality by enacting cap and trade programs that establish a cap on aggregate emissions and then allow regulated entities to trade emission allowances in order to meet the cap in the most cost-effective manner.[174] Many of these programs concentrate pollution in low-income communities that host older and larger emitting facilities, because it is cheaper for these facilities to purchase emission credits than to install expensive pollution control technology.[175] Furthermore, NAAQS may not protect communities with high concentrations of polluting facilities (such as Mossville) because compliance is measured by monitoring average levels of air pollution in large geographic areas, thereby failing to take into account "hot spots" in communities that host a disproportionate number of polluting facilities.[176] Finally, the risk assessments used by regulators to determine reasonably safe levels of exposure to pollutants under the Clean Air Act and the Clean Water Act are often under-protective because they examine each pollutant in isolation and fail to account for the cumulative and synergistic exposures experienced by communities in highly industrialized areas.[177]

U.S. anti-discrimination law has also failed Mossville. Lawsuits alleging violations of the Equal Protection Clause of the U.S. Constitution have failed to protect vulnerable communities because courts have interpreted the Equal Protection Clause to require proof of intentional discrimination.[178] The U.S. Supreme Court has rejected claims based solely on statistically disproportionate impact.[179] Litigation under Title VI of the Civil Rights Act of 1964, which prohibits discrimination by programs receiving federal funds, has fared no better.[180] While section 601 of this statute creates a private right of

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[173] *See* PERCIVAL ET AL., *supra* note 166, at 569–77

[174] *See id.* at 624.

[175] *See generally* Richard Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy,* 9 DUKE ENVTL. L. & POL'Y F. 231 (1999).

[176] *See* Gauna, *supra* note 7, at 48–49. The Clean Air Act's regulation of toxic air pollutants also produces hot spots in communities with numerous industrial facilities. Unlike the health-based approach applicable to conventional air pollutants, the Clean Air Act requires EPA to promulgate technology-based emission standards for industrial facilities that emit any of the 189 hazardous air pollutants identified in section 112 (b) of the statute. *See* 42 U.S.C. section 7412(b). While this approach reduces aggregate levels of pollution, residents of highly industrialized areas (like Mossville) continue to be exposed to high concentrations of pollutants due to the large number of emitting facilities. *See* Bradford C. Mank, *What Comes after Technology: Using an "Exception Process: to Improve Residual Risk Regulation,* 13 STAN. ENVTL L.J. 263, 271, 290 (1994).

[177] *See* RECHTSCHAFFEN, GAUNA, & O'NEILL, *supra* note 12, at 195–97, 214; *see generally* Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment,* 1996 U. ILL. L. REV. 103 (1996).

[178] *See* Weinberg, *supra* note 8, at 6–8 ("the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.") (citing Washington v. Davis, 426 U.S. 229, 240 (1976)).

[179] *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535, 548 (1972).

[180] Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d (2015).

action for victims of discrimination, the Supreme Court has determined that this provision similarly requires proof of intentional discrimination.[181] Discriminatory purpose is extremely difficult to prove,[182] and most discrimination is entirely unconscious.[183] Furthermore, many race-neutral policies have a disparate impact on communities of color despite the absence of intentional discrimination, because they reinforce existing structural disadvantages caused by unequal access to education, housing, and employment.[184] Due to the unwillingness of courts to entertain disparate impact claims, environmental racism cases in the United States have generally failed.[185]

Another provision of the Civil Rights Act of 1964, Section 602, offered a brief glimmer of hope for those seeking environmental justice but ultimately proved disappointing. Section 602 authorizes federal agencies to adopt regulations prohibiting state and local governments that receive federal funds from engaging in practices that have *discriminatory impacts* (such as a pattern of siting polluting facilities in communities of color) without requiring proof of discriminatory purpose.[186] In accordance with this provision, the U.S. Environmental Protection Agency ("EPA") has promulgated regulations adopting the disparate impact standard.[187]

Section 602 was promising to environmental justice advocates, because the federal government partially subsidizes state programs that administer federal environmental laws, thereby making most state environmental programs and nearly all state siting or permitting agencies subject to disparate impact scrutiny.[188] However, in 2001, in the case of *Alexander v. Sandoval*, the

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[181] *See* Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 23 (Michael B. Gerrard & Sheila R. Foster eds., 2008).

[182] *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284 (1997); Weinberg, *supra* note 8, at 6–13 (explaining why the difficulty of proving intent has proven fatal to most environmental justice lawsuits).

[183] *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

[184] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that the requirement that power plant employees have high school diplomas violated Title VII of the Civil Rights Act of 1964 because it had a disparate impact on African-American employees and was not justified by a legitimate business purpose).

[185] *See* S. Bronx Coal. for Clean Air v. Conroy, 20 F. Supp. 2d 565 (S.D.N.Y. 1998); R.I.S.E. Inc. v. Kay, 768, F. Supp. 1144 (E.D. Va. 1991); East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989).

[186] *See* Mank, *supra* note 181, at 23–24.

[187] *See, e.g.*, 40 C.F.R § 7.35(a) (2003). The EPA regulations specifically prohibit the siting of facilities in ways that produce discriminatory effects. *See* 40 C.F.R § 7.35(c) (2003).

[188] *See* Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection,* 87 NW. U. L. REV. 787, 835–36 (1993); Mank, *supra* note 181, at 26; Wyatt G. Sassman, *Environmental Justice as Civil Rights,* 18 RICH. J. L. & PUB. INT. 441, 452 (2014).

U.S. Supreme Court held that Section 602 does not create a private right of action to enforce agency regulations.[189] This case was a class action challenging the Alabama Department of Transportation's English-only policy on the basis of Department of Justice's disparate impact regulations.[190] The Court held that Congress did not intend to create a private right of action to enforce federal agency disparate impact regulations and that these regulations could not confer greater rights than the statute.[191] *Sandoval* effectively barred communities affected by environmental racism from suing to enforce disparate impact regulations promulgated by federal agencies.[192]

Unable to obtain justice in court, some communities disparately burdened by pollution have filed complaints with the EPA Office of Civil Rights, which is charged with ensuring that agencies receiving EPA funds act in a non-discriminatory manner.[193] Regrettably, the EPA Office of Civil Rights has a massive backlog of complaints and a poor record of responding to them.[194] The Office of Civil Rights has never once made a formal finding of discrimination under Title VI in its twenty-two year history.[195] Although agency rules requires the EPA to investigate discrimination claims and make findings of fact within 180 days of receipt of the complaint,[196] many communities have been waiting for more than a decade for a response from EPA.[197] As a result, the EPA is currently being sued by six different communities for failure to investigate their complaints in a timely and adequate manner.[198]

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[189] *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

[190] *See id.* at 278–79.

[191] *See id.* at 285–86, 291–93.

[192] *See, e.g.*, S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001) (holding that the plaintiffs did not have a private right of action under the EPA's disparate impact discrimination regulations).

[193] *See* Kristen Lombardi, *Environmental Racism Persists, and the EPA is One Reason Why*, CTR. PUB. INTEGRITY (updated Sep. 4, 2015, 4:55 PM), https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why.

[194] *See id.*

[195] *See id.*; Jeronimo Nisa, *EPA Proposal Would Weaken Civil Rights Protections: Agency Holds Hearings On Revision of Proposed Civil Rights Rule Revision*, EARTHJUSTICE (Jan. 8, 2016), http://earthjustice.org/news/press/2016/epa-office-of-civil-rights-proposal-weakens-civil-rights-protections.

[196] 40 C.F.R. § 7.115(c) (2017).

[197] *See* Californians for Renewable Energy v. EPA, No. 2:2015cv03292 (N.D. Cal. filed Jul. 15, 2015); Lombardi, *supra* note 193**;** Nisa, *supra* note 195.

[198] *See* Californians for Renewable Energy v. EPA, No. 2:2015cv03292 (N.D. Cal. filed Jul. 15, 2015). This lawsuit is based on complaints filed between 1994 and 2003, alleging state and local agencies receiving federal funds engaged in permitting practices that have a discriminatory impact on communities of color. In addition, some residents allege they were discouraged or prohibited from participating in hearings or providing information to regulators. The permitted facilities at issue are: two gas-fired power plants in Pittsburg, California; a landfill in Tallassee, Alabama; a hazardous waste facility in Chaves County, New Mexico; a wood-incinerator power station in Flint,

B. The Mossville Petition Before the Inter-American Commission on Human Rights

On March 8, 2005, Mossville Environmental Action Now filed a petition in the Inter-American Commission on Human Rights (IACHR)[199] alleging that the U.S. government violated the petitioners' rights to equality,[200] privacy,[201] health,[202] and life[203] under the American Declaration of the Rights and Duties of Man,[204] which was adopted in 1948 by the Organization of American States (OAS).[205] Under the OAS Charter, all member countries, including the United States, are bound by the American Declaration and subject to the jurisdiction of the IACHR.[206] Although the American Declaration does not recognize a right to a healthy environment, the IACHR has acknowledged that environmental degradation can threaten other human rights, including "the rights to life, security, and physical integrity."[207] The Mossville petitioners seek remedies in the form of medical services for residents suffering from illnesses related to toxic exposures and relocation of consenting Mossville residents.[208] They also request that the U.S. government refrain from issuing additional permits to polluting facilities in and around Mossville, reform its regulatory system to address multiple, cumulative, and synergistic exposures to toxic chemicals, and require a safe distance between residential populations and hazardous

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Michigan; and an oil-refinery expansion along the Texas Gulf Coast. *Id.* The plaintiffs allege the EPA's delay in investigating the discrimination complaints has enabled these polluting sources to continue to harm local residents. *Id.* Many of the facilities are on the EPA's Significant Violators List, and are paying hefty fines for violating environmental laws and regulations. *Id.* The lawsuit against EPA is being brought under the Administrative Procedure Act for failure to perform a non-discretionary act. *Id.*

[199] *See* Mossville Admissibility Report, *supra* note 17, at para. 1.

[200] American Declaration, *supra* note 15, at art. II ("[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.").

[201] *Id.* at art. V ("[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life."); *id.* at art. IX ("[e]very person has the right to inviolability of home.").

[202] *Id.* at art. XI ("[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.").

[203] *Id.* at art. I ("[e]very human being has the right to life, liberty and the security of his person.").

[204] See American Declaration, *supra* note 15; Mossville Admissibility Report, *supra* note 17, at para. 2 (summarizing the petitioners' claims).

[205] *See* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 173 (2011).

[206] *See id.* at 343; Huang, *supra* note 22, at 243.

[207] Kuna Indigenious People of Madungandi and Embera Indigenious People of Bayano and Their Members v. Panama, Case 12.354, Inter-Am. Comm'n H.R., Report No. 125/12, ¶ 233 (2012).

[208] *See* Mossville Petition, *supra* note 130, at 93.

polluting facilities.[209] On March 17, 2010, the IACHR found two of these claims admissible: the equality and privacy claims.[210]

1. The Equality Claim

The American Declaration provides that "all persons are equal before the law and have the rights and duties established under this Declaration without distinction as to race, sex, language, creed, or any other factor."[211] The petitioners allege that Louisiana's approval of fourteen polluting industrial facilities in and around Mossville has imposed a discriminatory burden of pollution on Mossville residents without any reasonable justification, thereby violating the American Declaration's equality provision.[212]

When evaluating petitions under the Declaration, the IACHR has an established practice of looking to the evolving corpus of human rights law in other jurisdictions in order to give meaning to the terms of the Declaration.[213] For example, in *Dann v. United States,* the IACHR relied on a variety of international law sources to interpret the American Declaration, including legal instruments, reports, and decisons of the Committee to Eradicate All Forms of Racial Discrimination (which oversees compliance with the CERD treaty), the U.N. Human Rights Committee, the International Labor Organization, and the domestic legal systems of various nations.[214]

The IACHR has construed the right to equality under international human rights law to prohibit "not only intentional discrimination, but also any distinction, exclusion, restriction or preference which has a discriminatory effect."[215] For example, in its decision in *Lenahan v. United States*, which involved standards of due diligence in domestic violence cases, the IACHR explained that "States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either in their face *or in practice*; and to combat discriminatory practices."[216] This interpretation is consistent with the

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[209] *See id.* at 94.

[210] *See* Mossville Admissibility Report*, supra* note 17, at paras. 33–34, 37. The IACHR found the right to life and right to health claims inadmissible because it did not believe the petitioners had exhausted domestic remedies based on U.S. environmental law or that efforts to exhaust these remedies would be futile. *See id.* at paras. 35–36.

[211] *See* American Declaration, *supra* note 15, at art. II.

[212] *See* Mossville Admissibility Report*, supra* note 17, at para. 31.

[213] *See id.* at para. 43; Dann v. United States*, supra* note 16, at para. 124.

[214] Brian D. Tittemore, *The Dann Litigation and International Human Rights Law: The Proceedings and Decisions of the Inter-American Commission on Human Rights,* 31 AM. INDIAN L. REV. 593, 614 (2007).

[215] *See* Mossville Admissibility Report*, supra* note 17, at para. 42.

[216] Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11 ¶109 (2011) (emphasis added).

jurisprudence of the European Court of Human Rights, which recognizes disparate impact as one way of establishing discrimination under the European Convention on Human Rights.[217] More importantly, this interpretation is also consistent with the requirements of the CERD,[218] which the U.S. signed and ratified, albeit with significant RUDs.[219]

Article 1.1 of the CERD expressly defines racial discrimination to include "any distinction, exclusion, restriction or preference . . . which has the purpose *or effect*" of nullifying or impairing the equal enjoyment of human rights.[220] Unlike the U.S. equal protection jurisprudence, the CERD's definition of racial discrimination encompasses government actions with discriminatory purpose as well as government actions with discriminatory impacts.[221] The goal of the treaty is not merely formal equality through racially neutral laws and policies, but the attainment of substantive equality.[222] While the CERD does not explicitly address environmental protection, the Committee on the Elimination of All Forms of Racial Discrimination ("CERD Committee"), which monitors state compliance with the treaty, recognized that environmental racism undermines the rights guaranteed under the CERD, including "the rights to freedom, equality and adequate access to basic needs such as clean water, food, shelter, energy, health, and social care."[223]

Although the CERD may not be enforceable in U.S. courts due to the U.S. Senate's declaration that the treaty is non-self-executing,[224] the treaty, which is consistent with the IACHR's equality jurisprudence, will undoubtedly be used by the IACHR to interpret the American Declaration. Based on the foregoing, the Mossville petitioners have a good chance of prevailing on the merits of their claim that racial disparities in the siting of polluting facilities

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[217] Julie Suk, *Disparate Impact Abroad*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 283, 295 (Samuel R. Bagenstos & Ellen D. Katz eds., 2015); Hadyn Davies, *Equal Protection and Environmental Justice: A Matter of Unconscious Justice*, *in* CONTROVERSIES IN EQUAL PROTECTION CASES IN AMERICA: RACE, GENDER AND SEXUAL ORIENTATION 288 (Anne R. Oakes ed., 2015); Rory O'Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR,* 29 LEGAL STUD. 211, 211–29 (2009).

[218] *See* CERD, *supra* note 85, at art. 1.1 (emphasis added).

[219] *See* U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994), http://hrlibrary.umn.edu/usdocs/racialres.html [hereinafter U.S. Reservations].

[220] *See id.* (emphasis added).

[221] *See* Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet its International Obligations in Racial Discrimination Jurisprudence,* 4 DE PAUL J. SOC. JUST. 263, 264 (2011).

[222] Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination,* 79 AM. J. INT'L L. 283, 289 (1985).

[223] *See* Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc A/57/18, at 108 (2002).

[224] U.S. Reservations, *supra* note 219.

in Mossville, Louisiana, violated their right to equality under the American Declaration.

2. The Privacy Claim

The American Declaration recognizes the inviolability of the home as a human right[225] and provides that "[e]very person has the right to the protection of the law against abusive attacks upon . . . his private and family life."[226] The Mossville petitioners allege that the siting of fourteen polluting industrial facilities in and around Mossville caused severe health problems in violation of the right to privacy and the inviolability of the home.[227]

In the United States, the constitutional right to privacy encompasses issues like birth control, child rearing, and abortion,[228] and the Supreme Court has refused to extend this right much further.[229] However, the European Court of Human Rights has adopted a far broader interpretation of the right to privacy, which includes the right to be free from adverse environmental conditions that interfere with the enjoyment of the home.[230] For example, in *López Ostra v. Spain*,[231] *Fadeyeva v. Russia*,[232] *Guerra v. Italy*,[233]and *Tatar v.*

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[225] *See* American Declaration, *supra* note 15, at art. IX.

[226] *See id.*, at art. V.

[227] *See* Mossville Admissibility Report, *supra* note 17, at para. 31.

[228] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the First, Third, Fourth, and Ninth Amendments to the U.S. Constitution created a constitutional right to privacy); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that parents have the right to bring up their child how they see fit); Roe v. Wade, 410 U.S. 113 (1973) (holding the Fourteenth Amendment's concept of personal liberty and the Ninth Amendment's reservation of rights to the people, give women the right to choose whether or not to terminate pregnancy).

[229] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[230] *See, e.g.*, Jeannine Cahill-Jackson, *Mossville Environmental Action Now v. United States: Is a Solution to Environmental Injustice Unfolding?*, 3 PACE INT'L L. REV. ONLINE COMPANION 173, 192–206 (2012) (applying the European Court of Human Rights' jurisprudence on the right to privacy, family life and home to the facts of the Mossville case); Maria T. Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights,* 8 NYU ENVT'L L. H. 437, 471–93 (2000) (describing the European Court of Human Right's jurisprudence on the right to privacy and family life in cases involving pollution).

[231] López Ostra v. Spain**,** App. No. 16798/90, 19, Eur. Ct. H.R. (1994) (holding that odors emanating from an unlicensed waste treatment plant violated the applicant's right to privacy, family life, and home).

[232] Fadeyeva v. Russia, App. No. 55723/00, 7–28, Eur. Ct. H.R. (2005) (holding that toxic emissions from an iron smelter in the middle of a densely populated town violated the applicant's right to privacy, family life, and home).

[233] Guerra v. Italy, App. No. 14967/89, Eur. Ct. H.R. (1998) (holding that exposure to a chemical plant's emissions and withholding of information about potential risks violated the right to privacy, family life, and home).

Romania,[234] the European Court of Human Rights concluded that states violated the petitioners' rights to privacy and family life under the European Convention on Human Rights by failing to take measures to protect local residents from the impacts of polluting facilities.[235] If the IACHR interprets American Declaration in a manner consistent with international human rights norms, then the Mossville petitioners have a good chance of prevailing on their claim that the government's failure to address the impacts of multiple polluting facilities in their community violates their right to privacy, family life, and home under the American Declaration.[236]

3. A Pyrrhic Victory?

While international human rights law favors the Mossville petitioners, a favorable decision by the IACHR may be purely symbolic if the U.S. government resists compliance. For example, in *Dann v. United States,* the petitioners prevailed in their claim that the U.S. government appropriated ancestral indigenous lands in violation of the petitioners' right to property and equality under the American Declaration.[237] While the IACHR's decision made a significant contribution to the growing jurisprudence on the rights of indigenous peoples, the United States refused to implement the IACHR's findings and recommendations.[238]

The Mossville petition illustrates both the advantages and disadvantages of human rights-based approaches to environmental protection in a country like the United States that has generally resisted international human rights law and institutions. The enforcement mechanisms of the international human rights system are notoriously weak and reflect the unwillingness of states to relinquish sovereignty over domestic affairs.[239] However, this does not mean that victories in human rights tribunals are necessarily hollow or pyrrhic. On the contrary, the reports and decisions of human rights bodies must be regarded as means rather than ends, as tools to be used by social movements in the struggle to expose and remedy human rights abuses.[240]

A victory by the Mossville petitioners before the IACHR would name and shame the United States by highlighting the enormous gap between the

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[234] Tatar v. Romania, App. No. 67021/01, 44–45, Eur. Ct. H.R. (2009) (holding that exposure to cyanide after the breach of a holding dam at a gold mine violated the right to privacy, family life, and home).

[235] *See* Cahill-Jackson, *supra* note 230, at 192–206 (analyzing the leading cases of the European Court of Human Rights and concluding that the Mossville petitioners have a strong likelihood of prevailing on the merits of their claim).

[236] *See id.*

[237] *See* Tittemore, *supra* note 214, at 594.

[238] *See id.* at 614–17.

[239] *See* Lewis, *supra* note 117, at 237.

[240] *See id.* at 242–43.

narrow interpretation of antidiscrimination law adopted by U.S. courts and the requirements of international human rights law, including the American Declaration and the CERD. Like the NAACP and CRC U.N. petitions, the appellate court decision in the *Fujii* case, and the Supreme Court briefs citing international law in the desegregation cases, a decision in favor of the Mossville petitioners would challenge American exceptionalism by demonstrating the shortcomings of U.S. antidiscrimination law and offering specific measures the United States might take to comply with its international human rights obligations.

A decision in favor of the Mossville petitioners would put pressure on U.S. decision-makers to respect, protect, and fulfill the human rights of Mossville residents to avoid international condemnation at a time when the water crisis in Flint, Michigan and the violence against the water protectors at Standing Rock, North Dakota, have tarnished the country's international image.[241] The U.S. government may be hostile to international human rights law, but it has generally been sensitive to the foreign policy implications of its troubled history of race relations. As discussed in Part II of this Article, the Cold War rivalry between the United States and the Soviet Union for the allegiance of newly independent states in Africa and Asia helped spur racial progress in the United States. While the demise of the Soviet Union ended the Cold War, the United States is currently locked in a struggle against radical Islam that requires the cooperation of Asian and African allies to succeed.[242] A decision against the United States in the Mossville case might have induced compliance, rather than resistance, from the Obama administration as a means of moderating the country's negative image in the eyes of potential allies. However, President Donald Trump, who repeatedly alienated voters of color during his election campaign, is less likely to be influenced by the IACHR's decision.[243]

A determination that the United States violated the human rights of the Mossville petitioners would provide environmental justice advocates with additional tools to harmonize U.S. and international antidiscrimination law. The findings and recommendations of the IACHR in the Mossville case could be used to propose changes to existing laws to promote environmental justice, such as amending Title VI of the Civil Rights Act of 1964 to prohibit policies

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[241] *See, e.g.,* John Eligon, *A Question of Environmental Racism in Flint*, N.Y. TIMES (Jan. 21, 2016), https://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html; Jason Nichols, *Environmental Racism Harms Americans in Flint – and Beyond,* THE GUARDIAN (Jan. 23, 2016), https://www.theguardian.com/commentisfree/2016/jan/23/environmental-racism-harms-americans-in-flint-and-beyond; Andrew Buncombe, *Standing Rock Protest, Amnesty International Condemn 'Excessive' Force Used by Police,* THE INDEPENDENT (Dec. 4, 2016), http://www.independent.co.uk/news/world/americas/standing-rock-pipeline-amnesty-international-excessive-force-north-dakota-a7455176.html.

[242] *See* Richard Delgado, *Why Obama? An Interest Convergence Explanation of the Nation's First Black President,* 22 LAW & INEQ. 345, 362–65 (2015).

[243] *See* Michael D'Antonio, *Is Donald Trump Racist? Here's What the Record Shows,* FORTUNE (June 7, 2016), http://fortune.com/2016/06/07/donald-trump-racism-quotes/.

and practices that have discriminatory racial impacts. At a minimum, Congress should amend section 602 of the Civil Rights Act of 1964 to overturn *Alexander v. Sandoval* and authorize private rights of action to enforce federal agency disparate impact regulations. This legislative strategy may not succeed in a Republican-dominated Congress after a divisive presidential election in which economic anxiety was filtered through the lens of racialized animus.[244] However, the political tide may turn if the presidency of Donald Trump unites and galvanizes movements for social and economic justice and generates a multiracial coalition dedicated to eradicating racial, gender, and economic inequality.

The Mossville petition gives the IACHR the opportunity to educate regulators in the United States about the relationship between environmental protection and human rights. Just as the 2005 Inuit petition before the IACHR put a human face on climate change and sparked unprecedented cooperation between environmental and human rights institutions,[245] the Mossville petition may influence the way state and federal environmental regulators think about siting and permitting polluting facilities and the enforcement of environmental statutes. Viewing the regulatory process through the lens of human rights, including equality and non-discrimination, means that progress will not be measured by aggregate environmental statistics, but by the impact on those most vulnerable (including children, the elderly, and people with chronic health conditions) and those most exposed (such as overburdened communities of color like Mossville).[246] Whereas environmental protection traditionally focuses on achieving optimal levels of pollution without regard to the distributional implications,[247] a human rights approach entitles all people to a minimum core level of environmental quality.[248] Such a reconceptualization of environmental law could occur at the federal level under the auspices of the Federal Inter-Agency Working Group on Environmental Justice, which was established in 1994 to implement President Clinton's Executive Order 12898 on environmental justice.[249]

Furthermore, the Mossville petition represents an opportunity to clarify and develop both treaty and customary international law regarding the right to a healthy environment and the obligation of states to regulate corporations

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[244] *See, e.g.,* Sean McElwee, *Yep, Race Really Did Trump Economics: A Data Dive on His Supporters Reveals Deep Racial Animosity,* SALON (Nov. 13, 2016), http://www.salon.com/2016/11/13/yep-race-really-did-trump-economics-a-data-dive-on-his-supporters-reveals-deep-racial-animosity/; Amanda Taub, *Behind 2016's Turmoil, a Crisis of White Identity,* N.Y. TIMES (Nov. 1, 2016), https://www.nytimes.com/2016/11/02/world/americas/brexit-donald-trump-whites.html.

[245] *See* Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT'L L. 31, 34 (2015) (discussing the Inuit petition submitted to the Inter-American Commission on Human Rights).

[246] *See id.* at 53.

[247] *See* Gauna, *supra* note 7, at 48; Yang, *supra* note 164, at 173.

[248] *See* Bratspies, *supra* note 245, at 36.

[249] *See* Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

in order to fulfill these rights. In its response to the Mossville petition, the United States denied the existence of a right to a healthy environment as a stand-alone right or as a prerequisite to the fulfillment of other human rights recognized in the American Declaration.[250] The IACHR has developed in some detail the notion that environmental protection is a precondition to the enjoyment of other human rights.[251] The Mossville petition enables the IACHR to clarify the substantive and procedural obligations of the United States under the American Declaration and explain the relationship between environmental quality and the equality and privacy claims the IACHR found admissible.

In particular, the IACHR might address the obligations of the United States to regulate non-state actors, such as the corporations that own the fourteen polluting facilities located in or near Mossville. A recent study published in Environmental Research Letters found that ninety percent of toxic emissions in the United States come from just five percent of polluting facilities and that minority and low-income communities are more likely to live in close proximity to these super-polluters.[252] This research suggests that substantial environmental gains may be made by focusing on these hyper-polluters and that it would be helpful for the IACHR to clarify the obligations of states to regulate these and other corporate actors. In addition, the Guiding Principles on Business and Human Rights, which was unanimously endorsed by the U.N. Human Rights Council in 2011, articulated a clear duty on the part of business enterprises to respect human rights.[253] A decision from the IACHR clarifying the human rights responsibilities of business enterprises in Mossville, independent of state duties, would enable social movements to bring international pressure to bear on transnational corporations, such as SASOL, to comply with international human rights norms.[254]

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[250] *See* Mossville Admissibility Report, *supra* note 17, at para. 18.

[251] *See* Bratspies, *supra* note 245, at 52. The Inter-American Commission and the Inter-American Court have developed an impressive body of jurisprudence on the relationship between human rights and environmental protection. The right to a decent or dignified life has been used to hold states responsible for violations of economic, social, and cultural rights, including the rights to health, food, and clean water. *See, e.g.*, Yakye Axa Indigenous Cmty. v. Para., Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶167 (Jun. 17, 2005); *see generally* Sophie Theriault, *Environmental Justice and the Inter-American Court of Human Rights*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 309–30 (Anna Grear & Louis J. Kotzé eds., 2015).

[252] Mary B. Collins et al., *Linking 'Toxic Outliers' To Environmental Justice Communities,* 11 ENVTL. RES. LETTERS (Jan. 26, 2016).

[253] *See* U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Rep.of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 17th Sess., U.N. Doc. A/HRC/17/31(Mar. 21, 2011), *available at* http://www.businesshumanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf.

[254] *See generally* Joanne Bauer, *Business and Human Rights: A New Approach to Advancing Environmental Justice in the United States, in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 175 (Shareen Hertel & Kathryn Libal eds., 2011) (discussing ways that

Finally, the Mossville petition gives the IACHR the opportunity to address the intersectional and multi-dimensional nature of environmental injustice and the indivisibility of human rights. Mossville residents are living in an industrial sacrifice zone not just because they are black, but also because they are too poor to move.[255] Racial discrimination and material deprivation are often inextricably intertwined.[256] Although the United States is not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United States signed and ratified the CERD, which prohibits discrimination in the enjoyment of not only civil and political rights, but also economic, social, and cultural rights, including housing, employment, public health, and education.[257] Because the IACHR routinely refers to the evolving corpus of international human rights law to interpret the American Declaration, the Mossville petition provides an excellent occasion to clarify the relationship between the United States' obligations under the CERD and the rights to equality, privacy, family, and home under the American Declaration.

IV. CONCLUSION

Compliance with international law was important to the United States in the early days of the Republic, because the country was vulnerable to attack by powerful European states. When the United States emerged as a superpower in the aftermath of World II, the cost of violating international law diminished considerably. From its insertion of a domestic jurisdiction clause in the U.N. Charter, to its practice of ratifying human rights treaties sparingly and with restrictive RUDs, the United States actively resisted international human rights obligations. The driver of this resistance in the post-war period was the country's determination to maintain state-sponsored racial discrimination in the face of evolving international human rights norms that made this practice illegal. During the Cold War, human rights activists were branded as traitors and subversives who threatened the country's prestige in the eyes of the Third World. The United States blocked efforts by the NAACP and the CRC to present human rights petitions to the United Nations and deployed an arsenal of judicially created doctrines to prevent the enforcement of human rights treaties in U.S. courts.

In the 1960s, both Malcolm X and Martin Luther King Jr. condemned the bifurcation of civil rights from human rights and advocated the

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environmental justice movements can press corporations to comply with international human rights norms).

[255] *See* Rick Mullin, *Mossville's End,* 94 CHEMICAL & ENGINEERING NEWS 33 (Mar. 21, 2016) (explaining the goal of many Mossville residents is relocation, but that buyouts offered by SASOL and other industrial facilities are often insufficient).

[256] *See* Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection,* 89 GEO. L.J. 2279, 2288–92 (2001) (discussing the relationship between racial inequality and material deprivation).

[257] *See* CERD, *supra* note 85, at art. 5.

internationalization of the movement for social and economic justice.[258] More recently, scholars have lamented the lack of attention to human rights in the U.S. environmental policy discourse and have called for stronger linkages between environmental justice and human rights.[259] Communities of color disparately burdened by environmental degradation are increasingly heeding this call. Unable to obtain relief in U.S. courts from environmental racism, the residents of Mossville, Louisiana are appealing to the IACHR. By insisting that the United States comply with its human rights obligations, they are revealing the deficiencies of the U.S. legal system in relation to evolving international human rights norms and calling for reform. In so doing, the Mossville petitioners are bridging the gap between international law and domestic law, bringing human rights home, and demanding that the United States live up to its promise of justice for all.

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[258] *See* Dorothy Q. Thomas, *Against American Supremacy: Rebuilding Human Rights Culture in the United States, in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS 1 (Cynthia Soohoo et al. eds., 2008).

[259] *See, e.g.*, Damayanti Banerjee, *Environmental Rights, in* THE LEADING ROGUE STATE: THE U.S. AND HUMAN RIGHTS 164 (Judith Blau et al. eds., 2008); Bratspies, *supra* note 245 (discussing the benefits of recognizing a human right to a healthy environment); *but see* Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South,* 13 SANTA CLARA J. INT'L L. 151 (2015) (discussing both the advantages and disadvantages of human rights-based approaches to environmental protection).