

SPEAKING UP TO STOP THE CLIMATE CRISIS: HOW THE FIRST AMENDMENT AND EQUAL PROTECTION PROVISIONS CAN AMPLIFY ADVOCACY FOR FRONTLINE COMMUNITIES

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Abstract

This Article explores the need for an interdisciplinary approach to climate advocacy. Frontline communities in the United States watch as court decisions erode their legal protections, and they bear the burden of disproportionate pollution. Environmental justice activists are speaking out, and these advocates are also educating the public of their unique struggles for clean air, water, and soil. However, their advocacy is under attack and most traditional environmental lawsuits will not solve their problems. Below I explore ways that First Amendment advocacy could better include these environmental justice issues.

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I. INTRODUCTION

*What have I, or those I represent, to do with your national independence?
Are the great principles of political freedom and of natural justice, embodied
in that Declaration of Independence, extended to us?*

- Frederick Douglass¹

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1. Frederick Douglass, *All Rights for All!*, Frederick Douglass' Paper, July 9, 1852, at 1.

Environmental racism and white supremacy are closely linked.² Because of this, without intervention, attacks on advocates at the intersection of racial justice and environmental protections will rise.

White residents resisted environmental hazards in their neighborhoods, sparking the Not in My Back Yard (NIMBY) movement.³ They diverted the pollution burden to Black and other frontline communities.⁴ And we continue to see a disproportionate number of environmental hazards in communities of color.⁵ At the same time, a narrow interpretation in what it meant to practice environmental law left frontline communities unprotected for years.⁶ Frontline communities are typically communities with larger populations of Black, Latine, Indigenous, and poor residents.⁷ Frontline communities are often low resourced and are sometimes considered historically excluded or disadvantaged communities.⁸ I use this term in this Article to highlight that frontline communities typically feel the most impact and experience brutal effects regarding environmental racism and climate change.⁹ Some believe that the complexity of environmental laws created an easier pathway for hazards to be placed in frontline communities.¹⁰

2. See COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 15–16 (1987).

3. See *id.*; Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 495 (1994).

4. See Gerrard, *supra* note 3.

5. See COMMISSION FOR RACIAL JUSTICE, *supra* note 2.

6. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 620 (1993) (“Until recently, mainstream environmental groups have not focused on the environmental problems faced by low-income communities, and poverty lawyers traditionally have not ranked environmental cases highly.”). See generally Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809 (2018). Even in writing environmental statutes, a justice component was completely disregarded because economic equity concerns were diminishing and therefore the inequitable distribution of harms and disparate impact were deprioritized and completely erased from many early environmental statutes.

7. Cole, *supra* note 6, at 624–27.

8. U.S. Department of Energy, *Justice40 Initiative Fact Sheet* (2021), https://www.energy.gov/sites/default/files/2022-08/J40%20Fact%20Sheet%208_25_22%20v3.pdf [<https://perma.cc/AGX5-RTFA>].

9. Monica C. Sanders, *Equity in Addressing Climate Change: Using Law and Policy to Serve Frontline Communities*, 27 AM. PSYCH. ASS’N 48, 50–51 (Oct. 26, 2021).

10. See Cole, *supra* note 6, at 644, 646.

And today, the United States remains reliant on fossil fuels and plastic which has increased environmental justice issues in frontline communities.¹¹ U.S. based government entities, scientists, and researchers, as well as policy-making bodies have not focused enough on water conservation, infrastructure, and trees, all of which are vital for a functioning climate in all communities.¹² Human made climate decisions, such as burning fossil fuels, have caused some of the hottest days in U.S. history.¹³ They've also led to drought and more frequent and severe natural disasters.¹⁴ Communities of color are bearing the brunt of these decisions.¹⁵ Globally, the Amazon Forest may be beyond repair and our oceans are so full of debris that the fish are dying.¹⁶ There is also an uptick in untested projects placed in frontline communities, making the problem worse and enabling environmental

11. *Fossil Fuel Sources Accounted for 79% of U.S. Consumption of Primary Energy in 2021*, U.S. ENERGY INFO. ADMIN. (July 1, 2022), https://www.eia.gov/todayinenergy/detail.php?id=52959&utm_ [https://perma.cc/2WBJ-3AY9]; *U.S. Plastics Trade by the Numbers*, AM. CHEMISTRY COUNCIL, <https://www.americanchemistry.com/chemistry-in-america/data-industry-statistics/u.s.-plastics-trade-by-the-numbers/> [https://perma.cc/TBZ9-U49W].

12. See Fatima Yousofi et al., *Climate Change Poses Risks to Neglected Public Transportation and Water Systems*, PEW TRUSTS (Sept. 2024), <https://www.pewtrusts.org/-/media/assets/2024/09/climate-change-poses-risks-to-neglected-public.pdf> [https://perma.cc/V7ZH-FDP7]; Cary Funk et al., *Majorities See Government Efforts to Protect the Environment as Insufficient*, PEW RSCH. CTR. (May 14, 2018), https://www.pewresearch.org/internet/2018/05/14/majorities-see-government-efforts-to-protect-the-environment-as-insufficient/?utm_ [https://perma.cc/99V9-MQ8U]; *Gaps in Laws and Policies Leave Water and Sanitation Systems Vulnerable to Harmful Climate Impacts in Frontline Communities Across the US, New Report Finds*, GLOBAL NEWS WIRE (Oct. 21, 2024, 8:05 PM), https://www.globenewswire.com/news-release/2024/10/21/2966172/0/en/Gaps-in-Laws-and-Policies-Leave-Water-and-Sanitation-Systems-Vulnerable-to-Harmful-Climate-Impacts-in-Frontline-Communities-Across-the-US-New-Report-Finds.html?utm_ [https://perma.cc/G23U-ZRQN].

13. See *Extreme Heat in North America, Europe and China in July 2023 Made Much More Likely by Climate Change*, WORLD WEATHER ATTRIBUTION (July 25, 2023), <https://www.worldweatherattribution.org/extreme-heat-in-north-america-europe-and-china-in-july-2023-made-much-more-likely-by-climate-change/> [https://perma.cc/4YRY-MVPJ].

14. *Extreme Weather and Climate Change*, NASA, <https://science.nasa.gov/climate-change/extreme-weather/> [https://perma.cc/85KD-JWTC].

15. See Sanders, *supra* note 9.

16. See Gisele Bundchen, *Amazon Deforestation and Climate Change*, NAT'L GEOGRAPHIC (Mar. 17, 2025), <https://education.nationalgeographic.org/resource/amazon-deforestation-and-climate-change/> [https://perma.cc/4TG4-8UCQ]; *Ocean Plastics Pollution: A Global Tragedy for Our Oceans and Sea Life*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/campaigns/ocean_plastics/ [https://perma.cc/M28M-NCMK].

racism to persist.¹⁷ For example, the U.S. Environmental Protection Agency (EPA) recently approved Louisiana overseeing the largest Class VI Program Revision Application to date.¹⁸ This is despite residents' objections of the project due to the 22 other injection wells that are in the state.¹⁹ Many of the existing wells are in frontline communities and the new project would allow for additional siting in Louisiana's frontline communities.²⁰ The permit allowed the Louisiana Department of Natural Resources to inject carbon dioxide in the ground despite safety concerns.²¹ A smaller scaled carbon dioxide pipeline erupted in Mississippi that sent 49 people to the hospital.²² And Louisiana's plan to implement this project has ignored community input.²³

While this country reckons with its role in creating a climate emergency which will only get worse by increasing fossil fuel production, in 2023, the Southern Poverty Law Center tracked a record 165 white nationalist groups.²⁴ White nationalist groups believe in the inferiority of people of color.²⁵ Inevitably, white nationalism overlaps with NIMBY-ism and attacks on communities harmed by environmental racism.²⁶ White nationalists do not consider communities of

17. A. Conner & M. McClanahan, Comment Letter on Proposed Class VI Program Revision Application to Include Class VI Geologic Sequestration (July 3, 2023), <https://naacp.org/sites/default/files/documents/NAACP%20comments%20re%20LA%20Primacy%20and%20CCS%20EPAHQOW20230073.pdf> [<https://perma.cc/NF47-UWTS>]; Yukyan Lam et al., *Analysis of Proposed Carbon Capture Projects in the U.S. Power Sector and Co-Location with Environmental Justice Communities*, TISHMAN ENV'T & DESIGN CTR. (Sept. 2023), https://static1.squarespace.com/static/5d14dab43967cc000179f3d2/t/64f9df23792cce775bf32100/1694097188142/Map_Proposed+CCS+Projects+-+Two+Pager_CURRENT.pdf [<https://perma.cc/BR3T-K3FV>].

18. State of Louisiana Underground Injection Control Program Class VI Program Revision Application; 88 Fed. Reg. 28450 (May 4, 2023); Conner & McClanahan, *supra* note 17.

19. Conner & McClanahan, *supra* note 17.

20. *Id.*

21. *Id.*; see also State of Louisiana Underground Injection Control Program Class VI Primacy, 40 C.F.R. § 147 (2024).

22. Conner & McClanahan, *supra* note 17; Dan Zegart, *The Gassing of Satartia*, HUFFPOST (Aug. 26, 2021), https://www.huffpost.com/entry/gassing-satartia-mississippi-co2-pipeline_n_60ddea9fe4b0ddef8b0ddc8f [<https://perma.cc/AJN7-FH7K>].

23. Zegart, *supra* note 22.

24. *White Nationalists*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist> [<https://perma.cc/E5KZ-9F2Q>].

25. See *id.*

26. See Phuong Ho, *The Costs and Environmental Justice Concerns of NIMBY in Solid Waste Disposal*, 10 J. ASS'N ENV'T & RES. ECO. 607, 651 (2023) (concluding "waste is currently more likely sent to facilities in communities with a high percentage of minorities").

color worthy of protection.²⁷ Indeed, environmental and climate justice activists have raised alarms about the impact of the climate emergency on frontline communities.²⁸ However, environmental justice activists are facing backlash for speaking out to share the danger of the global climate catastrophe.²⁹ This is despite the First Amendment protections which purportedly vests them with access to petition the government and exercise free speech.³⁰ Mari Matsuda stated, “The clear and present danger of climate chaos will require all hands on deck—all citizens standing free, equal, and mutual—if we are to respond in a way that does not end democracy itself.”³¹

Nevertheless, many free speech absolutists have ignored the narratives and intentionally built legal cases without frontline communities for decades.³² This failure to center frontline communities’ narratives cannot continue as it will create new barriers for today’s and tomorrow’s advocates for environmental and climate justice in historically excluded communities.³³ Early scholars in the environmental

27. See *White Nationalists*, *supra* note 24.

28. See Dana R. Fisher & Sohana Nasrin, *Climate Activism and Its Effects*, WIRES CLIMATE CHANGE (2020), <https://climateadvocacylab.org/system/files/Fisher%20Nasrin%202020%20-%20Climate%20activism%20and%20its%20effects.pdf> [https://perma.cc/6FLA-8LC5].

29. See Nina Lakhani et al., *How Criminalisation Is Being Used to Silence Climate Activists Across the World*, THE GUARDIAN (Oct. 12, 2023), <https://www.theguardian.com/environment/2023/oct/12/how-criminalisation-is-being-used-to-silence-climate-activists-across-the-world> [https://perma.cc/LL5P-2J24]; *Joint Declaration on the Climate Crisis and Freedom of Expression*, OFF. HIGH COMM’R HUM. RTS. (May 3, 2024) [hereinafter *Joint Declaration on the Climate Crisis*], <https://www.ohchr.org/sites/default/files/documents/issues/expression/statements/20240503-statement-freedom-expression-climate-change-EN.pdf> [https://perma.cc/9NSD-NAML] (“Acknowledging the elevated risk faced by journalists, environmental and other human rights defenders and whistleblowers when shedding light on environmental and climate issues, and condemning censorship of environmental and climate debates through online and offline violence, suppression of protests and public assemblies, arbitrary detention, and the pursuit of strategic lawsuits against public participation (SLAPPs) by private actors and public authorities[.]”).

30. U.S. CONST. amend. I.

31. Mari Matsuda, *Dissent in a Crowded Theater*, 72 SMU L. REV. 441, 456 (2019).

32. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 467, 472 (1990).

33. See Purdy, *supra* note 6, at 834 (“[M]ost of the time public interest law firms represent established and well-informed groups or organizations. The environmental . . . cases are the best examples of this.”); *id.* at 480 (“We must also begin to think creatively as lawyers. We must embark upon the development of a first amendment jurisprudence that is grounded in the reality of our history and contemporary experience . . .”).

justice movement called for an interdisciplinary approach to environmental issues.³⁴ They highlighted areas like poverty, housing, tax, and civil rights law.³⁵ I argue that a comprehensive First Amendment strategy includes framing and power dynamic shifts to include environmental and climate justice advocates as well.³⁶

II. THE EVOLUTION OF FREE SPEECH ACCESS

You may rejoice, I must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony.³⁷

The First Amendment should protect everyone, but history shows it has not.³⁸ Many historic cases involving First Amendment speech have an under inclusion of fact patterns that promote protecting frontline communities.³⁹ The omission of frontline narratives and empowerment in the free speech space has contributed to an entitlement among white supremacist groups.⁴⁰ For example, recent messages between well-known white nationalists read that they were willing to evoke violence in the name of free speech: “Kline to Spencer: ‘Just got off the phone with Kessler and the ACLU . . .’ Kessler to Spencer: We’re raising an army my liege. For free speech, but the cracking of skulls if it comes to it.”⁴¹

34. See Cole, *supra* note 6, at 671–72; Purdy, *supra* note 6 at 837.

35. See Cole, *supra* note 6 at 671–72.

36. See U.S. CONST. amend. I.

37. FREDERICK DOUGLASS, “*The Meaning of July Fourth for the Negro*,” in *SELECTED SPEECHES AND WRITINGS* 188 (Philip S. Foner ed., 1999).

38. See generally Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL L. REV. 871 (1994); see also Lawrence III, *supra* note 32.

39. Delgado & Yun, *supra* note 38, at 881–82. In fact, history has demonstrated that people of color have made the most progress regarding the use of the First Amendment when they defied the traditional use of the Constitution. This included defying slavery. *Id.* When the Constitution was drafted, enslaved people were not a concern. However, with the Civil Rights Movement, Black people were arrested for “exercising their free speech.” See *id.*

40. See *id.* at 874–75 (discussing how campus speech codes and a city ordinance that prohibited hate speech were challenged by First Amendment claims and ultimately struck down); Lawrence III, *supra* note 32, at 472 (“Whenever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society . . . [t]his amounts to white domination, pure and simple.”).

41. Elle Reeve, *Charlottesville Civil Trial Will Explore Where Free Speech Becomes Conspiracy to Commit Violence*, CNN (Oct. 26, 2021), <https://www.cnn.com/2021/10/26/us/charlottesville-lawsuit-civil-trial/index.html> [https://perma.cc/FH7A-WVPD].

Additionally, certain industries, government agencies, and hate groups use Strategic Litigation Against Public Participation (SLAPP) lawsuits and other tactics to attack and silence frontline communities.⁴² Legal arguments against frontline communities are now more egregious.⁴³ The Atlanta Solidarity Fund, an organization working to provide resources to individuals who may have been arrested, announced last year that environmental justice activists who opposed “Cop City”—a project in Atlanta, Georgia that would demolish tree canopy—were bracing for state prepared Racketeer Influenced and Corrupt Organizations Act (RICO) charges.⁴⁴ The state hinted at their preparation of RICO charges, primarily used to stop Mafia activity, near the “Week of Action” planned to raise awareness regarding opposing Cop City.⁴⁵ Don Samuel, an expert in RICO law noted, “The notion that RICO would be invoked to punish protestors engaged in a widely-supported challenge to a government decision is a giant leap in the wrong direction.”⁴⁶

Decades ago, in cases such as *Village of Skokie v. National Socialist Party of America*, the goal was to represent individuals with the intention of ensuring that protecting even the most egregious speech would demonstrate that all other types of speech should also be protected.⁴⁷ However, this trickle-down theory has not proven to have the intended impact needed. In *Skokie*, the National Socialist Party of America (NSPA) challenged the Village of Skokie’s ordinances that would require them to obtain a permit and have a sizeable insurance bond to hold public demonstrations.⁴⁸ The NSPA claimed the ordinances violated their First Amendment rights by stopping their march.⁴⁹ The case dealt with whether the government could restrict the party’s speech and assembly.⁵⁰ The ordinances were

42. Jennifer Safstrom, *Time to SLAPP Back: Advocating Against the Adverse Civil Liberties Implications of Litigation that Undermines Public Participation*, 3 LSU L.J. SOC. JUST. & POL’Y 125, 135–42; *Joint Declaration on the Climate Crisis*, *supra* note 29.

43. Safstrom, *supra* note 42; *Joint Declaration on the Climate Crisis*, *supra* note 29; Matsuda, *supra* note 31.

44. *Statement on Possible RICO Charges Against Stop Cop City Activists*, ATLANTA SOLIDARITY FUND (Feb. 27, 2023), <https://atlsolidarity.org/statement-on-possible-rico-charges-against-stop-cop-city-activists/> [https://perma.cc/2UAB-A582].

45. *Id.*

46. *Id.*

47. 373 N.E.2d 21, 26 (Ill. 1978).

48. *Id.* at 22–23.

49. *Id.* at 23.

50. *Id.* at 22–23.

enacted due to a feared harmful reaction from the community and the speech's content.⁵¹

At the time, the NSPA planned to march in uniforms that had Nazi symbols, including swastikas, on their clothing.⁵² Skokie was a predominantly Jewish community, with a significant population of Holocaust survivors.⁵³ Because of this, there was a counterprotest being planned by Jewish individuals.⁵⁴ The Supreme Court held that the National Socialists could march in Nazi uniforms in Skokie, despite Skokie's large Jewish population.⁵⁵

The ruling allowed individuals to display swastikas in this Jewish community.⁵⁶ The Illinois Supreme Court, on remand, held that swastikas, even in this setting, were not "fighting words."⁵⁷ The Illinois Supreme Court said that removing swastikas before the march was a "prior restraint" on speech and that the listeners' feelings were not enough to allow a government entity to limit that speech.⁵⁸ A parallel case, *Collin v. Smith* struck down the ordinance in the city that made it a crime to disseminate materials that may incite racial, religious, or other hatred.⁵⁹ Together, these cases laid the groundwork for the march that was ultimately moved to Chicago.⁶⁰ The court likely believed these protections would be neutrally applied over time, stating "the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich."⁶¹

Many free speech absolutists cling to the rationale outlined in *Skokie*.⁶² These free speech absolutists often share that expressing unpopular ideas is a fundamental

51. Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 629 (1985).

52. Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 22 (1978).

53. *Id.*

54. *Id.*

55. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977).

56. *Id.*

57. *Skokie*, 373 N.E.2d at 22.

58. *Id.*

59. 578 F.2d 1197, 1210 (7th Cir. 1978).

60. See generally Downs, *supra* note 51 (discussing case law leading to the march in Chicago).

61. *Collin*, 578 F.2d at 1201.

62. See generally *Skokie*, 373 N.E.2d at 26 ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").

right in a democracy.⁶³ Opinions such as *Skokie* were meant to enhance free speech protections for everyone. Both at that time and now, it is controversial to use these cases to build the fundamental rights argument.⁶⁴ *Skokie*, indeed, harmed Holocaust survivors in doing so.⁶⁵

Likewise, free speech absolutists have argued another controversial point to the Supreme Court—that it was best to not criminalize speech that harmed Black people.⁶⁶ In *R.A.V. v. City of St. Paul*, the Supreme Court struck down an ordinance that made it a crime to burn a swastika or cross because the ordinance singled out swastikas and cross burning based on whether the person was motivated by race, color, creed, gender, or religion bias.⁶⁷ However, the background of this case is important. The city of St. Paul wrote an ordinance to protect Black families.⁶⁸ *R.A.V.*, a juvenile at the time, placed a burning cross in the family’s yard after the family recently moved to the neighborhood.⁶⁹ The ordinance made it a misdemeanor to “place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika,” if one knew or had reason to know it would “anger . . . others based on race, color, creed, religion, or gender.”⁷⁰ The Court unanimously struck down the ordinance.⁷¹ Many free speech absolutists believed this decision upheld provisions within the First Amendment. The ruling highlighted that the

63. See, e.g., Nadine Strossen, *Freedom of Speech and Equality: Do We Have to Choose?*, 25 J. L. & POL’Y 185, 186 (2016) (discussing the negative impact of disallowing offensive and hateful speech).

64. See Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 13 (Fall 1989) (arguing that the First Amendment is a “crude implement” at protecting the justifications for the First Amendment); Delgado & Yun, *supra* note 38 (discussing how the theory of paternalistic objections to free speech reform often highlights that people of color do not understand free speech fully enough to understand those decisions will benefit them as well); Lawrence III, *supra* note 32 (discussing the tension between free speech constitutional values).

65. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2357 (Aug. 1987) (explaining the limits to racist and semantic speech under the First Amendment); Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963, 969–72 (Summer 2009). See generally *Skokie*, 373 N.E.2d 21.

66. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992).

67. *Id.* at 379–80, 391.

68. *Id.* at 393 (“[T]he ordinance applies only to ‘racial, religious, or gender-specific symbols’ such as ‘a burning cross, Nazi swastika or other instrumentality of like import.’”); *Virginia v. Black*, 538 U.S. 343, 352–54 (2003) (explaining how cross burning became inextricably tied to the Ku Klux Klan).

69. *R.A.V.*, 505 U.S. at 379.

70. *Id.* at 380.

71. See *id.* at 379, 391.

First Amendment protects even the most offensive speech, unless it is a true threat or incitement to imminent lawless action.⁷² The rationale that the Court deemed important reflected removing government actors from deciding which ideas are acceptable or unacceptable,⁷³ thus supposedly ensuring even broader protections of free speech for all.⁷⁴

However, these First Amendment protections, while in some instances should support frontline advocates' free speech, have not helped many environmental justice advocates.⁷⁵ Environmental justice advocates' inaccessibility to utilize free speech protections is likely due to their proximity with other racial justice advocates who have also struggled to access free speech protections.⁷⁶ In *R.A.V.*, many free speech absolutists downplayed the harm to the Black family and any enduring harm the decision to uplift a white supremacist narrative could create.⁷⁷ Free speech absolutists wanted to celebrate a win for free speech even if it meant reinforcing white supremacist ideology.⁷⁸

This model of looking at cases with a tilt towards professional and elite advocacy, coined the "legal-liberal" model that impacted the environmental legal movement, likely impacted the decisions for First Amendment case selection as well.⁷⁹ The legal-liberal model framed issues from the perspective that individuals

72. See *id.* at 393–94; *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

73. See *R.A.V.*, 505 U.S. at 384, 386 (stating that government cannot regulate an underlying message based on hostility or favoritism).

74. See *id.* at 397–98 (White, J., concurring) (believing the majority unnecessarily expanded First Amendment protections).

75. See Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 *GOLDEN GATE U. ENV'T. L.J.* 9, 27–28 (2007).

76. See Delgado & Yun, *supra* note 38, at 881–82.

77. See Bell, *supra* note 65, at 979; Schauer, *supra* note 64, at 7 (demonstrating the idea that freedom of speech can be overinclusive and underinclusive of its background justification, highlighting the importance of selecting the right cases).

78. Megan Keneally, *Skokie: The Legacy of a Nazi March in a Town Full of Holocaust Survivors*, ABC NEWS (May 4, 2018, 12:44 PM), <https://abcnews.go.com/US/skokie-legacy-nazi-march-town-holocaust-survivors/story?id=56026742> [https://perma.cc/BTV4-3LXP] (discussing how the ACLU decided to represent a Nazi group and David Goldberger, who represented the Nazi group, shared that some board members of the ACLU resigned and members from a different legal group "came to our office with ball bats at one point"); Delgado & Yun, *supra* note 38, at 881–82; Lawrence III, *supra* note 32; Strossen, *supra* note 63, at 187.

79. Delgado & Yun, *supra* note 38, at 871 (discussing how dominant free speech theorists take the stance that there is no conflict between equality and liberty, thus discouraging any real discourse as to how free speech is wielded in this country); Lawrence III, *supra* note 32; see also Purdy, *supra* note 6, at 833–34 ("[L]egal-liberalism: collaboration between senior professionals whose politics were often cast in a New Deal/Great Society mold and young

could create reform within the traditional legal system that can be transformative for the most impacted communities.⁸⁰ This model focuses more on securing rights, but not necessarily redistributing power to the communities who are facing harms.⁸¹ This typically means ensuring that historically excluded communities can share their issue in court.⁸² Winning, from a community perspective, is not the goal, the goal is more to ensure historically excluded communities have access to the system and that a clear right can be outlined while in court.⁸³

Decades ago, many mainstream environmental groups were tasked to find cases or advocacy plans that would be embraced by courts with this framework in mind.⁸⁴ So, if an issue shifted power to a community, but the issue was difficult to frame for courts, those issues were not prioritized by certain organizations.⁸⁵ At the same time, in places where there was an intersectional need for First Amendment legal advocates to elevate environmental justice actions, environmental justice activists did not receive the same legal support.⁸⁶ In Warren County, North Carolina, over 500 people were arrested during the birth of the environmental justice movement.⁸⁷ The Warren County protests that led to the nationwide understanding of environmental racism are not noted as a place where First Amendment advocates strategized for this cause.⁸⁸ So the gap in protections has been deeply embedded in the progression of environmental justice advocacy since its inception.

activists, frequently with moderate New Left sympathies, who saw in the law an institutional path to very basic changes, including welfare rights, death-penalty and criminal-justice reform, and revolutions in sex and gender.”); Louis Michael Siedman, *J. Skelly Wright and the Limits of Liberalism*, GEO. L. FAC. PUBL’NS & OTHER WORKS, 2014, at 2–4; Matsuda, *supra* note 31, at 443.

80. See Purdy, *supra* note 6, at 833–34.

81. See *id.* at 824–25.

82. See *id.* at 831.

83. See *id.*

84. *Id.* at 849.

85. See *id.*

86. See Lawrence III, *supra* note 32, at 478 (discussing the 1989 ACLU Biennial Convention where a majority of delegates refused to take a different approach to free speech case selection that would center communities of color and give the ACLU support of their resources).

87. Burwell & Cole, *supra* note 75, at 32.

88. This movement did see an intersectional blend from labor, civil rights, student, and poverty groups, but there is no widely known recognition of First Amendment groups during these protests that lasted over six weeks. See *id.* at 32–33 (discussing the various events and groups surrounding the Warren County protests and not identifying any First Amendment advocacy groups).

The effect of many exclusionary decisions has rippled decades after the protests. Years later, in places like Atlanta, environmental justice advocates fought for the tree canopy and an opportunity to save land that helps to mitigate the climate crisis.⁸⁹ Atlanta has one of the largest Black populations of U.S. cities.⁹⁰ Atlanta also has a high tree canopy percentage, which helps reduce flooding, heat, and air pollution.⁹¹ After George Floyd's killing by police in 2020, Atlanta announced the removal of these trees for the construction of an \$90 million, 85-acre police facility, Cop City.⁹² This outraged many environmental justice activists. Unfortunately, these activists suffered harassment and intimidation from the state government for opposing Cop City.⁹³ In fact, government actors decided what speech was acceptable, the very argument that was supposed to have been settled in *R.A.V.*⁹⁴ Irrefutably, the Governor and other government actors deemed that the environmental justice speech and the activists' position on Cop City were unacceptable.⁹⁵

One activist outlined to NBC News that "We've tried everything. We went through City Council, we've taken the legislative route, we've done tons of advocacy, we've sent in letters, and all we've been responded with is force."⁹⁶ This selective acknowledgment by government actors of which types of speech matter, as well as attacks on environmental justice actors, unfortunately track with the

89. TONY GIARRUSSO, 2018 CITY OF ATLANTA URBAN TREE CANOPY ASSESSMENT AND CHANGE ANALYSIS (2008-2018) 1 (2018) (on file with the *Drake Law Review*).

90. *Data USA: Atlanta, GA*, DATA WHEEL, <https://datausa.io/profile/geo/atlanta-ga> [<https://perma.cc/UYJ9-7TZ3>] (showing a black population of 233,000 people, equaling 47.1 percent of Atlanta's population); Gracie Martinez & Jeffery S. Passel, *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Jan. 23, 2025), <https://www.pewresearch.org/race-and-ethnicity/fact-sheet/facts-about-the-us-black-population/#geography> [<https://perma.cc/TCG6-UQS4>] (showing New York City is the only city with a larger black population than Atlanta).

91. GIARRUSSO, *supra* note 89.

92. See Char Adams, *What Is 'Cop City'? How Opposition to an Atlanta Police Center Prompted National Demonstrations*, NBC NEWS (Jan. 26, 2023), <https://www.nbcnews.com/news/nbcblk/what-is-cop-city-atlanta-police-protests-rcna67291>.

93. See *id.*

94. See Nora Benavidez, *Why Georgia's Latest Assault on Free Speech Is So Chilling*, ROLLING STONE (Sept. 19, 2023), <https://www.rollingstone.com/politics/political-commentary/free-speech-under-assault-georgia-cop-city-protests-1234827603/>; Thomas Wheatley, *Gov. Brian Kemp Takes on Atlanta's "Cop City"*, AXIOS ATLANTA (Jan. 5, 2023), <https://www.axios.com/local/atlanta/2023/01/05/brian-kemp-cop-city-atlanta-georgia>; *R.A.V. v. St. Paul*, 505 U.S. 377, 396 (1992).

95. Benavidez, *supra* note 94; Wheatley, *supra* note 94.

96. Adams, *supra* note 92.

attacks on protesters who shared their disdain for the project more broadly.⁹⁷ Indeed, these environmental justice activists have had government entities trying to intimidate them to silence their speech.⁹⁸

At least three members of a group that fought to end Cop City were arrested and charged with “charity fraud.”⁹⁹ Governor Brian Kemp said the demonstrators “facilitated and encouraged domestic terrorism.”¹⁰⁰ However, using broad terms like “domestic terrorism” can create fear of environmental justice activists.¹⁰¹ These activists only sought to stop a facility that will harm the tree canopy in a frontline community.¹⁰² Current definitions of “domestic terrorism” hinge on extreme ideology.¹⁰³ This can be manipulated to target environmental activists helping frontline communities.¹⁰⁴ The *Skokie* decision aimed to protect “unpopular views “ from groups whose voices were not the majority at that time.¹⁰⁵ Yet, Governor Kemp used Cop City to shame and bully Cop City’s critics. He believed environmental justice activists held an unpopular view—to use the 85 acres for tree canopy, not a police facility.¹⁰⁶

97. See Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 22 (1989) (“Case-specific suboptimality is relevant in determining what kinds of free speech rules are most appropriate as guidance for frontline governmental officials who, far more than judges, determine how much the first amendment means in this country.”).

98. See Adams, *supra* note 92; Benavidez, *supra* note 94.

99. Jeff Amy & Kate Brumback, *3 Activists Arrested After Their Fund Bailed Out Protesters of Atlanta’s ‘Cop City’*, ASSOC. PRESS (May 31, 2023, 7:25PM) <https://apnews.com/article/police-training-center-protest-arrests-0426f5da3c3a7d823b8a5203b671ee88> [<https://perma.cc/MGS4-89N4>].

100. *Id.*

101. See LISA N. SACCO, CONG. RSCH. SERV., R47885, UNDERSTANDING AND CONCEPTUALIZING DOMESTIC TERRORISM: ISSUES FOR CONGRESS, at 19–20 (2023); Daniel L. Byman, *Who Is a Terrorist, Actually?*, BROOKINGS INST. (Sept. 22, 2020), <https://www.brookings.edu/articles/who-is-a-terrorist-actually/> [<https://perma.cc/263K-8CTV>].

102. See Amy & Brumback, *supra* note 99; Sanders, *supra* note 9, at 48.

103. See SACCO, *supra* note 101, at 3 (2023) (describing that the FBI definition of domestic terrorism stems from “extremist ideological influences”).

104. See Byman, *supra* note 101.

105. See 373 N.E.2d 21, at 24.

106. See Amy & Brumback, *supra* note 99 (“Gov. Brian Kemp said the state would ‘track down every member of a criminal organization, from violent food soldiers to their uncaring leaders.’”). As will be discussed later to some extent, free speech advocates who did not mount legal challenges against Governor Kemp who called environmental justice activists “domestic terrorists” when arguments were used in the *Kessler v. City of Charlottesville* against the city for calling white nationalists “racists” furthers the blurred line regarding who is deserving of protection. 441 F. Supp. 3d 277

As seen in Atlanta and in other recent decisions, the *Skokie* and *R.A.V.* decisions have negative consequences for our legal system.¹⁰⁷ These and other landmark cases allow hate groups and those who uphold systemic racism to exploit free speech protections to challenge and intimidate those fighting for justice.¹⁰⁸ Scholars have highlighted that the law is the means for incentivizing changed behavior; thus, framing the issue of free speech through a lens that promotes white nationalism inherently promotes white nationalism itself, rather than free speech for all.¹⁰⁹ As many critical race theorists recognize, and as highlighted by Justice Harry Blackmun's dissent in *Bakke*, "[i]n order to get beyond racism, we must first take account of race. There is no other way."¹¹⁰

What free speech absolutism fails to acknowledge is that the racism it tolerates in service of its free speech narratives ultimately perpetuates more racism, not racial justice. To be sure, there are elements of free speech narratives that can be built by trying to remove the backstory in those cases, but the hatred and vitriol of white supremacists will always remain part of the case. Meanwhile, past free speech case selections by free speech absolutists have not centered around frontline communities. This is consistent with why certain government and private actors are deeming environmental justice advocates' speech unacceptable.¹¹¹ This dynamic was evident in how the Governor reacted to resistance of Cop City: by declaring a state of emergency.¹¹² Despite the fight in these cases to broaden free speech, environmental justice activists face pushback and criminalization, echoing the suppression of those historically silenced for free speech in *Skokie* and *R.A.V.*¹¹³

107. Matsuda, *supra* note 65, at 2322; Bell, *supra* note 65, at 979.

108. See Delgado & Yun, *supra* note 38, at 874–75 (noting that in *Doe v. University of Michigan*, *UWM Post, Inc. v. Board of Regents*, and *R.A.V.*, there were compelling justifications for the narrow laws or actions at issue); Bell, *supra* note 65, at 969–72.

109. Matsuda, *supra* note 65, at 2360–61; see, e.g., Delgado & Yun, *supra* note 38, at 886–87.

110. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

111. See, e.g., R.J. Rico & Jeff Amy, *State of Emergency Declared Over Atlanta 'Cop City' Protest*, A.P. NEWS (Jan. 26, 2023, 4:34 PM), <https://apnews.com/article/brian-p-kemp-protests-and-demonstrations-atlanta-0f9361abe87ffb3394ef5db97ae16348> [<https://perma.cc/A637-KQ8E>] (noting that Governor Kemp, in response to the environmental protests, stated that this was "just the latest example of why here in Georgia, we'll always back the blue")

112. *Id.*

113. See Matsuda, *supra* note 65, at 2376–77; Bell, *supra* note 65, at 971–72 (discussing *R.A.V.* and other attempts to broaden free speech); Lawrence III, *supra* note 32, at 447.

Heidi Beirich, the director of the Intelligence Project at the Southern Poverty Law Center, shared that “Skokie was a planned decision by Nazis basically to pick a place to come together in public force and assert their First Amendment rights . . . but also to assert that they are a powerful force in American politics, and Charlottesville was exactly the same thing.”¹¹⁴

Years after *Skokie* and *R.A.V.*, free speech absolutists continued to pursue a path of protecting white supremacists, this time in Charlottesville, Virginia. This is despite the continued lack of protections for frontline communities.¹¹⁵ In *Kessler v. City of Charlottesville*, Kessler’s team made similar, if not more egregious, arguments to protect white nationalist rhetoric and exclude frontline communities.¹¹⁶ The ACLU of West Virginia and Kessler argued that the City must protect their “Unite the Right” rally from counter-protesters.¹¹⁷ This white nationalist group claimed the counter message was “violent rhetoric.”¹¹⁸ This was despite the Unite the Right’s white nationalist message.¹¹⁹ The district court noted that the City had no duty to ensure the group’s rally was unaffected by the counter-protesters.¹²⁰ Kessler and the white nationalist rioters argued who deserved protection—the Unite the Right team.¹²¹ And their suit also debated which speech to allow and which to condemn.¹²² Indeed, instead of protesters being harmed, a counter-protester was killed at the rally.¹²³ This entitlement resulted from years of protecting white nationalist ideology.¹²⁴

114. Keneally, *supra* note 78 (further stating that “[t]he only way you see the ACLU mentioned in a positive way by white supremacist circles is in reference to Skokie,” and noting that they view it as an example where lawyers had to “enforce our constitutional rights”).

115. Matsuda, *supra* note 65, at 2346; Bell, *supra* note 65, at 977–78.

116. See 441 F. Supp. 3d 277, 284–85 (W.D. Va. 2020).

117. *Id.* at 280.

118. *Id.* at 282.

119. Brief in Opposition to Plaintiff’s Motion for a Preliminary Injunction or Temporary Restraining Order at 2, *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277 (W.D. Va. 2020) (No. 3:17-cv-00056-GEC) (outlining how Kessler was proud of the march and others describing it as “the largest hate-gathering of its kind in decades in the United States”).

120. *Kessler*, 441 F. Supp. 3d at 287.

121. *Id.* at 284–85.

122. *Id.* at 287–88.

123. Debbie Elliott, *The Charlottesville Rally 5 Years Later: ‘It’s What You’re Still Trying to Forget’*, NPR (Aug. 12, 2022, 5:00 AM), <https://www.npr.org/2022/08/12/1116942725/the-charlottesville-rally-5-years-later-its-what-youre-still-trying-to-forget> [https://perma.cc/9D92-38JN].

124. See Delgado & Yun, *supra* note 38, at 878 (“Quite the contrary, the psychological evidence suggests that permitting one person to say or do hateful things to another *increases*, rather than decreases, the chance that he or she will do so again in the future.”); *Freedom of*

With this history, these questions remain: Was it best to decide these cases for the greater good of all First Amendment cases? Can we review these decisions with total impartiality? Will they ensure that all can access the protections? In many previous cases, the narratives imply support for protecting white nationalists, Nazis, and racists. And despite the lack of acknowledgement that hate groups are often centered in First Amendment legal pedagogy, many First Amendment absolutists still argue that speech is the absolute priority.¹²⁵

Recent legal and political moves have worsened the selective application of free speech protections. For example, SLAPP lawsuits are becoming a more common tactic for those trying to silence advocates for environmental and racial justice.¹²⁶ Those with access to the funds to file these frivolous lawsuits to thwart free speech are those opposing frontline communities, thus further marginalizing these individuals.

A look at past First Amendment cases through the lens of frontline communities reveals a flaw. The application and access of First Amendment protections has not always been equitable.¹²⁷ To fix these disparities, we must reevaluate which narratives advance free speech protections that benefit the greater good.¹²⁸ These narratives should center around frontline groups.¹²⁹

Speech Is Not Freedom to Spread Racial Hatred on Social Media, Say UN Experts, U.N. OFF. HIGH COMM'R HUM. RTS. (Jan. 6, 2023), <https://www.ohchr.org/en/statements/2023/01/freedom-speech-not-freedom-spread-racial-hatred-social-media-un-experts> [https://perma.cc/53QX-XXRN] ("Allowing and tolerating the incitement to hatred and expression or advocacy of hatred against people of African descent and other marginalized groups, as well as individual members of such groups through online platforms, not only encourages the perpetrators, but also constitutes a continuous source of chronic race-based traumatic stress and trauma. These can be cumulative effects of racism on an individual's mental and physical health. The presence of racial hatred further undermines the confidence of the affected communities in utilising social media and seeking justice."); Bell, *supra* note 65, at 971; Matsuda, *supra* note 65, at 2321 (1989); Christine Reyna et al., *The Psychology of White Nationalism: Ambivalence Towards a Changing America*, 16 SOC. ISSUES & POL'Y REV. 79, 87 (2022).

125. See, e.g., R. George Wright & Chris Rowley, *Creative Jurisprudence: The Paradox of Free Speech Absolutism*, 95 UNIV. COLO. L. REV. 28 (2024).

126. See Safstrom, *supra* note 42.

127. See Delgado & Yun, *supra* note 38, at 881–82; Matsuda, *supra* note 65, at 2354–55.

128. See Delgado & Yun, *supra* note 38, at 891.

129. Matsuda, *supra* note 65, at 2356.

III. AREAS FOR FREE SPEECH ADVOCATES TO BETTER CENTER ENVIRONMENTAL JUSTICE ADVOCATES

Future First Amendment cases need an expanded view that empowers frontline communities. We are in a climate emergency and the ways in which environmental and climate justice advocates' speech is being silenced requires a more comprehensive free speech perspective.¹³⁰ If not, they are doomed to a similar path of how racial justice activists have continued to encounter obstacles in exercising free speech. And those activists at the intersection of the two are likely in the most danger.

A. *Fearmongering Tactics*

"Reverend Ben Chavis of the United Church of Christ's Commission for Racial Justice notes, 'the environment is not just a good organizing issue, it is, but an issue of life and death.'"¹³¹

In the past, the FBI and other police entities' narratives of individuals who exercised free speech harmed racial justice and environmental advocates.¹³² The FBI utilized fearmongering tactics with its creation of the "Black Identity Extremists" list.¹³³ This was nothing new since in the 1950s and 1960s, the FBI used its infamous Counter Intelligence Program (COINTELPRO) to surveil Black activists.¹³⁴ It "conducted covert activities against Martin Luther King, Jr. and the

130. See Matsuda, *supra* note 62, at 2321–23; *Joint Declaration on the Climate Crisis*, *supra* note 29. The climate crisis poses an unprecedented global challenge, requiring informed, inclusive and open debate to promote prompt and decisive actions. Such debates will enable people to make informed decisions, and facilitate meaningful interaction among policymakers, scientific experts, academics, civil society, journalists, private companies, States and international organizations. Most importantly, it should take into account the knowledge, insights and perspectives of those directly affected by climate change. The right to freedom of expression is critical for informed debate and action. Enshrined in article 19 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), it includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and through any media.

131. Cole, *supra* note 6, at 634 (quoting Reverend Ben Chavis, Remarks at the 10th Anniversary Celebration of the South-West Organizing Project (Nov. 16, 1991)).

132. See Michael German & Sara Robinson, *The FBI Targets a New Generation of Black Activists*, BRENNAN CTR. FOR JUST. (Aug. 14, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists> [https://perma.cc/9XFX-QN56]; *Countering Terrorist Threats in the U.S.*, at 16:09:56, C-SPAN (Oct. 27, 1999), <https://www.c-span.org/video/?119923-1/countering-terrorist-threats-us>.

133. See German & Robinson, *supra* note 132.

134. Complaint for Injunctive Relief at 2, Ctr. for Media Just. v. FBI, No. 4:19-cv-014465-DMR (N.D. Cal. Mar. 21, 2019).

Southern Christian Leadership Conference, . . . the Student Non-Violent Coordinating Committee, and the Black Panther Party”.¹³⁵ It targeted el-Hajj Malik el-Shabazz (formerly Malcolm X), Gloria Richardson, Robert F. Williams, Ella Baker, and other civil rights activists.¹³⁶

“Similarly, in the late 1960s and 1970s, the FBI surveilled and investigated Black-owned bookstores”¹³⁷ The FBI believed the stores were centers of extremism.¹³⁸ In 2009, the FBI tracked population growth among Black people in Georgia, though claiming it was to learn about a terrorist threat from “Black Separatist” groups.¹³⁹ The FBI then began surveilling Black people under a program for “Black Identity Extremists.”¹⁴⁰ After collecting this information, it failed to promptly release documents on its assessment titled “Black Identity Extremists Likely Motivated to Target Law Enforcement Officers.”¹⁴¹ In this more recent case, the ACLU and other free speech advocates intervened, calling for the FBI to release these documents.¹⁴² This recognition of police entities thwarting racial justice advocates free speech was an important step in building a gap in the intersection of free speech advocacy and racial justice.

At the same time, FBI Director Louis Freeh called environmental activists “single-issue terrorists” nearly 20 years ago.¹⁴³ So, lists targeting environmental justice advocates after the FBI created a Black Identity Extremist list is still a real threat.¹⁴⁴ Other law enforcement agencies have already used similar harmful tactics. The National Sheriffs’ Association worked for years to surveil environmental defenders of the Keystone Pipeline.¹⁴⁵ Energy Transfer, the parent company building the Dakota Pipeline, hired TigerSwan, a private company, to

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 2, 6 (“The Assessment further claims that ‘advoca[cy] for violence against law enforcement,’ ‘violent anti-white rhetoric,’ and “affiliations with others in both the [Black Separatist Extremist] and sovereign citizen extremist movements” are purportedly ‘[p]ossible indicators’ that an individual presents a ‘violent threat to law enforcement.’”).

142. *Id.* at 3.

143. *Countering Terrorist Threats in the U.S.*, *supra* note 132, at 16:09:56.

144. *See* source cited *supra* note 134 and accompanying text.

145. Alleen Brown & Naveena Sadasivam, *Pipeline Company Spent Big on Police Gear to Use Against Standing Rock Protestors*, THE INTERCEPT (May 22, 2023), <https://theintercept.com/2023/05/22/standing-rock-energy-transfer-tigerswan/> [https://perma.cc/9QFU-2838].

offer additional security for the Pipeline.¹⁴⁶ TigerSwan was also there to ensure that messages about the Pipeline on sacred indigenous land did not stop the project.¹⁴⁷ Early in the process, TigerSwan reached out to the National Sheriffs' Association.¹⁴⁸ They wanted a partnership for their surveillance and militaristic intervention.¹⁴⁹ The Association was enthused to hear from TigerSwan.¹⁵⁰ Next, TigerSwan surveilled and even infiltrated protest activity and speech at Standing Rock.¹⁵¹ Moreover, investigative journalists recently uncovered the close working relationship of the National Sheriffs' Association and TigerSwan with documents from a 50,000 public record request.¹⁵² Energy Transfer is still fighting over another 9,000 disputed pages that they are trying to keep out of the public eye.¹⁵³ Environmental justice activists then filed a civil rights lawsuit to ensure their voices were not left out.¹⁵⁴ The County created road restrictions that only impacted those opposed to the pipeline, and they argued that the County's road restrictions chilled their free speech.¹⁵⁵ DAPL employees could, however, use the road.¹⁵⁶ The barricade was meant to block activists, journalists, and pipeline opponents.¹⁵⁷

146. Alleen Brown et al., *Dakota Access Pipeline Company Paid Mercenaries to Build Conspiracy Lawsuit Against Environmentalist*, THE INTERCEPT (Nov. 15, 2017), <https://theintercept.com/2017/11/15/dakota-access-pipeline-dapl-tigerswan-energy-transfer-partners-rico-lawsuit/> [https://perma.cc/2GCL-624C].

147. Brown & Sadasivam, *supra* note 145.

148. Alleen Brown & Naveena Sadasivam, *After Infiltrating Standing Rock, TigerSwan Pitched Its 'Counterinsurgency' Playbook to Other Oil Companies*, GRIST (Apr. 13, 2023) [hereinafter Brown & Sadasivam, *After Infiltrating*], <https://grist.org/accountability/tigerswan-documents-dakota-access-pipeline-standing-rock-surveillance/> [https://perma.cc/DYM2-FYGD].

149. Alleen Brown et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock To "Defeat Pipeline Insurgencies"*, THE INTERCEPT (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/> [https://perma.cc/CWL9-5EHJ].

150. Brown & Sadasivam, *After Infiltrating*, *supra* note 148.

151. Alleen Brown, *How an Undercover Oil Industry Mercenary Tricked Pipeline Opponents into Believing He Was One of Them*, THE INTERCEPT (Dec. 30, 2018), <https://theintercept.com/2018/12/30/tigerswan-infiltrator-dakota-access-pipeline-standing-rock/> [https://perma.cc/89BW-6629].

152. Brown & Sadasivam, *After Infiltrating*, *supra* note 148.

153. *Id.*

154. Complaint at 1, *Thunderhawk v. Morton Cnty.*, No. 118-cv-00212-CSM (D.N.D. Oct. 18, 2018).

155. *Id.* at 22.

156. *Id.* at 13.

157. *Id.* at 3, 25–26.

The public record request confirmed these anti-frontline attacks will continue to target environmental justice advocates to silence their speech.¹⁵⁸ Indeed, TigerSwan has worked with at least two other major pipeline efforts and created intelligence profiles for those efforts.¹⁵⁹

Recently, President Trump ordered the FBI to criminally charge climate organizations for trying to “defraud the United States” the same day that the EPA Administrator announced he would cut all of the EPA’s environmental justice offices. And there is additional scrutiny from the Department of Government Efficiency on agencies and groups who work in or with frontline communities.¹⁶⁰ These targeted attacks have made some organizations afraid to speak out regarding environmental justice issues.¹⁶¹ Thus, stopping government agencies from utilizing fearmongering tactics is critical to ensure that environmental justice advocates have free speech monitors fighting these fearmongering efforts.

B. SLAPP Lawsuits

Another area demanding a more intersectional review is the trend of silencing environmental advocates through using Strategic Lawsuits Against Public Participation (SLAPP). These suits are being used against environmental advocates worldwide, especially in the United States.¹⁶² Globally, the Business and Human Rights Centre has tracked over 413 SLAPP lawsuits, with over half for environmental issues.¹⁶³ When George Pring originally studied this issue,

158. See Brown & Sadasivam, *After Infiltrating*, *supra* note 148.

159. *Id.*

160. Jean Chemnick, *Trump Officials Escalate Fight to Take Back \$20B in Climate Money*, POLITICO, (March 8, 2025), <https://www.politico.com/news/2025/03/08/trump-doj-climate-nonprofits-hand-over-info-come-to-court-00218992>; Mike Ludiwg, *DOGE Ransacks NOAA, Raising Fears About Privatization of Climate Data*, TRUTHOUT (Feb. 8, 2025), <https://truthout.org/articles/doge-ransacks-noaa-raising-fears-about-privatization-of-climate-data/>.

161. Sharon Lerner, *Earthjustice President Describes a “Fundamentally Different” Era of Hostility Toward Environmentalists*, PROPUBLICA (Apr. 22, 2025), <https://www.propublica.org/article/earthjustice-abigail-dillen-q-a> [https://perma.cc/5M8P-AKKM].

162. Isabella Kaminski, *SLAPP Attack: How Corporations Use Legal Tactics to Silence Activists*, THE WAVE (Oct. 5, 2022), <https://www.the-wave.net/slapp-attack/> [https://perma.cc/8R6G-7VVT].

163. *Id.* Similar trends have been documented for racial justice advocates as well as those who share political critique. Safstrom, *supra* note 42, at 135.

environmental cases and neighborhood issues comprised roughly a quarter of the SLAPP cases at that time.¹⁶⁴

On May 31, 2016, Resolute Forest Products originally filed a lawsuit, claiming substantial damages under RICO charges and other claims in the United States District Court for Southern Georgia, against Greenpeace International, Greenpeace, Inc., Greenpeace Fund, Inc., Stand.earth (formerly ForestEthics), and five individual staff members of these independent organizations.¹⁶⁵ Despite RICO charges historical use for mafia activity, oil and gas companies have shifted to use these tactics against environmental advocates.¹⁶⁶ Greenpeace shared in their press release,

From day one, it was clear Resolute intended to bully legitimate advocacy organizations and forest defenders by abusing laws designed to curtail the mafia. . . . Today's landmark decision should be a lesson for other corporate bullies attempting the same underhanded legal tactics, like Energy Transfer, that they will not succeed in attempts to criminalise free speech. We will continue to speak truth to power.¹⁶⁷

Another group filed a baseless lawsuit against a University of Virginia law professor for saying, "For generations this family has been roiling the lives of Black people, and this is what [plaintiff Tayloe] chooses to pursue."¹⁶⁸ The irony of the case is that the plaintiffs were upset that the case seemed to outline the fact that their family indeed enslaved Black people.¹⁶⁹

This same dynamic played out in police officers trying to pin actions on Deray McKesson and the Black Lives Matter movement as a whole.¹⁷⁰ In *McKesson v. Doe*, the police officer filed a lawsuit against DeRay McKesson, a

164. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T. L. REV. 3, 9 (1989).

165. Complaint at 1, 22, *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005 (2017) (No. 1:16-cv-00071).

166. Ricardo Torres Febre, Note, *The Juridification of Environmental Justice*, 93 REV. JUR. U.P.R. 383, 406 (2024).

167. Greenpeace, *US Federal Court Dismisses Racketeering Counts Against Greenpeace*, GREENPEACE (Jan. 22, 2019), <https://www.greenpeace.org/international/press-release/20357/us-federal-court-dismisses-racketeering-counts-against-greenpeace/> [<https://perma.cc/4X82-JQLQ>].

168. Lisa Provence, *The Plaintiffs: Who's Who in the Fight to Keep Confederate Monuments*, C-VILLE WKLY. (Mar. 6, 2019), <https://www.cville.com/the-plaintiffs-whos-who-in-the-fight-to-keep-confederate-monuments/> [<https://perma.cc/8QAT-F994>].

169. See *id.*

170. See *Doe v. McKesson*, 71 F.4th 278, 281–82 (5th Cir. 2023).

well-known activist and leader of the national “Black Lives Matter” movement.¹⁷¹ The entire lawsuit was based on a “rock like” object being thrown at the officer during a protest for justice for Alton Sterling.¹⁷² Alton Sterling was a black person killed by the police.¹⁷³ The officer who sued Mckesson argued that, as an alleged protest organizer, Mckesson had a duty to protect everyone there from harm.¹⁷⁴ The Fifth Circuit agreed with this argument and although the Supreme Court declined to review this decision, it did vacate the Fifth Circuit judgment and remanded the case.¹⁷⁵ However, when the Middle District of Louisiana heard the case later, the court ruled in favor of protesters and Mckesson in *John Ford v. Mckesson*.¹⁷⁶ The officer’s evidence that Mckesson organized the protest was based on him retweeting the time and location of a protest in Baton Rouge.¹⁷⁷ The officer even shared during this case that he did not hear McKesson give any clear orders at the protest.¹⁷⁸ The Court used the *Counterman v. Colorado* decision¹⁷⁹ to justify their rationale for siding with Mckesson stating that a “negligent protest theory of a leader’s liability . . . clashes head-on with constitutional fundamentals.”¹⁸⁰

According to DeRay,

The goal of this lawsuit was to prevent people from showing up at a protest out of the fear that they might be held responsible if anything happens, which makes this decision a win not only for me, but for all protest leaders and organizers across the country who are going to continue to show up and speak

171. See *id.* at 283.

172. See *id.*; see also Tasnim Motala, “Foreseeable Violence” & Black Lives Matter: How Mckesson Can Stifle a Movement, 73 STAN. L. REV. ONLINE 61, 65 (2020-2021) (describing the background events leading to the lawsuit).

173. See Motala, *supra* note 172, at 65.

174. *Mckesson*, 71 F.4th at 283–84.

175. *McKesson v. Doe*, 592 U.S. 1, 6 (2020) (“The Louisiana Supreme Court, to be sure, may announce the same duty as the Fifth Circuit. But under the unusual circumstances we confront here, we conclude that the Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court.”).

176. 739 F. Supp. 3d 344, 353 (M.D. La. 2024).

177. *Id.* at 348.

178. *Id.* at 348–49.

179. *Id.* at 352–53 (citing *Counterman v. Colorado*, 600 U.S. 66 (2023)).

180. *Id.* at 353 (granting Mckesson’s motion for summary judgment and dismissing the lawsuit).

out. It's heartening to know that the Constitution still protects our right to protest.¹⁸¹

DeRay Mckesson and Greenpeace both see SLAPP lawsuits as a danger for activists. And these lawsuits illustrate the need to protect environmental justice advocates who work at the intersection of racial justice activists and environmentalists. These narratives also highlight that there is a path to ensure a more comprehensive framework for free speech advocacy. To be sure, coalitions are forming that include traditional environmental organizations and free speech advocates; however, there is a need to ensure that environmental justice organizations and advocates are part of these efforts.¹⁸² A Senior Policy Advisor at EarthRights International confirmed the importance of an environmental justice approach to these efforts when he stated:

But what if there's a small community group that is concerned about pollution of their water or air and they want to speak up but they won't necessarily have the resources to know what is protected... free speech? What could actually get them in trouble? There are all these tricky decisions that might make them second guess themselves.¹⁸³

Based on placement of environmental hazards, the community groups who have fewer resources are typically communities that have higher numbers of Black, Indigenous, Latine, and other people of color.¹⁸⁴ Thus, coalitions and other legal strategists must understand where there may be an uptick of SLAPP lawsuits against environmental justice advocates as well.

181. *In a Major Win for Our Right to Protest, Federal Court Rules in Favor of Prominent Civil Rights Activist*, ACLU (July 11, 2024, 2:00 PM), <https://www.aclu.org/press-releases/in-a-major-win-for-our-right-to-protest-federal-court-rules-in-favor-of-prominent-civil-rights-activist> [<https://perma.cc/8XF2-2FSY>].

182. See, e.g., *Anti-SLAPP Taskforce*, PROTECT THE PROTEST, <https://www.protecttheprotest.org/the-taskforce> [<https://perma.cc/Y833-6XRJ>]. Protect the Protest is a new effort that has support from several traditional free speech organizations and several larger environmental organizations with an approach of Build Resilience to SLAPPs, Exposing SLAPPs and Those Who File Them, and Campaigning on Strategic Issues. These efforts are critical, but should lead with environmental justice organizations as part of the taskforce and organizing committee to have a truly intersectional approach.

183. Kaminski, *supra* note 162 ("Senior policy advisor for EarthRights International Kirk Herberston told *The Wave* they are "clearly being used to try to inflict serious damage on environmental movements.").

184. Cole, *supra* note 6, at 630.

C. Skewing Messaging for Environmental and Climate Justice Speech

There are efforts to fully erase a justice-based perspective to the climate crisis. For example, Governor Ron DeSantis in Florida is working to undo the efforts of climate activists who used their First Amendment rights to petition the government.¹⁸⁵ Two years ago, over 200 Floridians under the age of 25 petitioned to move to clean energy.¹⁸⁶ Now, textbook authors must remove climate change references for their work to be accepted for Florida's curriculum.¹⁸⁷ And President Trump has banned the use of phrases like "climate change" from being used at federal agencies.¹⁸⁸

And there is a push to let companies like Chevron mislead the public on environmental issues, under the guise of "political speech."¹⁸⁹ The domestic attacks are troubling. And what is happening globally can also be illuminating for what is already starting to happen in the United States. As it stands, criminal groups are leading the Amazon's deforestation.¹⁹⁰ They are willing to kill activists to continue their illegal timber trade.¹⁹¹

The UN Rapporteur on Environmental Defenders stated in a report earlier this year that

[t]he environmental emergency that we are collectively facing, and that scientists have been documenting for decades, cannot be addressed if those raising the alarm and demanding action are criminalized for it. The only legitimate response to peaceful environmental activism and civil disobedience

185. See Amy Green, *Bill Discounting Climate Change in Florida's Energy Policy Awaits Desantis' Approval*, WUWF (May 15, 2024, 3:25 PM), <https://www.wuwf.org/florida-news/2024-05-15/bill-discounting-climate-change-in-floridas-energy-policy-awaits-desantis-approval> [<https://perma.cc/N56K-8UKW>].

186. *Id.*

187. *Climate Change Censored in Florida Science Textbooks*, NAT'L CTR FOR SCI. EDUC. (June 10, 2024), <https://ncse.ngo/climate-change-censored-florida-science-textbooks> [<https://perma.cc/A3HK-LXAY>].

188. Kate Yoder, *In Trump's New Purge of Climate Language, Even 'Resilience' Isn't Safe*, GRIST (Mar. 11, 2025) <https://grist.org/language/trump-delete-climate-change-words-resilience-order/> [<https://perma.cc/NA9Q-677E>].

189. Emily Sanders, *Big Oil Is Weaponizing the First Amendment*, THE LEVER, (Jan. 8, 2024), <https://www.levernews.com/big-oil-is-weaponizing-the-first-amendment/> [<https://perma.cc/5CJN-AT6M>].

190. César Muñoz Acebes, *Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon*, HUM. RTS. WATCH (Sept. 17, 2019), <https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon> [<https://perma.cc/WAJ9-PXYV>].

191. *Id.*

at this point is that the authorities, the media, and the public realize how essential it is for us all to listen to what environmental defenders have to say.¹⁹²

The efforts outlined above demonstrate just a few of the documented attempts to silence environmental justice protesters, but there are many others.¹⁹³

IV. WHAT CAN BE DONE TO FIX THE CURRENT CHALLENGES?

First, coalitions like Protect the Protest recognize the importance of centering environmental issues and First Amendment protections. The emphasis must center environmental justice advocates and frontline communities. Prioritizing more stories like Esther Calhoun's, which is on the Protect the Protest site, is a good start.¹⁹⁴ Esther, from Uniontown, Alabama, is a founder and former president of Black Belt Citizens Fighting for Health and Justice.¹⁹⁵ A landfill was going to be placed in her community.¹⁹⁶ She and three others were sued for speaking up about health concerns.¹⁹⁷ She highlighted the challenges that her organization faced even prior to the SLAPP lawsuit by sharing that "people are afraid of speaking out as we're in the south where there is still white supremacy."¹⁹⁸

192. MICHEL FORST, STATE REPRESSION OF ENVIRONMENTAL PROTEST AND CIVIL DISOBEDIENCE: A MAJOR THREAT TO HUMAN RIGHTS AND DEMOCRACY 2 (Feb. 2024) (on file with the *Drake Law Review*).

193. Louisiana's Attorney General sued the EPA on behalf of the State asking to ensure that frontline communities cannot be part of civil rights complaints. Complaint at 1, 3, *Louisiana v. EPA*, 712 F. Supp. 3d 820 (W.D. La. 2024). Residents exercised their First Amendment right to petition the government through a Title VI and the state responded with an all-out government attack on the ability to file disparate impact complaints with the federal government. *Id.* at 34–35. In *Louisiana v. EPA*, the state contends that the U.S. Environmental Protection Agenda has "weaponized" a civil rights complaint process to be a beacon of hope for environmental justice and equity decisions. 712 F. Supp. 3d 820, 829–30 (W.D. La. 2024). The state outlines in part, that because the state asked the groups who filed the complaint about their thoughts to extend informal negotiation, the EPA conveyed "governmental veto power" to the community. *Id.* at 834. As of now, the court limited its decision to enjoining agencies from utilizing disparate impact in Louisiana. *Id.* at 866.

194. Esther Calhoun, *SLAPPED for Defending Her Community Against Environmental Racism*, PROTECT THE PROTEST <https://www.protecttheprotest.org/stories/esther-calhoun-slapped-for-defending-her-community-against-environmental-racism> [<https://perma.cc/8HBA-PXLN>].

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

Esther shared that they had First Amendment lawyers, civil rights lawyers, and environmental lawyers helping on her case.¹⁹⁹ The company finally dropped the lawsuit, and the company still tried to restrict their speech by asking Black Belt Citizens to remove social media posts.²⁰⁰ This story demonstrates the future of SLAPP lawsuits.²⁰¹ It highlights the need for a multi-faceted approach to stop these companies.²⁰² Unlike stories from larger organizations, Esther's community could have been saddled with legal fees without this approach.²⁰³ And the companies filing these lawsuits are willing to sue anyone in their way.

Next, the Human Rights Council Working Group of Experts on People of African Descent shared recommendations in their report titled "Environmental justice, the climate crisis and people of African descent"²⁰⁴ which describes ways that First Amendment advocates should approach this topic. A few include:

People of African descent must be part of the solution to climate change and other environmental crises. States should include the leadership, experience and expertise of frontline communities, such as communities of people of African descent, in all stages of environmental policies, processes and implementation in an equitable way.²⁰⁵

States should recognize the rights of people of African descent to ancestral territories and value ancestral knowledge to mitigate climate change; and develop policies and of capacity-building programmes to help communities to protect nature and to strengthen their ability to resist climate change and other environmental destruction.²⁰⁶

These recommendations are critical as an overarching framework when First Amendment advocates consider ways to work with frontline communities in a manner that authentically honors their voice.

199. *Id.*

200. *Id.*

201. *See id.*

202. *See id.*

203. *See id.* Esther shares, "With this lawsuit, I didn't have anything for them to get. It would be a different story to me if I owned a nice big house and if they won they could take it, but I didn't have anything." *Id.*

204. Rep. of the Working Grp. of Experts on People of Afr. Descent, *Environmental Justice, the Climate Crisis and People of African Descent*, UN Doc. A/HRC/48/78 (Sept. 21, 2021).

205. *Id.* at 16.

206. *Id.* at 16, 17.

Finally, First Amendment advocates must avoid cases with a white supremacist framework to prove a free speech point.²⁰⁷ History, as well as current arguments that center around white supremacy, have caused direct and indirect harm to frontline communities.²⁰⁸ Environmental justice advocates will face more obstacles in accessing First Amendment protections as long as free speech absolutists prioritize harmful speech.²⁰⁹ The climate emergency poses a unique challenge to environmental justice advocates who already have fewer supporters on some issues.²¹⁰ Living in a frontline community and fighting to eat, live, and access daily resources is already a challenge without emboldening white supremacists to continue silencing frontline communities who are demanding a better life.

Nearly two centuries ago, Frederick Douglass's words support the entrenched silencing of activists who sit at the intersection of racial justice and environmental advocacy when he stated:

[B]ut, in regard to the ten thousand wrongs of the American slave, you would enforce the strictest silence, and would hail him as an enemy of the nation who dares to make those wrongs the subject of public discourse! You are all on fire at the mention of liberty for France or for Ireland; but are as cold as an iceberg at the thought of liberty for the enslaved of America.²¹¹

Environmental justice grew from a lack of access to and voice within the conservation and environmental spaces.²¹² It developed from a power dynamic shift need for a fundamental need to survive.²¹³ Therefore, free speech cases must follow suit and begin to amplify environmental justice advocates stories in frontline communities.

207. *But cf.* Matsuda, *supra* note 65, at 2320–23 (using caselaw with a white supremacist framework to support argument that criminal and administrative sanctions are an appropriate response to racist speech).

208. *See id.* (providing an example of current arguments that harm frontline communities).

209. *See* Sanders, *supra* note 9, at 48–49 (discussing challenges faced by environmental justice advocates).

210. *See id.*

211. DOUGLASS, *supra* note 37.

212. *See* Cole, *supra* note 6, at 630 (explaining how the poor and people of color have the least resources available to them to deal with environmental harms); Purdy, *supra* note 6, at 822 n.42 (discussing Massachusetts dedication to providing environmental justice to communities that have limited access to greenspace).

213. *See* Cole, *supra* note 6, at 643.