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Notice & Comment

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NOTICE & COMMENT

Lessons on Race and Place-Based Participation from Environmental Justice and Geography, by Sonya Ziaja

– August 16, 2020

Symposium on Racism in Administrative Law

In America, to be agnostic about place is likely being agnostic about race. As scholars grapple with racism in Administrative Law, it is important to consider place-based scholarship from the perspectives of Environmental Justice (EJ) and Geography. Both provide important insights into how administrative agencies can be instruments of [strategic-structural racism](#) and how administrative law can facilitate equity in regulation. At root, EJ is concerned with the fair distribution of environmental burdens (e.g., which communities bear the brunt of hazardous waste) and benefits (e.g., which neighborhoods gets parks and tree cover). EJ's attention to agency actions painfully demonstrates how the decisions of administrative agencies have profound inter-generational impacts on the health and wellbeing of communities, from [Cancer Alley, Louisiana](#), to [mass lead poisoning in Flint](#), Michigan. Geography teaches that when considering distribution of environmental impacts and access to decision-making, place matters, because the physical characteristics of the environment—e.g., hydrology, geology, climate, etc.—and social characteristics—e.g., built infrastructure, history, law, etc.—influence the severity and distribution of environmental harm in social-ecological systems. Together, lessons from these disciplines argue for an increased emphasis on placed-based public participation in agency processes.

Here's how these lessons play out in the Administrative Law context:

First, there is significant overlap between Administrative Law scholarship and treatment of public participation in Environmental Justice. Public participation has been a “steadfast norm”^[1] and “cornerstone”^[2] of Administrative Law.^[3] Likewise, public participation is fundamental to the procedural justice aspects of EJ.^[4] And, just as Administrative Law scholarship questions [whether existing mechanisms are sufficient](#) to produce “meaningful” or “real” democratic participation in administrative rulemaking,^[5] EJ scholarship provides evidence that existing mechanisms can fail to encourage participation,^[6] and [fail to prevent environmental injustice](#). Research from both realms have similar diagnoses regarding the failure of public participation: agency processes are complex, costly, overly formal, and/or captured by well-funded interests^[7]

Second, a geographic perspective offers Administrative Law a lens through which scholars and practitioners can consider

whether agency processes are likely to include or exclude marginalized communities, especially Black and Native American communities. Public participation requirements, for example Executive Order 12898^[8] and APA § 553, are frequently agnostic to place. But, a legacy of segregation, redlining, and unequal access to transportation means that members of marginalized communities will, almost by definition, have a more difficult time physically getting to, [let alone participating in, agency forums](#). By shining a light on place, geography also offers ways for agencies to proactively include marginalized communities in decision making and investment decisions, as in the case of California's mapping tool [CalEnviroScreen](#) and Maryland's [EJSCREEN](#). One might think, in this time of social-distancing and zoom meetings, that geography no longer poses a problem for public participation. The [digital divide](#), however, falls along old faults.

Third, although consideration of distributional impacts and place is key to meaningful public participation, it is insufficient to protect against agencies being used in racist ways. Here, the EJ concept of "strategic-structural racism," borne out of the Flint Water Crisis, is instructive. Professor Hammer, who coined the term, describes it this way: "Structural racism consists of the inter-institutional dynamics that produce and reproduce racially disparate outcomes over time[,] while "[s]trategic racism is the manipulation of intentional racism, structural racism and unconscious biases for economic or political gain, regardless of whether the actor has express racist intent"^[9] In the case of Flint, public participation safeguards were deliberately removed from the decision to switch Flint's water supply. Without public participation safeguards, the lack of consideration of the relationship between place and participation is just one more hole in an already sinking ship.

Scholarship for a racially cognizant Administrative Law should include analyses of why, how, and where protections for public participation fail or succeed. Scholars and practitioners can employ methods from Geography (e.g., GIS mapping) and rely on the history and present of Environmental Justice to more deliberately incorporate place in Administrative Law to overcome existing strategic-structural racism, as embedded in disparate environmental impacts and ability of marginalized Black and Native American communities to participate in the agency processes. As a practical starting point, agencies themselves can revisit the Executive Order 12,898 process, begun nearly 30 years ago, of conducting reviews of racial injustice. If done right, with more deliberate inclusion of communities in the process, it could shift administrative practice into a more collaborative and active endeavor.

[1] Emily Hammond, *Public Participation in Risk Regulation: The Flaws of Formality* 16.1 Utah L. Rev 169-192, 170 (2016).

[2] Miriam Seifter, *Second-Order Participation in Administrative Law* 63 UCLA L. Rev.1300-1364, 1302 (2016).

[3] C.f. William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson* 61 Admin. L. Rev. 171 (2009).

[4] See Dorothy M. Daley and Tony Reams, *Public Participation and Environmental Justice: Access to Federal Decision Making, Failed Promises: Evaluating the Federal Government's Response to Environmental Justice* (Konisky ed. 2015); Daniel Scholsberg, *The Justice of Environmental Justice: Reconciling Equity, Recognition, and Participation in a Political Movement*, in *Moral and Political Reasoning in Environmental Practice* (Andrew Light and Anver De-Shalit eds. 2003); Eliot Metzger and John Lendvay, *Seeking Environmental Justice through Public Participation: A Community-Based Water Quality Assessment in Bayview Hunters Point*, 8.2 Environ. Practice 104-113 (2006).

For environmental governance perspectives, see Dietz, Thomas, Paul C. Stern, and the National Research Council. 2008. Panel on Public Participation in Environmental Assessment and Decision Making, and National Research Council (U.S.) Committee on the Human Dimensions of Global Change. *Public participation in Environmental Assessment and Decision Making*. Washington, DC: National Academies Press.

[5] See, e.g., Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 Wisc. L. Rev. 671 (2013); Hammond *supra* note 1; Seifter *supra* note 2.

[6] Daley and Reams 2015.

[7] Hammond 2016, Wagner 2013, Daley and Reames 2015, Seifter 2016.

[8] Among first federal law to specifically address the EJ, [Executive Order \(EO\) 12898](#) (1994), stresses that agencies must provide [access to public participation](#) and work with communities to identify EJ problems and solutions.

[9] Peter Hammer, *The Flint Water Crisis, the Karegnondi Water Authority and Strategic-Structural Racism*, 45.1 *Critical Sociology* 103-119, 104 (2019).

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