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## Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice

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# **ABANDON ALL HOPE YE THAT ENTER? EQUAL PROTECTION, TITLE VI, AND THE DIVINE COMEDY OF ENVIRONMENTAL JUSTICE**

*Carlton Waterhouse\**

## **I. INTRODUCTION - THE INFERNO**

Midway through life's journey and a few years hence, it came to me to inquire of the state of those I had encountered sometime before in the wood of error before I had sought to ascend to the mount of joy. At that time, I traveled the wood in the hope of aiding those attacked by the offspring of two great beasts. In days past, three beasts ruled the wood attacking and ravaging countless souls both young and old. One beast, displayed many colors and had exceedingly long claws with which it scarred and disfigured some and destroyed others. Its teeth were exceedingly sharp and those suffering its bite new pain and death. This beast was called Sexism. The second beast was pale in color with a sweeping gate. It placed many souls in fear and inspired great terror through its roar. Those who opposed it and the entire wood knew its might and its power to destroy. Through its teeth, it killed instantly and by practice it displayed the carcass of those it destroyed for all to see. Racism was the title given to it. A third beast also prowled the wood and by its great tail it swept its prey from their feet and trampled them under foot; grinding their faces into the dirt with its immense hooves. This third beast was the oldest of the beasts. It was arrayed with many

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colors and fat from the many souls it devoured. All knew it as Poverty.

From time to time, cadres of warriors joined together to oppose one or the other beasts and in my youth hunters of stout heart assailed the second beast and drove it back to the shadows from whence it still strikes. To prevail against this second beast these great hunters fashioned special weapons that could wound the beast and decrease its power. Though more fleet of foot and elusive, the first beast also succumbed to an onslaught of hunters and yielded territory it formerly controlled. Alas, because of its age and past failures against it, many accepted the reign of the third beast saying "this beast shall always be with us we can at best avoid it ourselves and possibly aid its victims."

Unbeknownst to some, these three beasts yielded two offspring. Though mighty like their predecessors, the offspring had small stature and narrow gaits. They left faint tracks that seemed as those of the older beasts, so many doubted that offspring were sired. The doubters claimed that the first beast with its many colors and long claws fell upon the supposed victims of the offspring or that it was the third beast that all should avoid who had attacked them. Yet, the victims knew that offspring prowled the wood and that these creatures daily devoured their kindred. The two offspring traveled to together sometimes sharing prey. The larger of the offspring had many colors, long claws, and a great tail. On either of its two heads were written "sexism" and "poverty" and on its underbelly "environmental destruction." Its sibling was pale in color with long claws and sharp teeth. Like the larger creature it also had two heads. On one head was written "racism" and on the other "sexism" and on its underbelly "environmental destruction."

In days now past, I was called to join the hunt against this second creature. Though I and my associates were few we were confident that we could track this creature and cut back its territory. Armed with two of the weapons that prevailed against the second beast, a lance dubbed "Equal Protection" and a sword called "Title VI," I and my colleagues rode the wood to respond to cries for aide. Sadly, we didn't know that the creature we hunted was immune from the weapons that had diminished the power of the second beast, but we soon find out that neither "Equal Protection" nor "Title VI" stood much hope against the creature its victims called "environmental racism."

If you are a person who is squeamish about issues of race, perhaps you should stop reading here. The remainder of this article talks

specifically about the relationship between race law and environmental protection. I recognize up front that in some minds this subject warrants less consideration and exploration as the cynical views of a privileged law professor whining about the supposed but more likely imagined injustices against racial minorities; a subject that is uninteresting in the minds of many of our nation's racial majority.<sup>1</sup> Others' distaste for the subject matter may rest in its seeming irrelevance to the important subject of environmental protection that places vast human and animal populations at risk through phenomena like global climate change. Such readers may feel, as one of my former students, that cries for environmental justice threaten all people's well being by distracting us from the life and death issues facing the entire planet. If you fit either of these two descriptions you should probably put down this article to save yourself time. On the other hand, if you keep reading you may find, as Dante, that even a distasteful journey may carry great benefits.<sup>2</sup>

Mounting environmental challenges command an ever increasing prominence within American society. Unbeknownst to most Americans, decision makers at all levels of government have routinely formulated and implemented environmental decisions that affected local communities, the nation, and the globe. For some communities, those decisions increased pollution exposure, health risks, road hazards, odors, and blight while for other communities environmental policies maintained or created greenways, walking trails, convenient transportation options, and increased environmental quality. The difference between the decisions can sometimes be explained by race, other times by income, and frequently by a combination of the two.

This article explores the attempts to use civil rights law as a means of addressing racial bias, perceived and otherwise, in environmental decision making. Its primary contribution is its development and use of an "environmental racism" rubric to explain why civil rights based challenges to pollution permits and waste facility siting decisions have uniformly failed in the federal courts. Pending congressional legislation, the article concludes, offers little assistance to community members concerned about the effects of additional pollution sources in their neighborhoods. If congress intends to aide

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1. See JOE FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (Routledge ed. 2001).

2. See DANTE ALIGHIERI, *INFERNO: THE DIVINE COMEDY* (Bantam Classics ed., Bantam Dell 1982) (1314).

communities facing racially discriminatory and adverse effects from polluting facilities the article maintains that comprehensive legislative action is needed. At a minimum, the article contends, Congress should legislatively overturn *Alexander v. Sandoval* in the environmental context and allow private citizens to enforce EPA's Title VI regulations. The article attempts this in five parts.

Part two provides historical background on the American race problem. Through an examination of concerns raised by Dr. Martin Luther King Jr. in 1967 that many forms of racial bias present in the nation's cities remained unabated despite the promulgation of civil rights legislation. The Kerner Commission echoed these concerns in their now famous report issued in 1968. The special panel was commissioned by President Lyndon Johnson the previous year to determine the cause of racial unrest and urban rioting in America's cities. Like Dr. King's remarks, the Commissions' findings reflect and foreshadow the limited success of existing civil rights law to address some of the nations' most basic racial ills.

Part three reviews federal cases that involved challenges to the environmental decisions of state and local officials. The courts in these cases almost uniformly reject claims of racial discrimination under the Equal Protection Clause of the United States Constitution or Title VI of the Civil Rights Act of 1964. By surveying the range of cases and facts giving rise to claims, this part shows courts' denial of "environmental racism" claims across an assortment of facts.

Part four of the article explains the failure of "environmental racism" claims in the courts. To accomplish this, the section shows that the court's decisions in these cases cohere when viewed through the veil of Democratic Process and Motive Review theory. This insight finds additional support when considered in light of the "Perpetrator's Perspective" of antidiscrimination law and the ethnic competition model of racial disparity used by the Supreme Court in its racial discrimination jurisprudence. This section culminates with the development of an environmental racism rubric that identifies the characteristics of the environmental racism cases most likely to succeed and to fail.

In Part five, the article examines a recent follow up to the original Kerner Report forty years after its issuance. The findings of significant racial segregation in housing and education in American cities are then related to the limitations of civil rights legislation identified by Dr. King and the original Kerner Commission. The section investigates the society's and the courts' interest in addressing envi-

ronmental injustices that merely reflect the de facto segregation accepted in housing and education.

Part six explores pending legislation on “environmental justice” in the United States Congress and its potential for resolving communities concerns. The proposed legislation builds on Executive Order 12898, issued by President William Clinton, as a means to address human and environmental inequities that result from federal programs, policies, or procedures.

The article concludes with recommendations for Congressional action that addresses the challenges posed by the issue of “environmental racism.”

## II. THROUGH THE GATES OF HELL

During the latter part of the Civil Rights Movement, the Southern Christian Leadership Conference (SCLC) expanded their campaigns beyond the borders of the Jim Crow South into the north and the west.<sup>3</sup> Chicago, Illinois stood as the focus of SCLC and Dr. King’s attention.<sup>4</sup> In an effort to build on the successes gained against Jim Crow segregation in the South and by the passage of civil rights legislation proscribing discrimination in public accommodations, employment, and voting, civil rights workers hoped to end the discrimination in housing and education faced by African-Americans living on the Westside of Chicago.<sup>5</sup> At the end of the campaign, King and the civil rights workers left Chicago with a real sense of despair.<sup>6</sup> Despite their significant investment of time and resources, African Americans living on Chicago’s Westside still faced de facto

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3. See STEPHEN B. OATES, *LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR.* 376-79 (Harper Collins Publishers 1994) (1982).

4. See *id.* at 379-80.

5. See *id.* at 387.

6. See *id.* at 417-18. A similar phenomenon had taken place a few years before in Albany, GA. This campaign, which took place immediately before the success of Birmingham, failed due to the courteous treatment and planning of the white Police Chief Laurie Pritchett. Despite Pritchett’s courteous treatment and the absence of overt venom by his men that characterized so much of the South, African-Americans in Albany still suffered daily from the effects of racist policies and practices. Nonetheless, due to the lack of opprobrium and overt racial animus displayed toward King and other civil rights workers, the campaign failed to engender the same support from the justice department and the courts that SCLC gained in other campaigns. *Id.* at 191-95.

segregation in their schools and in housing.<sup>7</sup> Moreover, efforts by King and others to address these problems received little sympathy from whites.<sup>8</sup> In fact, polls of the time showed that “85 percent of white Americans believed that Negroes were demanding too much, going to far...”<sup>9</sup> In fact, the *Village of Arlington Heights* case itself took place in one of the Chicago’s suburban neighborhoods marked by de facto segregation.<sup>10</sup> The Court, however, like the power structure faced by King and others could find no fault with the North’s “neutral” public policies that resulted in the adversity faced by blacks.<sup>11</sup> King recognized this toward the end of the Civil Rights Movement and expressed his frustration with the intractable de facto segregation experienced by the millions of blacks living outside of the South.<sup>12</sup> He confessed that the successes of the first decade of the movement misled everyone about the depth of anger suppressed by northern blacks and “the amount of bigotry” that America’s white majority disguised.<sup>13</sup> “The white power structure is still seeking to keep the walls of segregation and inequality substantially intact” he explained in 1967, just a few short months before his death.<sup>14</sup>

Earlier the same year, President Lyndon B. Johnson had established a national Advisory Commission on Civil Disorders, popularly known as the Kerner Commission.<sup>15</sup> In 1968, the Commission provided its findings; as a result of its study the eleven member group reached the conclusion that “Our nation is moving toward two societies, one black, one white - separate and unequal.”<sup>16</sup> Further, the report found the following:

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7. *See id.*

8. *See id.* at 418.

9. *Id.*

10. *See id.*; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 255 (1977) (During the 1960s, Arlington Heights experienced considerable growth, but the population of its racial minority groups remained low. In 1970, the population of the Village included 64,000 residents; however, only 27 of the residents were black).

11. *Id.* at 270-71.

12. *See* DAVID GARROW, BEARING THE CROSS 581 (William Morrow & Co., Inc. 1986)

13. *Id.*

14. *Id.*

15. *See* NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, SUMMARY OF REPORT, REPORT OF THE NATIONAL ADVISORY COMM’N ON CIVIL DISORDERS 609 (Bantam Books 1968), available at <http://www.eisenhowerfoundation.org/docs/Kerner.pdf>.

16. *Id.*

Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.<sup>17</sup>

Like the Commission, King believed that racism caused the urban unrest of the time.<sup>18</sup> In light of those realities, King realized that the desegregation campaigns in the South and the legal victories that accompanied them were limited achievements in light of the problems facing millions of blacks in America's cities.<sup>19</sup> Today, environmental justice activists and others face the same battle against apathy and facially neutral policies that relegate African-Americans and other racial minorities to bear disproportionate pollution burdens with the acceptance of federal and state law officials. This struggle began when claims of "environmental racism" surfaced in the 1970s.

### *Environmental Justice Background*

The environmental justice movement began as a continuation of the civil rights movement, and focused on the prevalence of racism in the environmental arena. Its national prominence can be traced to Warren County, North Carolina, which under the leadership of Congressman Walter Fauntleroy mirrored the "campaigns" of the civil rights movement.<sup>20</sup> Organizers fighting against the placement of a hazardous waste landfill in the area protested and used civil disobedience to challenge what they understood was "environmental racism."<sup>21</sup> After a truck driver traversed the state from the northern to the southern border and back again discharging waste oils along the shoulders of Interstate Highway 85, state officials decided to place a toxic waste landfill in Warren County to hold the contaminated soils

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17. *Id.*

18. *See infra* note 161, at 600, 609.

19. *See id.* at 581.

20. Walter Fauntleroy, the non-voting delegate to the United States House of Representatives for the District of Columbia, was a former civil rights organizer and lieutenant of Dr. Martin Luther King, Jr.

21. ROBERT BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVTL. QUALITY* 31 (Westview Press 2000).



gathered from across the state.<sup>22</sup> Protestors challenged the action as racism because the site selected was in the county with the largest black population of the state near a black residential area.<sup>23</sup> Congressman Fauntleroy was arrested along with 500 others during the protest. Upon his return to Washington he requested a General Accounting Office (GAO) study examining the demographics of communities with hazardous waste sites in the southeast.<sup>24</sup>

The 1985 GAO study found that three out of five hazardous waste landfills in the southeast region were located in predominantly black or Latino areas.<sup>25</sup> It was soon followed by a 1987 report, entitled "Toxic Waste and Race" by the Commission for Racial Justice of the United Church of Christ.<sup>26</sup> That report was more extensive than the GAO study.<sup>27</sup> It looked at the list of uncontrolled toxic waste sites contained in the Environmental Protection Agency Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) database and mapped them unto zip codes across the country.<sup>28</sup> Using census data, the study then correlated the zip codes with waste sites and the demographic data for nearby residents.<sup>29</sup> Beyond analyzing the racial makeup of residents, the study also examined residential income to assess its relative significance in the location of waste sites.<sup>30</sup> Report author, Charles Lee, and others, reported in the study that regardless of their income African-Americans disproportionately lived in zip codes with uncon-

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22. *See id.* at 30. Over 30,000 gallons of PCB-laced oil was dumped and left on the side of over 210 miles of road in North Carolina for four years before the state and the EPA began clean up efforts. *Id.*

23. *See id.* Warren County was more than 84% black at the time. *Id.*

24. *See* U.S. GENERAL ACCOUNTING OFFICE (GAO), SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING CMTYS. (June 1, 1983), *available at* <http://archive.gao.gov/d48t13/121648.pdf> (last visited Feb. 27, 2009).

25. *See id.*

26. CHARLES LEE, COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE U.S.: A NAT'L REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF CMTYS. WITH HAZARDOUS WASTES SITES (United Church of Christ 1987).

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.*

trolled toxic waste sites.<sup>31</sup> Within a year, a book by sociologist Robert Bullard of the Clark Atlanta University in Atlanta, Georgia, entitled “Dumping in Dixie” provided an academic examination of a historic and continuing phenomenon that relegated many undesirable waste disposal and polluting facilities to predominantly black areas. With the GAO study, Commission for Racial Justice report, and Professor Bullard’s book bolstering their claims, local activists and more prominent civil rights leaders began to draw attention to racial disparities in the siting of pollution related facilities.<sup>32</sup> In response to growing awareness and pressure, in 1990, Environmental Protection Agency (hereinafter “EPA”) Administrator William Reilly, commissioned an agency task force to determine what relationship existed between race and pollution.<sup>33</sup> Rejecting the activists’ claims that EPA and others participated in environmental racism; the Administrator adopted the name “Environmental Equity” to describe the concerns raised by activists.<sup>34</sup>

Because the southeast region represented a focal point of environmental racism claims, the EPA’s Region Four office in Atlanta became a major battlefield in the controversy. When the EPA’s Draft Environmental Equity report was issued in 1992, the author had been an attorney in the EPA Region Four Office of Regional Counsel for less than one year. Coinciding with the issuance of the report, regional personnel and local organizers convened a meeting of activists from across the region to come and discuss their concerns with EPA personnel.<sup>35</sup> At the well-attended meeting, one of the concerns raised was the EPA’s decision to study “environmental equity” instead of “environmental racism.”<sup>36</sup>

Though couched in semantic terms, this disagreement reflected a fundamental difference in the understanding that they and the EPA

31. *See id.* Charles Lee currently serves as the deputy director of the EPA’s Office of Envntl. Justice and chair of the EPA’s National Envntl. Justice Advisory Council.

32. *See Lee, supra* note 26.

33. *See* U.S. ENVTL. PROT. AGENCY [hereinafter *EPA*], ENVTL. EQUITY: REDUCING RISKS FOR ALL CMTYS. (June, 1992), *available at* [http://www.epa.gov/compliance/resources/publications/ej/reducing\\_risk\\_com\\_vol1.pdf](http://www.epa.gov/compliance/resources/publications/ej/reducing_risk_com_vol1.pdf) (last visited Feb. 27, 2009).

34. *See id.*

35. *See* Press Release, *EPA*, Release of Envntl. Equity Report (July 22, 1992) *available at* <http://www.epa.gov/history/topics/justice/01.htm> (last visited Feb. 27, 2009).

36. *Id.*

had over the issue. Activists felt that race affected the decisions of corporations and state officials in choosing sites for unwanted pollution. Though activists lacked direct evidence of racial animus, they believed that the disparity in siting shown by the preceding studies and their own experience confirmed the phenomenon. On the other hand, the EPA's position reflected the view that racism was a charged word and that the behavior of their grant recipients, personnel, and others should not be so described absent clear evidence to that effect. The disagreement escalated when the director of the Commission for Racial Justice, Benjamin Chavis Jr., popularized the phrase "environmental racism."<sup>37</sup> The issue continued to play out in the following three new contexts: studies contesting racial disparity in siting, federal court cases brought under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, and administrative complaints filed with the EPA alleging Title VI violations by EPA grant recipients.<sup>38</sup> Nonetheless, both the EPA and activists accepted "Environmental Justice" to describe their concern and the apparent disagreement faded.<sup>39</sup>

The EPA created an Office of Environmental Justice in the agency Administrator's Office. It was tasked with investigating the issue and educating agency personnel on how to approach citizens' concerns. The first director, Clarice Gaylord, had a Ph.D. in atmospheric science and brought a scientific perspective and background to the issue. She was assisted in the task with corresponding regional directors. In Region Four, where a substantial number of "environmental justice" hot spots existed, Vivian Malone Jones was hired to direct the office.<sup>40</sup> A love-hate relationship soon developed

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37. Rachel D. Godsil, *Remedying Envtl. Racism*, 90 MICH. L. REV. 394, 395 (1991) (Chavis using the term "environmental racism" to refer to both the intentional and the unintentional disproportionate imposition of environmental hazards on minorities). The EPA uses the term "environmental justice" to refer to the fair treatment of all people, no matter what their race, color, national origin, or income level, in the development, implementation, and enforcement of environmental laws, regulations, and policies. See Tom Stephens, *An Overview of Envtl. Justice*, 20 T.M. COOLEY L. REV. 229, 231 (2003).

38. See *infra* Part III.

39. See Stephens, *supra* note 37, at 231.

40. Unlike Dr. Gaylord, Ms. Jones' background was in civil rights. Best known for integrating the University of Alabama despite George Wallace's personal refusal to deny her entrance to the University, Ms. Jones provided the agency with a level of credibility in dealing with a new breed of environmental activists. Now deceased, Ms. Jones served as director from 1992 to 1996. During this time, the author served as the primary contact and support for the Regional

as William Clinton was elected President of the United States, and the EPA announced that “environmental justice” was one of its top five priorities.<sup>41</sup> The EPA soon became the agency that environmental justice activists loved to hate. Serving as a clearinghouse for activists to voice their concerns, the EPA modified many of its policies and practices of community relations and took substantial strides to give voice to the concerns raised by “EJ communities.” The agency provided numerous grants, sponsored several conferences and created a National Environmental Justice Advisory Council (NEJAC) to inform the agency on ways to achieve its environmental justice goals.<sup>42</sup>

One of the greatest benefits of these developments was the raised awareness gained by Native American, African-American, Latino, and other community members near Superfund sites and other pollution related facilities. During this time period, communities began to share stories, ideas, and knowledge to assist each other in learning about the risks they faced and the tools to decrease or eliminate them. In 1994, President William Clinton supported these developments across the federal government by issuing Executive Order 12898, directing federal agencies to identify and address disproportionately high and adverse human health effects affecting minority and low income populations.<sup>43</sup>

Under this regime, environmental justice became an exercise in community relations for the EPA, state agencies, and corporations.<sup>44</sup>

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Office of Env'tl. Justice and the lead attorney addressing “environmental justice” issues for the Region.

41. See Carol M. Browner, Adm'r of the EPA, Statement Before the U.S. Senate Comm. on Finance, 106th Cong. (Jan. 28, 1999), available at [http://www.epa.gov/ocir/hearings/testimony/106\\_1999\\_2000/012899cb.htm](http://www.epa.gov/ocir/hearings/testimony/106_1999_2000/012899cb.htm).

42. See EILEEN P. GAUNA & CLIFFORD RECHTSCHAFFEN, ENVTL. JUSTICE: LAW, POLICY AND REGULATION (Carolina Academic Press 2002) (describing the history of National Env'tl. Justice Advisory Council).

43. See Meredith J. Bowers, *The Executive's Response to Env'tl. Injustice: Executive Order 12,898* 1 ENVTL. LAW. 645 (Feb., 1995).

44. In the absence of either legislation or case law supporting reform in the legal and regulatory regime governing the vast majority of environmental decisions, Executive Order 12898 provided enough authority to raise public expectations but not to raise the level of environmental protection for minority communities. In fact, to date the EPA has never implemented the primary directive of the Executive Order to “identify and address the disproportionately high and adverse human health effects of its programs and procedures on low income and minority populations.” A 2004 EPA IG report concludes that the EPA “has not developed a clear vision or a comprehensive strategic plan, and has not established values,

Rather than the development of an environmental policy that attended to the alleged disparity in pollution exposure, the environmental justice movement raised the awareness of community members concerning their role in environmental decision-making and forced agency officials to develop a more effective means of dealing with the concerns of "minority" and "low income" populations. This represented a genuine improvement over the status quo. In fact, at the local level the environmental justice movement has provided well organized communities with access to funds, education, resources and great deal more respect and consideration from public officials and corporations.<sup>45</sup> Unfortunately, the fundamental discord remained and today represents the primary basis of federal courts' all but unanimous rejection of environmental justice claims under both the Fourteenth Amendment and Title VI. Moreover, the EPA's failure to find a single Title VI violation by any of its grant recipients since its 1997 decision to dedicate staff and resources to investigating Title VI complaints flows from the same discord.

However, while environmental justice was gaining notoriety and recognition through the 1980s and early 1990s, a different movement was transpiring in the federal courts. President Reagan's appointment of Justices Antonin Scalia and Sandra Day O'Connor to the

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goals, expectations, and performance measurements" to meet the directive. See EPA OFFICE OF INSPECTOR GENERAL [OIG], EVALUATION REPORT: EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVTL. JUSTICE, Report No. 2004-P-00007 (Mar. 1, 2004), available at <http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf>; A 2006 Report finds that the Agency has also failed to conduct Environmental Justice reviews of its programs as required by the Executive Order. EPA-OIG, EVALUATION REPORT: EPA NEEDS TO CONDUCT ENVTL. JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES AND ACTIVITIES (R. 21.8.5), Report No. 2006-P-00034 (Sept. 18, 2006), available at <http://www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf>.

45. The evacuation of residents located near the "Mount Dioxin" Superfund site in Pensacola, Florida, is a good example. See Sandra L. Geiger, *An Alternative Legal Tool for Pursuing Envtl. Justice: The Takings Clause*, 31 COLUM. J.L. & SOC. PROBS. 201, 221 (1998). In 1991, the EPA began what would become a five year evaluation process to assess whether an abandoned wood-treating facility posed a significant enough hazard to relocate the predominantly black families living in the area. See *id.* In light of evidence linking the residents' health problems to exposure to dioxin, arsenic and other chemicals from the facility, the EPA determined that it would be more cost effective to permanently relocate the residents. See *id.* The federal government gave each family cash for their home (calculated using the fair market value) and relocation costs. See *id.* This relocation program helped to expand the option for people who would normally not have the resources to leave. See *id.*

bench, Clarence Thomas to head the Equal Employment and Opportunity Commission, and a slew of federal court judges who were openly hostile to race based civil rights claims signaled the end of the expansion of civil rights coverage for racial minorities that began in the mid 1960s and the onset of a contraction of race based opportunities.<sup>46</sup> During this period, the federal courts, under the leadership of the Supreme Court, consistently erected greater burdens on parties seeking to remedy racial discrimination. Moreover, the U.S. Department of Justice, under Attorney General Edwin Meese, had so changed its position on race based discrimination that it switched sides in prominent cases to oppose its former position.<sup>47</sup> Accordingly, the expansion of civil rights protection to racial minorities in the environmental context had little hope of finding succor in the federal courts.<sup>48</sup>

### III. DOWN INTO THE ABYSS - CIVIL RIGHTS CASES AND ENVIRONMENTAL DECISIONS

#### A. *The Fourteenth Amendment Equal Protection Clause Cases*

Despite the ongoing contraction of race based civil rights claims and remedies in the federal courts during the 1980s, early activists and others increasingly brought suits claiming violations of the Equal Protection Clause of the Fourteenth Amendment.<sup>49</sup> These suits alleged that state agencies sited waste facilities in predominantly black and Latino areas and that racial disparity and inequality

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46. See KIMBERLE WILLIAMS CRENSHAW, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 57-80 (Katherine Bartlett and Rose Kennedy eds., Westview Press 1991).

47. See William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980-89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 673 (1995).

48. See generally Suzanne Smith, *Current Treatment of Envtl. Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B. U. PUB. INT. L. J. 223 (2002).

49. The Fourteenth Amendment states in relevant part that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

were characteristic of environmental decision-making.<sup>50</sup> These claims were uniformly unsuccessful; yet, some consideration of the handful of cases will help demonstrate the substance of my claim that federal courts will not recognize "environmental racism" claims under the Fourteenth Amendment absent a strong showing of the type of "racial animus" typically associated with the actions of Bull Connor and other white segregationists.<sup>51</sup>

In *Bean v. Southwestern Waste Management Corporation*, plaintiffs alleged that the Texas Department of Health's (TDH) issuance of a permit continued a historical pattern and practice of disproportionately siting waste facilities in and around African American neighborhoods.<sup>52</sup> As evidence, plaintiffs identified the racial makeup of the areas proximate to both the proposed and the existing waste facilities.<sup>53</sup> The evidence provided by the plaintiffs included sites permitted by the Texas Department of Water Resources (TDWR) and the TDH.<sup>54</sup> However, the plaintiffs' concerns accordingly stemmed from the data showing the disparity in facility locations affecting nearby African Americans.<sup>55</sup> Under the court's analysis, the relevant facilities only related to the actions of the TDH because they could only be responsible for their own actions.<sup>56</sup> After removing the TDWR sites from the data set, the court found that no statistically significant disparity existed in the location of waste sites.<sup>57</sup> The court further broke down the plaintiffs' claim by rejecting their method of analyzing the alleged disparate impact.<sup>58</sup> While the plaintiffs focused on the racial makeup of communities and parts of town, the court looked to census tracts to define the relevant statistical data.<sup>59</sup> The court rejected the plaintiffs' request for a pre-

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50. Donna Gareis-Smith, *Envtl. Racism: The Failure of Equal Prot. to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 65-70 (1994).

51. See *infra* Part IV.

52. *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 677-79 (Tex. 1979). This case launched the career of Robert Bullard, the leading scholar in the environmental justice field and the director of the Clark Atlanta Univ. Env'tl. Justice Resource Center.

53. *Id.* at 677-79.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 679.

58. *Id.*

59. *Id.*; see also *infra* Part III for a discussion of analytical methods.

liminary injunction to stop the location of the new landfill across from a predominantly black high school in the black residential area of Northwood Manor in Houston ruling plaintiffs were unlikely to succeed on the merits.<sup>60</sup>

This case and its outcome underscores one of the many problems faced by environmental justice litigants. Rather than examining how current and past governmental decisions collectively create adverse disparate impacts on minority populations, contemporary equal protection jurisprudence focuses on the motivation of a single entity to assess whether a constitutional violation took place.<sup>61</sup> Following the racial discrimination analysis proffered by the Supreme Court in the *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, courts seek to uncover some hidden impermissible motive.<sup>62</sup> Environmental justice claimants, however, focus on the results of government decisions that disproportionately burden them.<sup>63</sup> As in *Bean* above, litigants' concerns flow from the outcome of numerous decisions that now adversely affect them.<sup>64</sup> In their views, race played an impermissible role in the outcome of numerous decisions that reflect a lower standard of care and protection afforded them.<sup>65</sup> While courts may find these alleged injustices unfortunate, they do not view them as rising to the level of an impermissible government action.<sup>66</sup> Accordingly, claimants have had little hope of prevailing under civil rights based laws. Novel interpretations of existing civil rights statutes provide no better chances for litigants because their legal theories represent fundamental disagreements about the purpose and function of civil rights law.<sup>67</sup>

60. ROBERT D. BULLARD, *UNEQUAL PROT.: ENVTL. JUSTICE AND CMTYS. OF COLOR* 4 (Random House, Inc. 1997).

61. *Bean*, 482 F. Supp. at 673.

62. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Strangely, in the thirty years since its adoption the Court has rarely found racial discrimination using the analysis, including the case in which it was developed. In practice, the test legitimates suspect decisions by making disparity analysis a less significant part of the equal protection analysis. *Id.* at 266.

63. Consider the Warren County protests, and the studies by the GAO and the UCC Commission on Racial Justice, pointing out disparities in the location of hazardous and toxic waste.

64. *Bean*, 482 F. Supp. at 673, 677-79.

65. LUKE COLE & SHEILA FOSTER, *FROM THE GROUND UP: ENVTL. RACISM AND THE RISE OF THE ENVTL. JUSTICE MOVEMENT 70-74* (NYU Press 2000).

66. *Bean*, 482 F. Supp. at 679.

67. *See infra* Part III.



The foregoing decision demonstrates the way equal protection analysis has often been interpreted by the courts.<sup>68</sup> Unlike statutory interpretation, equal protection analysis flows almost exclusively from the standards imposed by the federal courts. Accordingly, despite the provision, injustices to blacks and other racial minorities passed legal scrutiny like in the form of prohibitions on interracial marriage, integrated schools, integrated railway cars, and other Jim Crow laws.<sup>69</sup> The Courts' subsequent decisions to the contrary in the wake of *Brown v. Board of Education* flowed from the changed racial sensibility of the nation rather than any substantive legal necessity.<sup>70</sup> In this regard, blacks and other racial minorities have historically had to wait for white sensibilities to change in order for them to enjoy many legal protections today taken for granted.<sup>71</sup> In light of such a contingent jurisprudential history, claimants should not view equal protection jurisprudence as fixed or preordained but as a reflection of the contemporary norms of the society.<sup>72</sup> Accordingly, environmental justice claimants should make note of the contemporary societal bias against race based antidiscrimination law when evidence of racial animus is absent.<sup>73</sup> The series of federal cases examined below each analyzed environmental decisions for possible violations of the Equal Protection Clause.

I next consider *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*.<sup>74</sup> In this case, the court reviewed the actions of a local zoning commission that approved the placement of an additional waste facility in a predominantly black community.<sup>75</sup> Plaintiffs contended that a historic practice existed of placing unwanted land uses in black communities.<sup>76</sup> Specifically, plaintiffs challenged the placement of a landfill in a

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68. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

69. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

70. Derrick A. Bell, *Brown v. Board of Ed. and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 521 (1980).

71. *Id.*

72. *Id.*

73. See *infra* Part III.

74. *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd.*, 896 F.2d 1264 (11th Cir. 1989).

75. *Id.*

76. *Id.*

majority black census tract.<sup>77</sup> Despite the disparate impact allegations of plaintiffs, the court's analysis reflected a primary concern with the intentions of the board in approving the most recent permit to ascertain if impermissible conduct took place.<sup>78</sup> As in *Bean*, the court in *East Bibb* followed the equal protection analysis established by the Supreme Court in *Arlington Heights v. Metropolitan Development Corp.*<sup>79</sup>

Recognizing that the placement of the landfill in a predominantly black census tract would necessarily have a disparate impact, the court countered that the placement of a previous landfill in a predominantly white census tract nearby mitigated claims of racial bias in the Commission's decision.<sup>80</sup> The adjoining census tract was much smaller with a majority white population; however, both tracts were located in a 70% majority black voting district.<sup>81</sup> The court also kept its analysis limited to facilities approved by the commission, just as the district court had in *Bean*.<sup>82</sup> Looking at the specific census tract of the existing facility without regard for the census tracts relationship to the larger community and area around it, the court found that no racial bias was associated with the new facility despite its placement in the predominantly black voting district with other unwanted facilities.<sup>83</sup> If the *Bean* and *East Bibb* cases appear to turn on the plaintiff's failure to persuade the court that a significant enough disparity exists to constitute an equal protection violation under *Arlington Heights*, the following decision will show that the significance of the disparity has not been determinative in environmental justice cases.<sup>84</sup>

*R.I.S.E. v. Kay, Inc.*, provides one of the best examples of the futile nature of past environmental justice equal protection litigation.<sup>85</sup> In that case, plaintiffs alleged that the proposed facility was the fourth placed in an almost exclusively black area, and that the sole facility placed in a predominantly white area was closed due to the lowered

77. *Id.* at 881.

78. *Id.* at 884.

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

80. *E. Bibb Twiggs Neighborhood Ass'n*, 706 F. Supp. at 880-84.

81. *Id.* at 885.

82. *Id.* See also *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 673-79 (Tex. 1979).

83. *E. Bibb Twiggs Neighborhood Ass'n*, 706 F. Supp. at 880-84.

84. *R.I.S.E. v. Kay, Inc.*, 786 F. Supp. 1144 (E.D. Va. 1991).

85. *Id.*

property values and the negative environmental affects that the facility would cause.<sup>86</sup> Although the court stipulated to the clear disparate impact of the decisions, it meticulously noted that the members of the Board of Supervisors making the decision about the current facility were not part of the Board when the first two facilities were located.<sup>87</sup> Although the court made no later reference to this fact, it did decide that the plaintiffs failed to provide the necessary evidence showing discriminatory purpose under *Arlington Heights*.<sup>88</sup> Instead, the court explained that the Board members based their decision on their concern for the economic plight of the entire county.<sup>89</sup> Moreover, the court made clear that "[T]he Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race."<sup>90</sup>

Although the court here seems to have given short shrift to *Arlington Heights*, finding that the current disparity and historic discrimination were not enough to infer a discriminatory purpose and discounting evidence showing deviations from the standard decision-making process, this case best reflects what environmental justice litigants' chances to succeed have been under an equal protection based analysis.<sup>91</sup> Despite the Court's claim in *Arlington Heights* that direct evidence of racial animus need not be provided to show discriminatory purpose in the absence of racial classifications, the opposite has proven true.<sup>92</sup> Absent evidence of racial animus, contemporary federal courts rarely invalidate government decisions based on the consideration of multiple factors to establish an equal

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86. *Id.* at 1148-49.

87. The court found that two members of the current board participated in approving the third facility suggesting the limited significance of past board decisions in light of the changes in membership. *Id.* at 1148.

88. *Id.* at 1149-50.

89. *Id.* at 1150.

90. *Id.*

91. *Id.* at 1149-50.

92. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); see also Robert Nelson, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Prot. Doctrine*, 61 N.Y.U. L. REV. 334, 341-42 (1986) (citing recent cases which have ignored the *Arlington Heights* rule, instead requiring a showing of discriminatory intent or direct evidence of racial animus as an absolute prerequisite to an equal protection claim).

protection violation.<sup>93</sup> In fact, a string of decisions show the unstated but implicit contemporary presumption that in the absence of explicit racial classifications or a direct link to past *de jure* segregation patterns, governments act without discriminatory purpose when substantial evidence to the contrary is lacking.<sup>94</sup> This presumption can create an insurmountable hurdle for environmental justice litigants who routinely lack direct evidence of racial animus.<sup>95</sup> Environmental justice and other litigants seeking to surmount the mount of joy may find themselves trapped in a legal hell occupied by the spirits of past litigants who hoped for racial justice.<sup>96</sup>

### B. Cases Under Title VI of the Civil Rights Act of 1964

In contrast to the cases above, the court in *Dowdell v. City of Apopka* considered whether the disparity in funding municipal services such as water distribution, sewerage facilities, and storm water drainage to black and white residents by the City of Apopka constituted a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>97</sup> Making

93. In *R.I.S.E.*, direct evidence of racial animus may not have been enough as plaintiff's appellate brief alleged that racially derogatory terms were used by both a board member and a county official regarding the matter. Robert Collin, *Envtl. Equity: A Law and Planning Approach to Env'tl. Racism*, 11 VA. ENVTL. L.J. 495, 532 (1992); see also Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284-85 (1997).

94. Such cases using the *Arlington Heights* analysis include the following: *Atkins v. Robinson*, 545 F. Supp. 852 (D.C. Va. 1982); *Laramore v. Ill. Sports Facilities Auth.*, No. 89 C 1067, 1996 WL 153672 (N.D. Ill. 1996); *U.S. v. Charleston County*, 316 F. Supp. 2d 268 (S.C. 2003).

95. Luke W. Cole, *Civil Rights, Env'tl. Justice, and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309 (1994). Although litigants in *Wash. Park Lead Comm., Inc. v. U.S. E.P.A.* were able to withstand a summary judgment motion when they alleged that a relocation decision perpetuated historic discrimination of a formerly segregated housing project, the claim was voluntarily dismissed on appeal. No. 2:98CV421, 1998 WL 1053712 (E.D. Va. Dec. 1, 1998). For a contrary decision consider, *Broward Gardens Tenants Ass'n v. U.S. E.P.A.*, 311 F.3d 1066 C.A.11 (Fla. 2002). In *Broward Gardens Tenants Ass'n*, the court held that alleged violations of the Equal Protection Clause of the Fourteenth Amendment did not circumvent the ban on pre-enforcement review under the Comprehensive Env'tl. Response Compensation and Liability Act (CERCLA). 311 F.3d at 1066.

96. For a contrary view, see Alice Kaswan, *Env'tl. Laws: Grist for the Equal Prot. Mill*, 70 U. COL. L. REV. 387, 456 (1999).

97. *Dowdell v. City of Apopka*, 698 F.2d 1181, 1181-82 (Fla. 1983).

much of the racial disparity in the level of services available to residents, the court connected the city's disparate funding decisions with the municipal ordinance mandating residential segregation prior to 1968.<sup>98</sup> The court went on to note that the city's awareness that its predominant funding of services for white neighborhoods would not only result in a lack of services for black residents, but constituted relevant evidence of discriminatory purpose.<sup>99</sup>

I begin my examination of Title VI with a brief survey of *Dowdell* as a case between the margins that also included an equal protection analysis. Unlike the previous cases concerned with the allocation of environmental permits and sites, this case related to the provision of municipal services to plaintiffs.<sup>100</sup> Using the *Arlington Heights* analysis, the court in this case nonetheless found violations of the Equal Protection Clause.<sup>101</sup> Rather than a broad exception to the rule against finding equal protection violations in the absence of direct evidence, this case represents a strand of cases finding equal protection violations when municipalities continue historic patterns of discriminatory service provision.<sup>102</sup> In these cases, courts connect the invidious purpose of historic *de jure* segregation with the contemporary denial of services, relating current patterns to past discriminatory ordinances.<sup>103</sup> Because environmental decision making falls outside the arena of conduct historically associated with discriminatory behavior, cases alleging purposive discrimination in that

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98. *Id.* at 1184.

99. *Id.* at 1185-86. EPA attorney, Steadman Southall participated in early efforts to resolve the dispute before the *Dowdell* decision. In discussions with the author held in 1997 in Region Four, Southall noted the city used EPA funding to develop its sewage treatment system and, that upon receipt of the grant, the city committed to use the funds in a non-discriminatory fashion. Nonetheless, he pointed out that the city's disparate funding practice took place despite his and others' efforts to encourage them to fulfill their non-discrimination obligations as an EPA grant recipient.

100. *Dowdell*, 698 F.2d. at 1181.

101. *Id.* at 1186.

102. *Neighborhood Action Coal. v. City of Canton, Ohio*, 882 F.2d 1012 (6th Cir. 1989); *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986); *Ammons v. Dade City, Fla.*, 783 F.2d 982 (11th Cir. 1986); *Tinsley v. Kemp*, 750 F. Supp. 1001 (W.D. Mo. 1990); *Midwest Comty. Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491 (N.D. Ill. 1983).

103. *Dowdell*, 698 F.2d. at 1181. See *infra* Part III below for consideration of why these cases of the 1970s and 1980s fit the definition of impermissible discrimination.

process failed to find traction in the federal courts.<sup>104</sup> In light of that difficulty, many claimants hoped to find relief under Title VI of the Civil Rights of 1964 using a discriminatory effects standard of proof found in the EPA's Title VI regulations.<sup>105</sup> This hope led some claimants down, what proved to be, an equally futile judicial tract.

In *Chester v. Seif*, residents of Chester, Pennsylvania, complained that the Pennsylvania Department of Environmental Quality violated Title VI of the Civil Rights Act of 1964 through the process it used to grant a waste facility permit to Soil Remediation Services, Inc.<sup>106</sup> At the time of trial, Delaware County, Pennsylvania had a population that was 86.5% white and 11.2% black.<sup>107</sup> Within Delaware County, plaintiffs noted that the Chester Township had a population of 5,399, of which 53.6% were black and 45% were white, and that the City of Chester, had a population of 41,856, 65.2% of which were black and 33.5% of which were white.<sup>108</sup> Residents and activists complained that defendants' issuance of five waste facility permits in less than ten years, which increased the permitted waste capacity in Chester by over 2,000,000 tons per year had a discriminatory effect on the predominantly black residents of the city of Chester.<sup>109</sup> Plaintiffs noted that the increased waste capacity did not include the permit capacity of a sewage waste facility to treat 44,000,000 gallons of sewage and incinerate 17,500 tons per year of sewage sludge.<sup>110</sup> The plaintiffs contrasted this permitting pattern within Chester with the two waste facility permits granted outside of Chester during the same period.<sup>111</sup> These two permits were located in two predominately white census tracts with a capacity of 700 tons per year.<sup>112</sup> Plaintiffs claimed that, "only two Census Tracts in all of Delaware County contained more than one waste facility and both of these were located in areas with populations that were predominately African-American."<sup>113</sup> In contrast, plaintiffs asserted that Delaware

104. *See supra* Part II.

105. *See* 40 C.F.R. § 7 (1998).

106. *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413, 414 (E.D. Pa. 1996).

107. *Id.* at 414.

108. *Id.* at 413, n.1.

109. *Id.* at 415.

110. *Id.*

111. *Id.* at 415-16.

112. *Id.* at 415.

113. *Id.*

County had 112 census tracts where white residents made up more than 50% of the population; 8 of those had one facility and 104 had none.<sup>114</sup>

Further, the court acknowledged that the City of Chester has one of the highest concentrations of industrial facilities in the state; it holds numerous plants, it incinerates all the solid waste from Delaware County, and 85% of Delaware County's raw sewage and sludge gets treated there.<sup>115</sup> In Chester, many of the pollution sources are near minority residential neighborhoods.<sup>116</sup> Within 100 feet of over 200 homes, a cluster of waste treatment facilities received permits for operation.<sup>117</sup>

At the district court level, the judge considered the claimants' evidence but granted a motion to dismiss because the complaint failed to allege intentional discrimination.<sup>118</sup> Citing the Supreme Court's decisions in *Alexander v. Choate*<sup>119</sup> and *Guardians Ass'n v. Civ. Serv. Comm'n of City of N.Y.*,<sup>120</sup> the court maintained that private parties bringing suit under Title VI of the Civil Rights Act must prove intentional discrimination even though federal agencies retained the ability to find violations of Title VI based solely on the discriminatory effects caused by their grant recipients' programs.<sup>121</sup> On appeal, the Court of Appeals for the Third Circuit reversed the District Court opinion, holding that a private right of action existed to bring an action under federal agencies' discriminatory effects regulations.<sup>122</sup> This 1997 appeal remanded the case back to the District Court for disposition in light of the Appellate Court opinion.<sup>123</sup> Although Pennsylvania appealed the circuit court's decision to the United States Supreme Court in 1998, the case ultimately resolved when the Pennsylvania Department of Environmental Protection

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114. *Id.* at 415-16.

115. *Id.* at 415.

116. *Id.*

117. *Id.*

118. *Id.* at 417.

119. 469 U.S. 287, 293 (1985).

120. 463 U.S. 582 (1983).

121. *Chester Residents Concerned for Quality Living*, 944 F. Supp. at 417, n.5.

122. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir.1997).

123. *Id.* at 927.

revoked the waste permit at issue.<sup>124</sup> DEP revoked the permit at the request of SRS after their initial time period to construct the facility under the original air quality plan approval expired.<sup>125</sup> Under the Title V program of the Clean Air Act, the facility would have been required to submit a new air quality plan that met with the more stringent regulations that had gone into effect.<sup>126</sup> In light of the permits revocation, the Supreme Court dismissed the state's appeal citing irrelevance and vacated the Appellate Court decision.<sup>127</sup>

Nonetheless, the Supreme Court resolved the Title VI legal questions raised in *Chester* a few years later in *Alexander v. Sandoval*.<sup>128</sup> Although the case took place outside of the environmental context, the Court ruled that no private right of action existed for plaintiffs to bring Title VI suits based on the disparate impacts caused by a federal grant recipient's program.<sup>129</sup> In the case, a 5-4 majority decided that the plaintiff's class action suit against the Alabama Department of Public Safety for its policy of limiting the Alabama Driver's license exam to English as a violation of the U.S. Department of Transportation's Title VI regulations could not be sustained because no private right of action exists under the statute to enforce agency disparate impact regulations.<sup>130</sup>

Despite the Court's decision in *Alexander v. Sandoval*, one glimmer of hope remained for environmental justice claimants seeking to bring a civil rights action that did not depend on intentional discrimination.<sup>131</sup> The residents of the Waterfront South neighborhood in Camden, New Jersey tested that hope when they filed an action under U.S. Code § 1983 against the New Jersey Department of Environmental Protection.<sup>132</sup> The case, filed prior to the Supreme

124. Pa. Dep't of Env'tl. Prot., *Env'tl. Hearing Board Dismisses SRS AIR Appeal*, <http://www.dep.state.pa.us/dep/DEPUTATE/polycomm/update/05-29-98/052998u8.htm> (last visited Mar. 26, 2007).

125. *Id.*

126. *Id.*

127. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998).

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

129. *Id.*

130. *Id.* at 293.

131. Bradford C. Mank, *Using Section 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001).

132. *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001) (§ 1983 providing in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citi-



Court's ruling in *Sandoval*, attempted to use the private right of action that exists under § 1983 to enforce the EPA's discriminatory effect regulations.<sup>133</sup> Claimant's initial complaint alleged that a proposed cement processing facility would cause a discriminatory impact on residents in violation of EPA's Title VI regulations.<sup>134</sup> The neighborhood hosted two Superfund sites, multiple abandoned and/or contaminated industrial sites, chemical companies, waste facilities, a petroleum coke transfer station, and more permitted polluting facilities.<sup>135</sup> The plaintiffs further contended that the New Jersey Department of Environmental Protection (NJDEP) granted additional permits for a regional sewage treatment facility, an incinerator, and a power plant in the neighborhood.<sup>136</sup> Consequently, the claimants maintained that the Waterfront South community, made up of 63% African-Americans, 28.3% Hispanics, and 9% white residents, hosted 20% of the city's contaminated sites and had more than double the number of permitted air polluting operations than an area within a typical New Jersey zip code.<sup>137</sup> As relief, the South Camden Citizens in Action (SCCIA) sought to enjoin the issuance of the air permit for the cement processing facility due to NJDEP's failure to assess the disparate impact the facilities operation would cause.<sup>138</sup>

The U.S. Court of Appeals for the Third Circuit reversed the District Court decision granting the injunction.<sup>139</sup> Specifically, the court held that the District Court erred in finding it likely that the plaintiffs would succeed on the merits of the case.<sup>140</sup> To support its decision, the court looked to the reasoning of the majority in *Alexander v. Sandoval*, writing:

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zen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." See 42 U.S.C. § 1983. Although plaintiffs initially filed suit under Title VI of the Civil Rights Act of 1964 at 42 U.S.C. § 2000d to § 2000d-7, the District Court provided them with leave to amend the complaint following the Court's ruling in *Alexander v. Sandoval*.

133. *S. Camden Citizens in Action*, 145 F. Supp. 2d at 509-10.

134. *Id.* at 450-51.

135. *S. Camden Citizens in Action*, 274 F.3d 771, 775 (N.J. 2001).

136. *Id.*

137. *Id.*

138. *Id.* at 776-77.

139. *Id.* at 791.

140. *Id.*

Inasmuch as the [Supreme] Court found previously that the only right conferred by section 601 was to be free of intentional discrimination, it does not follow that the right to be free from disparate impact discrimination can be located in section 602. In fact, it cannot. In sum, the regulations, though assumedly valid, are not based on any federal right present in the statute.<sup>141</sup>

Although the analysis of the enforceability of the EPA's regulations under § 1983 was one of first impression, the court did its best to ground its opinion solidly in the analysis of the *Alexander v. Sandoval* majority opinion.<sup>142</sup> In doing so, the court required that a clear congressional intention to prohibit disparate racial impacts be present in the underlying statute that plaintiffs claim creates a right enforceable under § 1983.<sup>143</sup> Further, the court specifically rejected arguments that agency regulations could form the basis for establishing enforceable federal rights under statutes that already establish such rights.<sup>144</sup> As a matter of policy, the court further supported its decision based on the concern that the right to bring private suits based on disparate racial impacts could have sweeping ramifications, and therefore should be expressly provided by congressional action rather than an interpretation by the courts.<sup>145</sup>

The District Court ultimately resolved the case in 2006, five years after the issuance of the original injunction.<sup>146</sup> In its decision, it ad-

141. *Id.* at 789-90.

142. *Id.* at 789, n.12.

143. *Id.* at 790. Because the majority in *Alexander v. Sandoval* had so recently decided that no congressional intent to provide a private right of action based on disparate racial impacts could be found in Title VI, the court used the same analysis to determine that Congress also lacked the intent to create a federal right that persons be free from disparate racial impacts caused by the programs of federal grant recipients.

144. *Id.*

145. The court writes, "[i]t is plain that in view of the pervasiveness of state and local licensing provisions and the likely applicability of Title VI to the agencies involved, the district court's opinion has the potential, if followed elsewhere, to subject vast aspects of commercial activities to disparate impact analyses by the relevant agencies... [w]hile we do not express an opinion on whether that would be desirable, we do suggest that if it is to happen, then Congress and not a court should say so as a court's authority is to interpret rather than to make the law." *Id.* at 790.

146. *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, No. Civ. A. 01-702, 2006 W.L. 1097498 (D.N.J.) (Mar. 31, 2006).

dressed the outstanding claim that the NJDEP intentionally discriminated against the residents of South Camden in issuing the permit.<sup>147</sup> Under that analysis the court on remand rejected each of the plaintiffs' contentions that NJDEP purposefully granted the permit based on the race of the residents.<sup>148</sup> The court went on to find the following:

When the Court grants all inferences in favor of Plaintiffs, including evidence of potentially discriminatory enforcement and of a foreseeable disparate impact, Plaintiffs still fail to establish that NJDEP issued permits to SLC because of, not merely in spite of, its adverse effects upon the minority community of Waterfront South.<sup>149</sup>

South Camden, like the other cases surveyed, represents the contemporary experience of many racial minorities today.<sup>150</sup>

#### IV. FACING THE BROKEN BRIDGE - EQUAL PROTECTION AND TITLE VI JURISPRUDENCE

##### A. *Equal Protection Jurisprudential Theory*

A broad and deep literature has developed over the past three decades around antidiscrimination and equal protection jurisprudence.<sup>151</sup> Most of the articles of the time period attempt to make

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147. *Id.* at 1.

148. *Id.* at 36.

149. *Id.* (The court's decision falls squarely within the vast majority of race based Equal Protection cases challenging race neutral policies decided over the past thirty years. As in those cases, the *Arlington Heights* factors serve to justify discriminatory racial impacts that result from facially neutral policies).

150. *See infra* Part II.

151. *See* Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007); Stephen A. Plass, *Privatizing Antidiscrimination Law with Arbitration: The Title VII Proof Problem*, 68 MONT. L. REV. 151 (2007); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Gregory Mitchell & Phillip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469 (2005); Viktor Winkler, *Dubious Heritage: The German Debate on the Antidiscrimination Law*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 959 (2005); Ivan E. Bodensteiner, *Review of*

sense of the Supreme Court's antidiscrimination jurisprudence under the Equal Protection Clause of the United States Constitution, the civil rights legislation of the 1960s or both.<sup>152</sup> The constant theme across the literature sounds in the reconciliation of the landmark *Brown v. Board of Education* and its progeny with the subsequent decisions of the Burger and Rehnquist Courts contracting the reach and warrants for race based antidiscrimination findings.<sup>153</sup> In this section, the article explains the rejection of environmental racism claims in the federal courts using democratic process and motive review theory; the article strengthens this insight through consideration of the "perpetrator's perspective" of discrimination and the ethnic competition model of racial disparity used by the Supreme Court in its Equal Protection Clause Jurisprudence.<sup>154</sup>

Beyond the assertion that intentional discrimination is required to prove a violation of the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964, this section situates the level of intentionality required in the environmental decision making process along a continuum with other public decisions and relates the level of intent required to constitute a violation to the process used to authorize pollution in predominantly minority communities. Because racial disparity is relevant to courts' analysis of racial discrimination under the *Village of Arlington Heights*, the section also explains the ever decreasing significance of the disparate impacts of environmental pollution to the outcome of federal "environmental racism" cases. This section culminates in the development of an "environmental racism" rubric that classifies environmental decisions based on their exposure to an equal protection challenge. Specifically, the rubric charts the assortment of public environmental decisions and the level of deference provided by courts together with the evidentiary burden necessary to prove discriminatory intent.

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*David E. Bernstein's You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws*, 31 J.C. & U.L. 437 (2005); P.K. Runkles-Pearson, *The Changing Relations of Family & the Workplace: Extending Antidiscrimination Laws to Parents and Nonparents Alike*, 77 N.Y.U. L. REV. 833 (2002); Chetan Gulati, *Genetic Antidiscrimination Laws in Health Insurance: A Misguided Solution*, 4 QUINNIPIAC HEALTH L.J. 149 (2001).

152. Most antidiscrimination scholarship falls into the later category, which would be expected in light of the shared historical development of the two areas.

153. See sources cited *supra* note 151.

154. While these do not represent all of the mechanisms used to "make sense" of the Court's decisions, they account for a substantial share of the commentary.

Legal commentators' concern with the Supreme Court's increasingly restrictive exposition of the protections offered by the Equal Protection Clause of the United States Constitution has dominated journal articles on the subject for over thirty years.<sup>155</sup> The articles cover a range of approaches. While some commentators decry the Court's turn away from the commitments of *Brown* and its progeny,<sup>156</sup> others challenge the Court's reliance upon "colorblind constitutionalism."<sup>157</sup> A much smaller group commends the court for their principled decisions<sup>158</sup> while others use psychological insights to critique the Court's intentional discrimination standards.<sup>159</sup> This section draw insights from an additional group of articles that endeavor to explain the Court's decisions based on an internal logic woven through the cases and a broader jurisprudential analysis.<sup>160</sup>

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155. See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284-85 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); George Rutherglen, *Symposium: The Jurisprudence of Justice Stevens: Panel VI: Equal Prot.: Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313 (2006); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007); Stacy E. Seicshnaydre, *Is the road to Disparate Impact Paved With Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141 (2007); Daniel R. Ortiz, *The Myth of Intent in Equal Prot.*, 41 STAN. L. REV. 1105 (1989); Samuel Issacharoff, *Making the Violation Fir the Remedy: The Intent Standard and Equal Prot. Law*, 92 YALE L.J. 328 (1982); Reva B. Siegel, *Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998); Richard A. Primus, *Equal Prot. and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

156. See sources cited *supra* note 155.

157. *Id.*

158. See Richard McAdams, *Cooperation & Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995) (for an example from an interesting economic perspective).

159. See Charles R. Lawrence III, *The Id, the Ego, and Equal Prot.: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Charles R. Lawrence III, *Unconscious Discrimination Twenty Years Later: Application & Evolution*, 40 CONN. L. REV. 931 (2008).

160. While other important articles offer viable accounts, their examination extends beyond the scope of this article. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 533 (1980); Daniel R. Ortiz, *The Myth of Intent in Equal Prot.*, 41 STAN. L. REV. 1105 (1989); Reva B. Siegel, *Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L.

Foremost are Motive Review and Democratic Process Theory. This theoretical framework explains the deferential approach taken by judges in reviewing Fourteenth Amendment Equal Protection challenges to the decisions of legislative bodies and executive authorities. A key feature of this section is the specific application of this theory to environmental decision making. The “Perpetrator's Perspective” of racial discrimination and the ethnic competition model of racial disparity are also integrated in order to contextualize this “race neutral” mechanism for judicial review in light of two dominant trends in Supreme Court race discrimination jurisprudence. The product of this approach is the creation of an “environmental racism” rubric that categorizes environmental decisions and the level of deference the courts should provide with the level of evidence required to prove an Equal Protection Clause violation.

The first of the three articles considered in this section is a seminal work in Critical Race Theory by David Alan Freeman.<sup>161</sup> In *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, professor Freeman chronicles the twenty-five year history of Supreme Court decisions on equal protection and racial discrimination.<sup>162</sup> Professor Freeman's elaboration of two perspectives on discrimination—perpetrator and victim—available to the Courts serves as one of the articles central insights.<sup>163</sup> The perpetrator perspective understands discrimination as discrete actions carried out by individual actors against particular victims.<sup>164</sup> From this perspective discrimination appears as historic and isolated events.<sup>165</sup> America's history of slavery and Jim Crow segregation constitute irrelevant background factors under this view unless directly linked to the alleged violation.<sup>166</sup> In contrast, the victim perspective focuses on current social condi-

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REV. 1470 (2004); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998).

161. KIMBERLE WILLIAMS CRENSHAW et al., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (New Press 1996).

162. Although these articles and my analysis focus on the race cases under equal protection they may offer a helpful background story to the Court's gender, disability, and age jurisprudence.

163. Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1057 (1978).

164. *Id.* at 1053-54.

165. *Id.* at 1053-55.

166. *Id.* at 1052-53.

tions and their relation to historic mistreatment.<sup>167</sup> From the victim's perspective, discrimination problems cannot be resolved until the conditions created by discrimination have been eliminated.<sup>168</sup> This view clearly contradicts the perpetrator perspective that construes the neutralization of the proscribed behavior as a remedy of the established violation.<sup>169</sup>

The twin concepts of fault and causation provide the strong structural artifice holding up the perpetrator perspective.<sup>170</sup> Fault allows antidiscrimination law to single out bad actors traversing the society's norm of racial neutrality.<sup>171</sup> Through it, a large class of "innocents" is constructed who lack legal and moral responsibility for the discriminatory results of their conduct because they act without a desire to do so.<sup>172</sup> The social ramification of this perspective's dominance can be seen in the resentment expressed by otherwise "innocent" members of the racial majority when remedial measures for historic discrimination such as affirmative action and reparations are discussed.<sup>173</sup> A vision of America as an equal opportunity meritocracy only occasionally sullied by aberrant discriminating actors emanates from this perspective.<sup>174</sup>

Causation balances fault in the perpetrator perspective.<sup>175</sup> By requiring that a defendant's actions create a "discriminatory effect," causation places objective discriminatory conduct beyond the reach

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167. *Id.* ("This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.").

168. *Id.* at 1053.

169. *Id.* (Affirmative action and reparations, both largely unpopular with the society's racial majority, grow out of this perspective.).

170. *Id.* at 1054.

171. *Id.*

172. *Id.* at 1055; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Prot.: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987) (examining the prevalence and importance of unconscious bias in American society and the impotence of current antidiscrimination law to address it).

173. See *id.* (While reparations programs are overwhelmingly rejected by whites, affirmative action is disfavored by a majority of white Americans); see also *id.* at note 83; Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action*, GALLUP, August 23, 2005, available at <http://www.gallup.com/poll/18091/Race-Ideology-Support-Affirmative-Action.aspx>. ("Whites are much more divided [than blacks], with opponents outnumbering supporters [of affirmative action] by a 49% to 44% margin.").

174. Freeman, *supra* note 163, at 1054.

175. *Id.* at 1056-57.

of legal protection when no unique harm befalls its victims.<sup>176</sup> This explains why the Court could find no violation of the Equal Protection Clause when jurisdictions across the American South openly closed down public facilities and services rather than provide them to blacks on an equal basis.<sup>177</sup>

Professor Freeman's article skillfully traces the Court's formalistic adoption of the "perpetrator perspective" and the challenge it faced in crafting remedies that correlated to the violations it identified that did not overly embrace the "victim perspective."<sup>178</sup> Professor Freeman accounts for dissonance in the Court's decisions in the twenty-five year period following *Brown* as the Court's ongoing efforts to legitimize the continued material subordination of blacks in the country while at the same time proscribing formal discrimination by public officials.<sup>179</sup> Freeman marks the creation of remedies that offer the mirage of resolution without endorsing the "victim perspective" as no mean feat rather skillfully accomplished by the Court.<sup>180</sup>

This article maintains that the perpetrator perspective provides the framework courts begin with in investigating environmental racism claims. Typically, environmental racism claimants bring cases based on their perspective as victims of polluting facilities that operate outside of the bounds of their control. For some, their experiences as racial minorities in the broader American society place them within a historical narrative fraught with political neglect and economic exploitation. Redlining, housing discrimination, segregated schools, and limited employment opportunities all color claimants perception of the government and businesses in their communities. In contrast, courts begin with a blind eye to these other factors. They focus almost exclusively on determining whether plaintiffs have presented sufficient evidence that government actors acted with racial malice in approving a commercial or public use of property or the release of pollutants into the environment. For the courts, evidence must dem-

176. *Id.* (Freeman cites, as examples of this, the post-*Brown* cases upholding state actions of closing public schools, swimming pools, and other segregated public facilities, rather than complying with desegregation orders.); *Palmer v. Thompson*, 403 U.S. 217 (1971); *Evans v. Abney*, 396 U.S. 435 (1970). A specific example in the environmental law context can be seen in *E. Bibb Twiggs Neighborhood Ass'n. v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880, 884-85 (M.D. Ga. 1989), *aff'd.*, 896 F.2d 1264 (11th Cir. 1989).

177. Freeman, *supra* note 163, at 1057.

178. *Id.* at 1054-57.

179. *Id.* at 1050-51.

180. *Id.* at 1057.



onstrate that one or more government officials, who are presumed innocent, acted on racial rather than commercial or environmental grounds in making a particular decision. Otherwise, officials will lack fault for the disparate racial effects that may result from their decisions. Moreover, the technical nature of environmental decisions considered in tandem with the commercial interests that typically drive them give officials a host of race neutral reasons to authorize the placement of polluting facilities in minority communities and to grant pollution permit requests. Through the blinders of the perpetrators perspective, environmental decision making seems less likely to be associated with improper racial motives than many other government actions regardless of the racial disparate effects associated with them because government actors lack "fault" for the disproportionate impacts that may result from their use of race neutral decision making criteria. This perspective also means that courts will discount pollution facilities and activities that impact whites and racial minorities alike as evidence that race was not the basis of a government decision. Even when the particular harm risked or exposure experienced by racial minorities is higher than that facing their white counterparts, courts will view the impact on whites as evidence that something other than race "caused" the alleged harm.

Sheila Foster provides the critical explanation of the Court's equal protection jurisprudence, for the purposes of this article.<sup>181</sup> In *Intent and Incoherence*, Professor Foster provides a cogent analysis of the Court's equal protection decisions by applying "motive review theory" and its antecedent "democratic process theory" to explain the seeming dissonance of the Court's decisions.<sup>182</sup> The article speaks directly to the divergent levels of consciousness required by the Court to satisfy the discriminatory intent standard applied to the Equal Protection Clause.<sup>183</sup>

Refining, extending, and critiquing the arguments advanced by Daniel Ortiz in the *Myth of Intent in Equal Protection*, Professor Foster posits the coherence of Supreme Court equal protection decisions when viewed in light of "institutional process and substantive concerns."<sup>184</sup> Under process theory, the Court self consciously exer-

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181. See Foster, *Intent and Incoherence*, *supra* note 155 at 1065.

182. *Id.* at 1070-71.

183. *Id.* at 1069. (This consciousness can range from a specific desire to harm the affected group, to general knowledge that harm is substantially certain to occur, to an unconscious bias towards the affected group.)

184. *Id.* at 1121-25.

cises “judicial restraint” when examining executive and legislative actions.<sup>185</sup> This deference supports the Court’s majoritarian preference for democratic policy decisions.<sup>186</sup> By restricting its role to examining the legitimacy of the process followed by its fellow branches, the Court avoids “substituting its policy preferences for those of other, more representative and accountable actors.”<sup>187</sup> As a “counter-majoritarian” institution,<sup>188</sup> under process theory, court decisions overturning the actions of other branches absent the violation of “clear and determinative constitutional provisions” represents the frustration rather than the furtherance of American democracy.<sup>189</sup>

Motive review theory envisions the Court as the “corrector of democratic process defects.”<sup>190</sup> Racial prejudice and bias represent improper legislative and administrative motives that corrupt an otherwise democratic process; when these are found present in the motivation of governmental actors courts properly withhold judicial deference and apply judicial scrutiny to remedy the defective process.<sup>191</sup> Ortiz shows that the Court uses the intent requirement to distinguish the protection of “political, criminal, and educational rights” from the protection of “social and economic goods, like jobs and housing” as a way of facilitating liberalism’s commitment to the protection of individual choice in a societal area relegated to “market control.”<sup>192</sup> Applying this reasoning, the Court’s decision to distin-

185. *Id.* at 1100-01.

186. *Id.* at 1101-02.

187. *Id.* at 1102.

188. For a contrary view of the Court’s counter-majoritarian nature in race cases, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 278–86 (1997) (examining the Supreme Court’s role as a majoritarian institution in significant cases involving the rights of blacks and other minorities); Carlton Waterhouse, *Avoiding Another Step In A Series Of Unfortunate Legal Events: A Consideration Of Black Life Under American Law From 1619 To 1972 And A Challenge To Prevailing Notions Of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207 (2006) (exploring the role of law in the historic mistreatment of African Americans).

189. Foster, *Intent and Incoherence*, *supra* note 155 at 1101-02.

190. *Id.* at 1102.

191. *Id.* at 1102-03.

192. Daniel R. Ortiz, *Myth of Intent in Equal Prot.*, 41 STAN. L. REV. 1105, 1141–42 (1989) (“In making this distinction, intent doctrine reflects our prevailing political ideology-liberalism-which is a system of values rooted in the belief that the state should allow every individual to pursue his own perception of the good. Since such an aim requires the state to remain neutral between competing conceptions of the good, the state can legitimately act only to allow individuals more fully to pursue their own private conceptions....Remaining social interaction is

guish the standard for establishing an equal protection violation from that used under Title VII in the case of *Washington v. Davis* falls into place.<sup>193</sup> Unlike voting, school desegregation, and jury selection cases where the Court allows a finding of discriminatory intent with something less than a showing of motivation, housing and employment cases under equal protection require a higher evidentiary burden to limit judicial intervention in these otherwise market controlled areas.<sup>194</sup>

Using Motive Review Theory, Foster extends Ortiz's work showing that the degree of consciousness required to cause an Equal Protection Clause violation varies within the areas identified by Ortiz as requiring a showing of discriminatory motivation.<sup>195</sup> She explains:

The degree of judicial restraint is linked, in turn, to the ability of disparate impact evidence to trigger the demand for a justification from the decisionmaker. In other words, as the reasons for judicial deference decline, the relevance of disparate impact to the intent inference escalates. This evidentiary variation, in turn, significantly determines the degree of consciousness—or level of intent that can violate the Equal Protection Clause. As a result, the intent doctrine can be conceptualized along a continuum, instead of a bright line, separating the decision's impact from the decisionmaker's intent."<sup>196</sup>

Democratic process concerns, institutional competence, and a decision's potential burden on a challenger's political or fundamental rights sway the Court's evidentiary requirements in equal protection cases.<sup>197</sup> Democratic process concerns—Foster's "democratic validation concerns"—reflect the Court's respect for the superior policy

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governed by free markets since that mechanism is thought best to allow persons to achieve their individually chosen objectives in free trade."

193. See *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (requiring that plaintiffs meet the substantial evidentiary burden of showing the defendants discriminatory motivation).

194. Foster, *Intent and Incoherence*, *supra* note 155 at 1098-99.

195. *Id.* at 1098-99.

196. *Id.* at 1121. The level of judicial restraint depends on the right affected by the decision, the decision maker's relation to the democratic process, and the nature of the decision being made. *Id.*

197. *Id.*

making authority of the executive and legislative branches based on their electoral accountability through the democratic process.<sup>198</sup> Institutional competence considerations involve the Court's deference to the executive and legislative branches but differ from democratic process concerns. Decisions involving an executive or legislative branch exercise of "core constitutional duties" along with those related to specific expertise of the decision maker represent judgments reflecting particular competencies of the decision makers and not the Court thereby justifying a higher evidentiary standard for plaintiffs to prove intent.<sup>199</sup> Potential burdens on a challenger's political or fundamental rights can provide a basis for lowering the evidentiary burden of the challenger in light of the substantive rights at issue.<sup>200</sup> By weighing these three factors, the Court shifts the level of consciousness required to violate the Equal Protection Clause along the continuum.<sup>201</sup>

Legislative and executive policy decisions beyond the scope of fundamental or political rights make up one end of the continuum.<sup>202</sup> The Court provides the highest level of judicial deference in these cases—"super restraint"—refusing to interject their judgment absent a showing of specific intent to harm.<sup>203</sup> At the opposite extreme, the Court applies "minimal restraint" as the lowest level of judicial deference.<sup>204</sup> In these cases, the Court will require a justification from a government decision maker after a showing of substantial administrative discretion and a disparate impact.<sup>205</sup> Between these extremes, the Court applies "intermediate restraint."<sup>206</sup> Under this analysis, the

198. *Id.* at 1101-02.

199. *Id.* at 1124-25.

200. *Id.* at 1125-28.

201. *Id.* at 1121-22.

202. *Id.* at 1122.

203. *Id.*

204. *Id.* at 1132-34.

205. *Id.* Jury cases based on peremptory challenges and the challenge to the key man system for grand jury selection used in Texas make up these cases. *Castaneda v. Partida*, 430 U.S. 482 (1977). The lower standard for these cases results from the Court's protection of the Sixth Amendment right of the defendant, the increased institutional competence of the Court to review the decision, and the decreased democratic process concerns in reviewing decisions of administrative bodies. Foster, *Intent and Incoherence*, *supra* note 155 at 1132-33. Unlike the actions of directly elected legislators and some executive branch personnel, administrative agency policy decisions warrant decreased democratic process concerns. *Id.* at 1128-31.

206. Foster, *Intent and Incoherence*, *supra* note 155, at 1127-28.

Court may supplement its review of the decision maker's stated rationale with consideration of the social and historical context of the decision.<sup>207</sup> If a finding of general intent is made then the Court will also find a decision presumptively unconstitutional absent a justificatory showing by the decision maker.<sup>208</sup> Using this approach, the Court distinguishes the level of intentionality required for equal protection violations—placing a high burden on parties claiming violations resulting from legislative or executive decisions over economic and social issues that do not implicate substantive rights.<sup>209</sup>

This article places environmental decisions into the continuum of government decision making developed by Foster. Unlike government action that involves a fundamental right like voting or jury selection, courts view environmental decisions as market based actions that require plaintiffs to meet a higher evidentiary standard of intent or consciousness for proof. This flows from the lower constitutional significance accorded burdens associated with non-fundamental rights. Institutional competencies further support higher standards of intent in environmental decision making cases for administrative agency and quasi-legislative bodies. Administrative agencies follow highly technical and race neutral federal and state environmental guidelines in making their decisions to grant or deny pollution permit requests. Staffed with scientists and engineers tasked with evaluating a permit applicants compliance with technical standards, administrative agencies have specialized knowledge that courts lack. Courts, in turn, defer to these special competencies and require a higher burden of proof to show that an agency acted with a discriminatory intent. Likewise, local land use decisions made by quasi-legislative bodies with the authority to grant or deny particular land uses receive deference from courts. Both democratic process concerns and institutional competencies support court deference to these bodies. County commissions, city councils, and similar bodies reflect local democratic decision making by voters regarding local land use policies and implementation. Courts defer to the actions of these bodies based on democratic process concerns, as such. However, many local bodies have been elected with the particular purpose of balancing the economic needs of local communities with the interests of commercial entities. Courts see these bodies as exercis-

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207. *Id.* at 1128.

208. *Id.*

209. *Id.* at 1098-99.

ing particular competencies to weigh the competing interests of their communities in economic and other matters. In turn, courts afford deference to these bodies' special abilities to ascertain and act in the best interests of local citizens. Based on this deference the local land use decisions of these entities warrant a higher evidentiary burden on plaintiffs that members acted with racial malice.

Matthew J. Lindsay provides the final analytical model, examined in this section.<sup>210</sup> In his recent article, *How Antidiscrimination Law Learned to Live with Racial Inequality*, Lindsay explores the Courts move from concern with racial disparity as indicia of discrimination in the Civil Rights Era to a doctrine of colorblind competition that explains economic, educational, and other racial disparities in society as a reflection of ethnic differences resulting from racially neutral market based meritocracy.<sup>211</sup> Lindsay maintains that following passage of the Civil Rights Act of 1964<sup>212</sup> antidiscrimination law in the federal courts can be divided into three periods: the Civil Rights Era; Colorblind Equality; and Colorblind Competition.<sup>213</sup> This article considers each period proposed by Lindsay for the luminary spotlight it casts on equal protection jurisprudence.<sup>214</sup>

From 1965-1971, federal courts and the United States Department of Justice sought ways to put the new antidiscrimination laws fully into practice.<sup>215</sup> The justice department, the Equal Employment Opportunity Commission, and others looked to racial proportionality in employment as a means to evaluate compliance with Title VII's<sup>216</sup> antidiscrimination requirements for the workplace.<sup>217</sup> The underlying logic commonly employed by the courts and federal officials was that absent racial discrimination blacks and other racial groups would experience proportionate representation in the labor force.<sup>218</sup>

210. Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87 (2006).

211. *Id.* at 88-90.

212. Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. (1964).

213. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 88-92.

214. *See infra* notes 216-250 and accompanying text.

215. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 93-95.

216. Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (1964).

217. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 95-100.

218. *Id.*

In response to concerns that more affirmative steps were required to facilitate a non-discriminatory and hence representative workforce, President Lyndon Johnson began and President Richard Nixon continued city based initiatives in federal contracting.<sup>219</sup> These programs required that the construction industry and its unions create hiring plans that would allow them to reach certain levels of minority representation.<sup>220</sup> When challenged, the federal courts upheld these programs using the same logic that applied to the ongoing Title VII cases—absent discrimination blacks would have proportionate representation in desirable jobs.<sup>221</sup> In *Griggs v. Duke Power* the Supreme Court weighed in and held that a racial disparity in the workforce based on facially neutral hiring criteria was sufficient to show discrimination and to establish a violation of Title VII unless the employer could connect the criteria with a business necessity.<sup>222</sup> Reflecting the logic of the lower courts and federal officials of the time, the Court viewed the employer's lack of black employees in certain positions resulting from its facially neutral criteria as indicia of discrimination requiring a justification by the employer.<sup>223</sup>

The next period, in Lindsay's analysis reflects the federal courts turn away from racial discrimination as the cause of racial disparity in education, employment and other aspects of society.<sup>224</sup> Justice Powell's opinion in *Regents of the University of California v. Bakke* provides the quintessential expression of the reasoning behind the social and legal turn away from expectations of racial proportionality.<sup>225</sup> Powell's opinion stands out in the landmark plurality decision for crafting the diversity rationale for affirmative action recent upheld in *Grutter v. Bollinger*.<sup>226</sup> Upon investigation, Powell's opinion also stands out for reformulating the Court's understanding of racial disparity in American society and its relationship to dis-

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219. *Id.* 98-100. See PHILIP RUBIO, A HISTORY OF AFFIRMATIVE ACTION 149-156 (Univ. Press of Miss. 2001), for a discussion of these initiatives and other aspects of affirmative action's development during this period.

220. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 99-100.

221. *Id.* at 100-04.

222. *Id.* at 104-07; See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

223. *Griggs*, 401 U.S. at 429-30.

224. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 109-15.

225. *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978).

226. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

crimination.<sup>227</sup> As Lindsay points out,<sup>228</sup> Powell leaves the original purpose and understanding of the Equal Protection Clause as providing freedom and protection to the slave race to the universalized purpose of providing protection to what had become “a nation of minorities.”<sup>229</sup> In making this turn Powell, recast the preceding two hundred and forty four year history of legally proscribed subjugation and subordination of American blacks<sup>230</sup> preceding the civil rights movement with the experience of discrimination against ethnic immigrants.<sup>231</sup> By defining America as a “nation of minorities” and equating blacks experience with that of other more successfully assimilated immigrants<sup>232</sup> Powell argues that the “white majority” consists of a range of ethnic immigrants who are equally threatened with discrimination from governmental actors seeking to remedy the effects of past discrimination by whites against other groups.<sup>233</sup>

Connecting Powell’s argument with the writings of colorblind advocates of the time, Lindsay illustrates the twofold effect of the argument.<sup>234</sup> He elaborates:

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227. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 110-12.

228. *Id.*

229. *Regents of Univ. of Ca.*, 438 U.S. at 291-93.

230. Not to mention the conquest of its Native Americans.

231. *Regents of Univ. of Ca.*, 438 U.S. at 292. He writes, “Each had to struggle -- and, to some extent, struggles still -- to overcome...prejudices. *Id.* at 292. A full examination of the validity of this claim is beyond the scope of this article. The experience of Jewish immigrants fleeing Nazi persecution, Vietnamese immigrants escaping the Killing Fields, and Cubans departing Castro’s Cuba to come to the United States, however, seems of a different type than that of Native Americans and blacks whose primary experience of persecution came from the colonial, state, and federal governments as well as its diverse citizens pursuant to its laws. For these groups, America beckoned not for their “tired poor and huddled masses yearning to be free.” See Carlton Waterhouse, *Avoiding Another Step in A Series of Unfortunate Events*, 26 B.C. THIRD WORLD L.J. 207, 227-250 (2006), for an examination of the significant role of law in the historic mistreatment of African Americans.

232. In the opinion Powell notes, “Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin.” *Regents of Univ. of Ca.*, 438 U.S. at 293.

233. *Id.* at 294.

234. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 113-14.



First, it suggests that African Americans will follow a path of ethnic progress comparable to that of their immigrant forebears--the Irish, eastern European Jews, Italians, Japanese, and the like. Second, it accounts for racial inequality as an expression of ethnically distinctive culture or taste. Racial inequality is thus tolerable because it is temporary and bound to be diminished with each generation; but even if it persists, it is merely a natural manifestation of black ethnic difference. Under this model, the goals of the civil rights movement have already been satisfied, notwithstanding apparent evidence to the contrary; all that remains for antidiscrimination law is to police against the isolated, exceptional acts of illicit discrimination perpetrated by a handful of racist throwbacks to the Jim Crow era.<sup>235</sup>

Each of these points corresponds to contemporary and popular views of racial discrimination.<sup>236</sup> Overt discrimination's substantial diminution and the continued disparity in the educational and economic achievement of black, Latino, and Native Americans find ready explanation in the "culture of poverty" arguments popularized in the 1980s and still very relevant today.<sup>237</sup> The implicit irony of the second point Lindsay identifies above is that adherents both espouse "colorblindness" and the essentializing arguments of racial difference that ascribe positive and negative stereotypes to racial minorities and ethnic groups to explain their relative successes and failures in society.<sup>238</sup> The first point, of course, reflects the huge

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235. *Id.*

236. *Id.* See also JOHN MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (The Free Press 2000), and THOMAS SOWELL, *BLACK REDNECKS & WHITE LIBERALS* (Encounter Books 2005).

237. The thesis maintains that the disparity in economic and educational achievement of blacks, Latinos, Native Americans, and other groups results from their failure to assimilate the positive norms of American society rather than discrimination. SOWELL, *BLACK REDNECKS & WHITE LIBERALS* *supra* note 236. A second extension of the argument is manifested in less popular genetic inferiority claims. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *BELL CURVE: INTELLIGENCE & CLASS STRUCTURE IN AMERICAN LIFE* (Free Press Paperbacks 1994).

238. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 117-18; see ROSALIND S. CHOU & JOE R. FEAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* (Paradigm Publishers 2008); see also FRANK WU, *YELLOW: RACE IN AMERICA BEYOND*

paradox at the heart of the argument—blacks, whose arrival predated that of the immigrants they are compared to by one to two centuries will succeed just as their predecessors did.<sup>239</sup>

Lindsay tracks the second thesis through a series of Court decisions to show its prevalence in the Court's Title VII and equal protection analysis.<sup>240</sup> In the Title VII context, the courts in *Watson v. Fort Worth Bank and Trust*<sup>241</sup> and *Wards Cove Packing v. Atonio*<sup>242</sup> reject the reasoning used in *Griggs* and its progeny that the lack of racial proportionality in the work place could rise to the level of a Title VII violation. In these cases, the majority rejected the argument that racial disparity reflected racial discrimination that required an employer to show that it was precipitated by "business necessity" as established by *Griggs*.<sup>243</sup> The *Ward's Cove* case represented a particularly strong expression of the thesis as Justice O'Connor deemed the ultra segregated positions, dining, and living quarters between whites and Alaskan natives as reflections of racial difference and inclinations devoid of legal significance.<sup>244</sup>

In its seminal equal protection cases, the Court even more keenly reflected the "racial difference" argument initiated in *Bakke*.<sup>245</sup> *City of Richmond v. Croson*, represents the next step in the Court's break with its approach adopted in *Griggs* explicitly reasoning that gross racial disparity<sup>246</sup> in the construction field in Richmond, Virginia did

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BLACK AND WHITE (Basic Books 2001) for an investigation of the pitfalls for Asians and other groups of accepting the label that they represent "model minorities" in American society who demonstrate the systems racial impartiality through their success.

239. Acceptance of this proposition while encouraging to some reflects a historical understanding of society that avoids the economic, educational, political, and psychological consequences of three centuries of collective experiences prior to the passage of the civil rights act of 1964. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 123-24.

240. *Id.* at 124-34.

241. *See* *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).

242. *See* *Wards Cove Packing Co., v. Atonio*, 490 U.S. 642 (1989).

243. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

244. *Wards Cove Packing Co.*, 490 U.S. at 642.

245. *Id.*

246. In this case, it represented the near exclusion of blacks as prime contractors in the industry. The city council's study revealed that blacks made up less than 1% of the City's construction contracts and 50% of the city's population. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 479 (1989).

not suggest the presence of racial discrimination.<sup>247</sup> In the plurality opinion, Justice O'Connor, dismisses the uncontested statistical evidence, testimony of witnesses, and findings of the United States Congress relied upon by the city council that racial discrimination against blacks was characteristic of the construction industry.<sup>248</sup> In this regard, O'Connor expresses the underlying view subsequently applied to the federal government in *Adarand v. Peña* that existing racial disparity in the market place can only be correlated with discrimination through specific and direct evidence of discriminatory acts.<sup>249</sup>

The model of ethnic competition rationalizes courts decreased reliance on disparate effects as evidence of improper racial motives. In environmental racism cases, polluting facilities and other environmental disamenities are disproportionately located in black and Latino communities. Though relevant, under the *Village of Arlington Heights*, to prove racial discrimination disparate environmental impacts lack the gravity required to offset the high evidentiary burden required to prove intent by quasi-legislative bodies and administrative environmental agencies. Even stark racial disparities are likely to be dismissed by courts as the result of free market land use decisions by residents and commercial entities. Moreover, the ethnic model of competition suggests that the racial disparities associated with blacks and Latinos today will likely dissipate over time as blacks and Latinos integrate into the society as other ethnic groups have. Under this reasoning, racial clusters and communities fit the paradigm of ethnic enclaves that decrease in significance as subsequent generations enjoyed increased opportunities within the broader society. The prevalence of environmental pollution sources in these communities, from this perspective, fails to implicate an improper racial motivation by government actors. More often than not, the free market will be seen as the reason for racial disparity based on

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247. O'Connor states, "the statistics comparing the minority population of Richmond to the percentage of *prime* contracts awarded to minority firms had little or no probative value in establishing prior discrimination." *Id.* at 503. O'Connor's opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 294 (1977), (foreshadows the more elaborated view that she adopts in *Crosby*).

248. *City of Richmond*, 488 U.S. at 499.

249. *See Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995) (requiring the "strictest judicial scrutiny" of racial classifications by Congress even when intended to remedy past discrimination.).

the availability of land and the depressed rent that residents may enjoy.

*B. Equal Protection Jurisprudential Theory and Environmental Justice*

Environmental justice cases fall typically within the level of what Foster identifies as intermediate restraint. These claims brought under the Equal Protection Clause seek to overturn state agency decisions regarding the adequacy of a party's pollution permit request on the grounds of racial discrimination.<sup>250</sup> Rather than alleging that state actors selected facility locations with the specific intent to adversely affect a particular racial group, plaintiffs routinely allege that state actors granted permit requests without regard to the discriminatory effect of their decision.<sup>251</sup> Although environmental permitting decisions are made by administrative entities rather than legislators or high-level executive officers, they fall clearly within the realm of economic ordering governed by the market.<sup>252</sup> They largely result from requests for permits from commercial entities engaged in business activities. As a matter of geography, state and federal permits rarely relate to local land use decisions beyond minimum technical standards of ecological suitability and compliance with local land use laws. Consideration of the racial makeup or identity of persons in near proximity to facilities is absent from the state and federal government permitting process. The identity of persons residing near facilities is simply a matter of the housing market divorced from governments' operating practices.

Based on the above perspectives on the Court's equal protection jurisprudence environmental justice claims, have little chance of success absent a specific showing of racial discrimination<sup>253</sup> by the

250. See *supra* text accompanying notes 52-96.

251. *Id.*

252. Environmental permit decisions routinely reflect the market forces driving local land use for both public and private entities. FRANK ACKERMAN & KEVIN GALLAGHER, G-DAE WORKING PAPER NO. 00-05: GETTING THE PRICES WRONG: THE LIMITS OF A MARKET-BASED ENVTL. POLICY 10 (Tufts Univ. Oct., 2000), available at [ase.tufts.edu/gdae/publications/priceswrong.PDF](http://ase.tufts.edu/gdae/publications/priceswrong.PDF).

253. In these contexts, historic discrimination requires more than past disparity. Covert or overt racial discrimination typically associated with segregation era racial bias will be required rather than facially neutral decisions that have a disparate racial impact. See *Dowdell v. City of Apopka*, 698 F.2d 1181 (Fla. 1983); *Fortson v. Dorsey*, 379 U.S. 433 (1965).

permitting agency in its past decisions and a level of intentionality in the current decision beyond awareness of disparate impacts.<sup>254</sup> In the absence of direct evidence of improper racial motive the courts' approach should roughly conform to the following chart:

DECISION MAKER/ DECISION <sup>255</sup>	DEFERENCE LEVEL <sup>256</sup>	EVIDENTIARY BURDEN	DISPARITY EVIDENCE REQUIRED <sup>257</sup>
Agency-Executive/ Technical	High	High	Highly Disparate Racial Impact
Agency-Executive/Non-Technical	Intermediate	Intermediate	Significant Disparate Racial Impact
Elected Board/ Technical	High	High	Highly Disparate Racial Impact
Elected Board/ Non-Technical	High	Intermediate	Substantially Disparate Racial Impact

254. See sources cited *supra* note 151.

255. See Mark D. Rosen, *The Surprisingly Strong Case For Tailoring Constitutional Principles*, 153 U. PA. L. REV 1513 (2005) (discussing the theoretical basis for tailoring constitutional principles to different levels of government). See also Norman R. Williams, *Rising Above Factionalism*, 69 N.Y.U. L. REV. 963 (1994) (contending that the Court should consider both the governmental agent making decisions and the procedure it followed during its judicial review). Technical decisions under this approach represent those based in scientific or technical proficiency beyond the expertise of judges. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984).

256. See Sidney A. Shapiro and Richard E. Levy, *Heightened Scrutiny of the Fourth Branch*, 1987 DUKE L. J. 387 (1987) (arguing that the separation of powers doctrine underlying court deference to agency actions also places a check on administrative conduct).

257. This column presumes the use of indirect evidence of racial motive contemplated by the Court in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 255 (1977) in conjunction with statistical data. Under this approach, the significance of racially disparate impacts is weighted along with other evidence of racial discrimination in assessing an alleged equal protection violation. See *Washington v. Davis*, 426 U.S. 229, 241-242 (1976) (discussing the use of statistical data to ascertain a discriminatory purpose under the Equal Protection Clause).

Agency Officer/ Technical	Intermediate	Intermediate	Significant Disparate Racial Impact
Agency Officer/ Non-Technical	Low	Low	Significant Disparate Racial Impact or Highly Disparate Racial Impact Alone

The highest evidentiary burden will be seen in the decisions of elected boards and executive level agency directors making technical decisions. These decisions require the greatest deference to in order to protect the democratic process that responds to the policy choices of elected officials. In order to prevail in such cases, claims relying on circumstantial evidence have a high bar that requires a highly disparate racial impact in addition to evidence of an improper racial motive. This high burden is required to overcome courts' reluctance to interfere in the decisions of elected officials without direct evidence of an impermissible racial motive characteristic of the *de jure* legislation of the pre-civil rights era and the affirmative action programs of the last three decades. In the absence of direct evidence, a combination of a high level of racial disparity and additional evidence from which the court can readily infer a discriminatory purposeful should meet the courts demands.

Elected boards making non-technical decisions make up a unique class of decisions. In these cases, a high level of deference ought to be provided the elected bodies absent direct evidence of racial motive, however, because the decision is non-technical fewer institutional competency concerns constrain the courts. Boards issuing decisions based in technical criteria warrant more restraint from courts than others. This distinction is reflected in a distinct evidentiary burden in these cases that requires that a substantial racial disparity be shown together with evidence of a racial motive. By requiring a substantial disparity along with racial motive evidence, this intermediate burden falls between the lowest and highest evidentiary requirements reflecting an appropriate deference to elected officials policy judgments when presented with fewer institutional competency concerns.

Executive level agency directors making non-technical decisions and non-executive level agency officials making technical decisions make up the next level which merits an intermediate level evidentiary burden. In each of these cases, claims relying on circumstantial evidence will require a significant disparate racial impact plus evi-

dence of an improper racial motive. Although the evidentiary burden and the deference provided by the court are the same for both of these cases, the rationale differs. Executive level agency directors making non-technical environmental decisions warrant less deference from the courts based on the non-technical nature of their considerations and the courts ability to evaluate the grounds of the challenged decision. In turn, a lower evidentiary burden is called for to infer a discriminatory purpose. When a non-executive agency officer renders a decision based on technical criteria the court should also apply an intermediate level of deference based on the technical nature of the officer's decision and the institutional competencies it reflects; in these cases an intermediate evidentiary burden will require that a significant racial disparity be shown in addition to racial motive evidence.

The lowest level of deference and the lowest evidentiary burden coincide when non-elected agency officers make non-technical decisions. These judgments raise the fewest institutional competence concerns as a result of their non-technical nature and warrant the least amount of deference from the courts based on the non-elected and non-executive position of the decision maker. These matters call for the greatest inquiry by the courts and the highest sensitivity to the racial disparity of decisions. At this level, an inference of discriminatory purpose can be raised by significant disparate racial impacts together with racial motive evidence and in some cases highly disparate racial impacts alone. By recognizing the different levels of evidence required and deference warranted courts gives meaningful expression to both democratic process concerns and institutional competencies while continuing to examine executive and legislative branch decisions for the taint of invidious racial discrimination that offend our constitutional protections.

This foregoing theoretical analysis of the Court's Equal Protection Jurisprudence conforms to the decisions in the environmental justice cases brought under the Equal Protection Clause discussed above.<sup>258</sup> In *Bean*, the court eviscerated the claimants' disparity claim by distinguishing the actions of the Texas Department of Health and the Texas Department of Water Resources.<sup>259</sup> While the claimant alleged that the TDH had continued the historic discriminatory pattern

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258. See *supra* text accompanying notes 52-96.

259. See *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 677-79 (Tex. 1979).

of the TDWR, the court maintained that as distinct agencies their actions should not be considered together.<sup>260</sup> This distinction plays out in similar ways in the other cases as well.<sup>261</sup> The Court in *East Bibb* began its analysis, like the court in *Bean*, removing the landfills placed in black communities by another body from the disparity analysis.<sup>262</sup> After doing so, the court found that no significant disparity existed.<sup>263</sup> In *R.I.S.E. v. Kaye*, the Court rejected evidence that all but one of the landfills placed in the county were located in black communities partially on the grounds that only two commissioners who approved only one of the three other landfills currently served on the commission.<sup>264</sup> This approach falls squarely within the “perpetrator’s perspective.”<sup>265</sup> Courts, when evaluating discriminatory effects, consider the actions of only one agency instead of the cumulative effect of multiple agencies.<sup>266</sup>

Environmental justice decisions can also be explained under democratic process and motive review theory.<sup>267</sup> Under those theories, courts will defer to the judgment of legislative bodies and high-level executive officers to exercise judicial restraint to protect democratic values.<sup>268</sup> The environmental cases above reflect the decisions of state administrative officers or county commissioners.<sup>269</sup> Motive review theory counsels distinct approaches under each of these two governmental bodies.<sup>270</sup> For the administrative decision maker, the issuance of a permit follows a highly regulated technical review process.<sup>271</sup> Generally, permitting authorities grant environmental permit requests unless applicants fail to satisfy pre-

260. *Id.*

261. *E. Bibb Twiggs Neighborhood Ass’n. v. Macon-Bibb County Planning & Zoning Comm’n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d.*, 896 F.2d 1264 (11th Cir. 1989).

262. *Id.* at 1266.

263. *Id.* at 1267.

264. *R.I.S.E. v. Kay, Inc.*, 786 F. Supp. 1144, 1149-50 (E.D. Va. 1991).

265. *See Freeman, supra* note 163.

266. Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

267. Foster, *Intent and Incoherence, supra* note 155 at 1100-02.

268. *Id.*

269. *See supra* notes 52-151 and accompanying text.

270. *See supra* text accompanying notes 52-151.

271. ABA, *THE LAW OF ENVTL. JUSTICE: THEORIES & PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 473-81 (Michael B. Gerrard ed., NYU Press 2001) (1999).



established federal or state criteria.<sup>272</sup> Unless these criteria include community input or “environmental justice” as considerations, agency decision makers typically express the view that they lack the authority to deny a permit if it otherwise complies with state and federal technical requirements.<sup>273</sup>

Courts reviewing these permitting decisions under an equal protection analysis will defer to the technical judgments of agency authorities absent evidence of a specific discriminatory intent.<sup>274</sup> Under motive review theory, these decisions can warrant a high level of deference.<sup>275</sup> The particular institutional competencies involved and the limited discretion of the decision makers, for some executive decisions, call for courts to use “super restraint” since neither political nor fundamental rights are involved.<sup>276</sup> Exercising this high level of restraint, courts will not overturn the decisions of a high-level administrator unless presented with evidence of a specific intent to discriminate.<sup>277</sup> Administrative agencies’ decisions to grant permits, despite discriminatory effects rather than due to them accordingly, fail to demonstrate the requisite intent.<sup>278</sup>

In *South Camden Citizens in Action v. N.J. Department of Environmental Protection*, the District Court denied plaintiffs’ claim that the NJDEP violated § 1983 by granting a pollution permit to a cement processing facility in a minority community already burdened with multiple polluting facilities without assessing the disparate racial impacts it would cause.<sup>279</sup> The District Court held that plaintiffs failed to show that the agency granted the permit because of rather than in spite of the disparate racial effects.<sup>280</sup> In essence, the court found no specific intention to discriminate by the department and

272. See Cole & Foster, *supra* note 65, at 103-21 (for a discussion of the role of the opportunities and limits of public participation within the environmental decision-making context).

273. *Id.* at 75-76. Consider the position adopted by the Michigan Department of Environmental Quality in *NAACP-Flint County Chapter v. Engler*, Genesee County Cir. Ct., 95-38228-CV.

274. Foster, *Intent and Incoherence*, *supra* note 155.

275. *Id.* at 1122-28.

276. *Id.*

277. *Id.*

278. *S. Camden Citizens in Action v. N.J. Dep’t. of Env’tl. Prot.*, 274 F.3d 771, 775 (2001); see also *supra* note 151.

279. *S. Camden Citizens in Action*, 274 F.3d at 775.

280. See *supra* note 151.

absent such a finding saw no basis to hold that the agency violated § 1983.

Quasi-legislative bodies with discretion to approve or deny local land use decisions lack the restrictions placed upon administrative agencies.<sup>281</sup> These voting bodies can weigh a host of considerations in their decision-making.<sup>282</sup> Under Motive Review Theory, the increased discretion these bodies enjoy; warrants a decreased level of deference from courts in light of the increased opportunity for improper considerations to affect members' judgment.<sup>283</sup> However, those bodies making local land use decisions will likely receive greater deference from courts in light of democratic process concerns and courts' preference that local elected officials make decisions about local land use.<sup>284</sup> Court decisions in these cases then will continue to reflect the "super restraint" shown to technical administrative agency decisions only finding racial discrimination when provided with evidence of "specific intent" by the decision making body.<sup>285</sup>

In *Rise v. Kaye*, the county commission's decision to grant a permit request for an additional landfill in a black neighborhood despite the exclusive location of the county's three other operating landfills in black communities received great deference from the court. Attributing little significance to the disparate impact of the decision, the court found that the commission's motivation was the economic well being of the entire county and not the race of the community where the facility would be located.<sup>286</sup> Consistent with motive review theory, the court looked to the decision of the commission with substantial deference to their stated rationale for the land use decision.<sup>287</sup> Without evidence that a specific intent to discriminate

281. See generally Cole and Foster, *supra* note 65.

282. See *R.I.S.E. v. Kay, Inc.*, 786 F. Supp. 1144, 1150 (E.D. Va. 1991) (noting the number of factors considered by the Board including the economic environmental and cultural needs of the country); *E. Bibb Twiggs Neighborhood Ass'n. v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880, 882-84 (M.D. Ga. 1989), *aff'd.*, 896 F.2d 1264 (11th Cir. 1989) (outlining the broad range of considerations in the Board's decision making process), and Foster, *Intent and Incoherence*, *supra* note 155 (discussing the significance of legislative versus administrative decision making bodies under the democratic process theory).

283. See Foster, *Intent and Incoherence*, *supra* note 155 at 1065, 1132-34.

284. *Id.* at 1102-03.

285. *Id.* at 1122.

286. *Id.* at 1150.

287. *Id.*

guided the commissioners, the court gave little consideration to claimant's allegations of racial bias.<sup>288</sup>

In each of the aforementioned court decisions plaintiffs alleged a disparate racial impact of the decision, specifically that one or more minority groups residing nearby suffered a disparate effect of the requested pollution permit.<sup>289</sup> The analytical model of ethnic competition provides significant insight into contemporary views of the federal courts regarding racial disparities related to the social and economic market place.<sup>290</sup> Absent evidence that government actors purposefully intended to discriminate against parties because of their race, the disproportionate effects of government decisions on particular racial groups that otherwise reflect market based choices and competition will only rarely implicate a violation of the Equal Protection Clause.<sup>291</sup> This has broad ranging implications for environmental justice advocates, activists, and would be litigants.<sup>292</sup> The Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, and § 1983 of the United States Code offer protection against mere racial disparity in pollution exposure, facility siting, or the negative effects of federal or state pollution permits in only a small category of cases with highly disparate racial impacts.<sup>293</sup> Further, it is extremely unlikely that the EPA's regulations proscribing such disparities will be used to invalidate a state permit decision absent overwhelming evidence that permitting officials acted in bad faith in making a permit decision.<sup>294</sup> Racial disparity based on de facto residential segregation patterns will rarely if

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288. *Id.* at 1149-50.

289. See Foster, *Intent and Incoherence*, *supra* note 155 at 1065.

290. See Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210.

291. Certain decisions are relegated to the markets, not to the courts. See Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 115. , and Foster, *Intent and Incoherence*, *supra* note 155 at 1110.

292. See *supra* notes 214-250 and accompanying text.

293. See Sean-Patrick Wilson, *Fighting the Good Fight: The Role of Env'tl. Civil Rights Litigators Going Forward and the Need for a Continuance of the Litigation Tool in the Env'tl. Justice Movement*, 28 W. NEW ENG. L. REV. 293 (2006); Uma Outka, *Env'tl. Justice and the Problem of the Law*, 57 ME. L. REV. 209 (2005), and Kyle W. La Londe, *Who Wants to be an Env'tl. Justice Advocate?: Options for Bringing an Env'tl. Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27 (2004).

294. See generally Michael Zywicki, *Scalia Env'tl. Justice Movement*, [www.vjel.org/editorials/pdf/ED10033.pdf](http://www.vjel.org/editorials/pdf/ED10033.pdf). (to date, the EPA has never invalidated a state permitting decision based on its Title VI regulation).

ever lead to civil rights violations under the courts contemporary analysis that accepts racial disparity as an expression of the preferences, values, and abilities of the diverse racial and ethnic groups that make up American society.<sup>295</sup> From this perspective, perceived environmental injustices reflect the function of the market place and not the racial biases of local, state, or federal officials responsible for making environmental decisions.<sup>296</sup> Successful cases based on disparity alone will require evidence of highly disparate racial impacts that lack an environmental justification.

Under the “perpetrator’s perspective,” disparities in alleged pollution exposure constitute unfortunate circumstances, but responsibility should not be placed on the “innocent” government or commercial actors who will routinely act without racial animus or discriminatory intent.<sup>297</sup> Using motive review theory, it appears that only two small categories of environmental decisions will typically violate the Equal Protection Clause as the institutional competencies and the democratic process preferences call for deference by courts that lead to a high evidentiary burden for litigants to prove decision makers acted with racially discriminatory motives.<sup>298</sup> Non-technical decisions made by elected bodies that include evidence of racial motive and a substantial disparate racial impact and non-technical decisions made by lower level agency officials that include evidence of racial motive and a significant disparate impact or highly disparate impact alone require the lowest level of deference and the least evidentiary burden. In these cases, courts ought to afford less deference and conduct a more searching review of the decisions rendered. Evidence of racial motive and statistically significant disparity should lead to a searching examination of the proffered explanation of agency officials.

Likewise, highly disparate impacts of non-technical decisions made by agency officials warrant a searching review even without evidence of racial motive. To afford the same level of deference to

295. See Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 210, at 87.

296. See Vicki Been, *What’s Fairness Got to Do With It? Env’tl. Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); see also Vicki Been & Francis Gupta, *Coming to the Nuisance or Moving to the Barrios? A Longitudinal Analysis of Env’tl. Justice Claims*, 24 ECOLOGY L.Q. 1 (1997) (for a discussion of the limitations of market-based decision making).

297. See Freeman, *supra* note 163, at 1049.

298. See *infra* notes 303-305 and accompanying text.

the non-technical decisions of unelected officials as that provided the technical decisions of elected officials would not represent a protection of the democratic process but a relinquishment of the courts responsibility to see that laws are faithfully executed in accordance with the constitutional constraints of the Equal Protection Clause. Of course, direct evidence of racial animus by a decision maker of the type associated with the Jim Crow South should end the deference afforded by courts on technical and political grounds and require a searching review of any environmental decision.

The judge's statement quoted above in *South Camden Citizens in Action* captures society's current view toward racial minorities' allegations of discrimination today—unless you can show that the challenged actions resulted from overt racial animus, the perceived infringement warrants neither moral nor legal sanction. Along with the jurisprudential analysis above, a historical analysis of the civil rights movement at its close clarifies the courts' rejection of environmental justice claims based in civil rights legal theories.<sup>299</sup>

#### V. CROSSING HELL'S BASEMENT - RACIAL ALIENATION WITHOUT RACIAL ANIMUS

In most respects, the de facto segregation in housing and public education experienced by African Americans today is no different than it was on Chicago's Westside in 1966 during SCLC's campaign.<sup>300</sup> Four decades later, segregation in housing and education remain as fixed reminders that civil rights laws were embraced as a popular means to eliminate the overt *de jure* segregation of the South but not the covert *de facto* segregation of the North. More than any other racial group, blacks today experience the highest level of racial segregation in housing and education.<sup>301</sup> In a follow-up to the Kerner Report, the Eisenhower Foundation found that forty years after the original Kerner Report 63% of African-Americans attended ra-

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299. See discussion *infra* notes 298-314 and accompanying text.

300. At the close of the Chicago campaign the lead local organizer who had implored Dr. King to come and offer assistance was distressed by the fact that "there may never be an answer" for the type of discrimination that they faced. Oates, *supra* note 3, at 418.

301. See Freeman, *supra* note 163, at 1057; Orfield, G. and Lee, C., *Racial Transformation and the Changing Nature of Segregation*. Cambridge, MA: The Civil Rights Project at Harvard University 4, 9, 18 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf).

cially segregated schools compared with 67% in 1968.<sup>302</sup> In housing, African Americans remain the most segregated members of American society despite modest gains over the past twenty years.<sup>303</sup> Despite these and other factors reinforcing the tenuous condition of black communities across the United States from 1968 up to the present, claims that racial bias influences environmental decision-making have been consistently rejected.<sup>304</sup>

In the cases considered above, the predominantly African-American communities in Flint, Houston, Macon, Danville, and South Camden were victims of significant residential segregation that resulted from a combination of private and public racially influenced decisions before and at the time the suits were brought.<sup>305</sup> On top of the residential segregation they experienced, these communities also suffered the adversity caused by multiple pollution sources near and in their communities.<sup>306</sup> In an effort to gain relief, community members turned to the courts in the hopes of gaining the protection of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.<sup>307</sup> Time after time and case after case, however, federal courts could find no racial animus or racial opprobrium and therefore no violation of the residents' rights by public officials.<sup>308</sup> This phenomenon reflects the long term fail-

302. DAWAYNE WICKHAM & TUKUFU ZUBERI, KERNER PLUS 40 REPORT, available at <http://www.ifajs.org/events/spring08/Kerner40/Report.pdf> (last visited Feb. 27, 2009).

303. JOHN ICELAND ET AL., U.S. CENSUS BUREAU, SERIES CENSR-3, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000 (U.S. Gov't Printing Office 2002), available at <http://www.census.gov/prod/2002pubs/censr-3.pdf> (last visited Feb. 26, 2009).

304. See Freeman, *supra* note 163, at 1049.

305. See ROBERT D. BULLARD ET AL., RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 49, 57, 62-63, 74-75 (CAAS Publications 1994), exploring the contemporary dominance of de facto segregation in American residential patterns. Bullard describes and explains the phenomenon that segregates Latinos and hyper-segregates African Americans; see generally ROBERT D. BULLARD ET AL., HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY (South End Press 2004) (discussing publicly funded segregation); JOE R. FEAGIN & KARYN D. MCKINNEY, THE MANY COSTS OF RACISM 335-36 (Rowman & Littlefield Publishers, Inc. 2005).

306. CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVTL. JUSTICE LAW, POLICY & REGULATION 334-349 (Carolina Academic Press 2002); Peter L. Reich, *Greening the Ghetto: A Theory of Env'tl. Race Discrimination*, 41 U. KAN. L. REV. 271, 291-95, 299, 301-02, 305, 311-2 (1992).

307. See Freeman, *supra* note 163, at 1057.

308. *Id.*

ure of civil rights law to address a historic form of racial discrimination perpetuated through facially neutral policies. From the close of the SCLC's Chicago Campaign to the present, the de facto segregation of American cities remains substantially intact.<sup>309</sup> Moreover, contrary to prevailing notions that blacks have moved into the middle class and rendered racial discrimination concerns irrelevant, research indicates the contrary. In education and economic advancement, most black "middle class" children attend racially segregated schools along with low-income blacks.<sup>310</sup> In economic terms, sixty-nine percent (69%) of black children from the middle class fail to exceed their parents' income in contrast with sixty-eight percent of whites (68%) from the middle class who surpass their parents' income.<sup>311</sup> These statistics, along with many others, reflect the society's continued failure to respond meaningfully to the discrimination concerns raised by Dr. King before his death and the Kerner Commission in their decisive report.<sup>312</sup> Despite the regular proof of continuing racial discrimination against blacks and other racial minorities in American society, in housing, employment, and other areas, race-based civil rights law remains at the fringes of political and legal action with the exception of reverse discrimination claims against parties seeking to remedy past discrimination.<sup>313</sup> The society and the courts' sanction of discrimination, couched in facially neutral policies that hide ongoing conscious and unconscious racial bi-

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309. See *supra* text accompanying notes 149-51; see also MARY PATILLO-MCCOY, *BLACK PICKET FENCES* 30 (Univ. of Chicago Press 1999) for consideration of the tenuous nature of black "middle class" life in northern cities.

310. See sources cited *supra* note 306.

311. DEWAYNE WICKHAM, et al., *KERNER PLUS 40 REPORT* (2008), <http://www.ifajs.org/events/spring08/Kerner40/Report.pdf>.

312. The Kerner Report was rejected by then President Lyndon B. Johnson. *Id.* at 78, 85.

313. Civil rights enforcement has continually declined over the past decades despite numerous studies showing continued racial discrimination and rather consistent complaint levels. Reverse discrimination claims in contrast have occupied increasing legislative, judicial, and executive attention over the last twenty years. Consider *Grutter v. Bollinger*, 309 F.3d 329 (6th Cir. 2001); *Gratz v. Bollinger*, 188 F.3d 394 (6th Cir. 1999); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007). Also note that Florida, California, Michigan, and Washington have passed ballot initiatives proscribing affirmative action and Arizona, Colorado and Nebraska are poised to vote on this issue in 2008.

ases and prejudices, precludes civil rights based attacks on environmental injustices.<sup>314</sup>

As the survey above indicates, civil rights laws have proven ineffective for communities claiming environmental injustice.<sup>315</sup> This ineffectiveness reflects the stagnation of the society's interest in eliminating the type of racism that the Kerner Commission found caused urban riots in the middle to late 1960s.<sup>316</sup> Because environmental injustice claims typically correspond to the covert racial bias associated with the American North of the late 1960s rather than the overt racial discrimination of the Jim Crow South, the nation's anti-discrimination law serves as an ineffective weapon to challenge the disparate racial effects of environmental decisions. However, before abandoning hope altogether, environmental justice claimants may consider the Environmental Justice Act of 2007 recently under consideration in the United States Congress as a backdoor out of the inferno they have faced. Much like Dante's ultimate escape from Hell, environmental justice claimants may find that they have descended so low in their legal journey that the only direction left to go is up.

## VI. UP FROM THE INFERNO - LEGISLATIVE LIGHT IN DARK PLACES

On February 15, 2007, Congressional representative Hilda Solis from California's 32<sup>nd</sup> Congressional District introduced H.R. 1103 – Environmental Justice Act of 2007.<sup>317</sup> On the same day, United States Senator Richard Durbin introduced S.642 – identical compan-

314. Consider Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934, 934-952 (2006) (finding that housing owners provided a positive response to inquiries from rental applicants with names identified with African-Americans at a 56% rate compared with a 89% rate for names identified with whites); see also Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (NAT'L BUREAU OF ECON. RESEARCH, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873>.

315. See *supra* Part II.

316. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 609 (Bantam Books 1968), available at <http://www.eisenhowerfoundation.org/docs/Kerner.pdf>; KERNER PLUS 40 REPORT, <http://www.ifajs.org/events/spring08/Kerner40/Report.pdf>.

317. Env'tl. Justice Act of 2007, S. 642, 110th Cong. (2007-2008) (a bill to codify Exec. Order 12898).



ion legislation in the Senate.<sup>318</sup> These bills attempt to enshrine the federal mandate penned by President William Jefferson Clinton in Executive Order 12898 on Environmental Justice into federal law.<sup>319</sup> While it is beyond the scope of this article to undertake a comprehensive evaluation of the proposed legislation, this section briefly raises some critical concerns regarding the proposed act. A more detailed examination of the role of federal agencies in addressing environmental justice concerns and the legal authorities to do so is contemplated for further research. The section begins by examining the existing executive order and its implementation by federal agencies; a consideration of some prominent limitations and likely challenges under the proposed act follows.

The core component of the Executive Order directs federal agencies to "identify and address... disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>320</sup> In addition, the Executive Order directs agencies to develop Environmental Justice strategies that list the "programs, policies, planning and public participation processes, enforcement, and/or rule-makings related to human health or the environment that should be revised" pursuant to the dictates of the order.<sup>321</sup> Further, the Order maintains the following:

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.<sup>322</sup>

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318. *Id.*

319. As officially titled "A bill to codify Exec. Order 12898, relating to environmental justice, to require the Administrator of the Env'tl. Prot. Agency to fully implement the recommendations of the Inspector General of the Agency and the Comptroller General of the United States, and for other purposes." *Id.*

320. Exec. Order No. 12898, 3 C.F.R. 859 (1994) *reprinted as amended in* 42 U.S.C. § 4321 (2001).

321. *Id.*

322. *Id.*

The preceding three provisions along with the requirement that agencies “collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income” form the bulk of the substantive obligations of the Order.<sup>323</sup> As drafted, these four provisions held considerable potential for addressing long and short term concerns of environmental justice claimants and advocates. Independently, each of these provisions could have significantly changed the long or short-term experience of environmental injustice faced by minority and low-income communities. Together, these provisions should have radically transformed the way that both low income and minority communities understood, related to, and were impacted by local pollution sources. From the EPA’s far-reaching pollution permitting programs to the Department of Transportation’s ubiquitous projects, the primary pollution sources affecting African American and other communities fall under some federal program.<sup>324</sup> Accordingly, after fourteen years, agencies should be well on their way to the resolution of a great number of environmental injustices.

Sadly, agencies have achieved an uneven record, at best, toward the directives of the Executive Order.<sup>325</sup> The agency with the most significant environmental responsibility, the EPA, has been cited repeatedly for its failure to follow the directives of the Executive Order.<sup>326</sup> Instead of the systematic program analysis approach outlined by the Executive Order, the EPA has conducted an inconsistent environmental justice program that readily raised public awareness, participated in crisis management, and improved community relations but failed to systematically implement the directives of the Ex-

323. *Id.*

324. Steven A. Light & Kathryn R.L. Rand, *Is Title VI A Magic Bullet? Envtl. Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1, 8, 44 (1996-1997).

325. Denis Binder, et al., *A Survey of Fed. Agency Response to President Clinton’s Executive Order No. 12898 on Envtl. Justice*, 31 ENVTL. L. REP. 11133, 11149-50 (2001). See also, Meredith Judge Bowers, *The Executive’s Response to Envtl. Injustice: Executive Order 12,898*, 1 ENVTL. LAW 645, 656 (1995).

326. OFFICE OF INSPECTOR GEN., EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVTL. JUSTICE, REPORT NO. 2004-P-00007 ii 7 (2004); U.S. GOV’T ACCOUNTABILITY OFFICE, EPA SHOULD DEVOTE MORE ATTENTION TO ENVTL. JUSTICE WHEN DEVELOPING CLEAN AIR RULES 3 (2005).

ecutive Order.<sup>327</sup> While many of these failures reflect the limited support in Congress and the White House for substantive changes to the agency's approach to fulfilling its substantive statutory obligations, high-level agency management had differing views about the role and standing of the program over the years.<sup>328</sup> Some agencies have fared better in implementing the Executive Order, and others have fared worse.<sup>329</sup> As a general matter, the limited success of some agencies in implementing the Executive Order appears to flow from the relative unimportance that agency executive's assigned Executive Order implementation.<sup>330</sup>

The codification of the Executive Order provides an affirmation from Congress that federal agency programs that spawn disproportionately high and adverse human health or environmental effects have a legal obligation to identify and address them.<sup>331</sup> This codification speaks directly to the past neglect of environmental injustices caused or perpetuated by agency programs by elevating the obligation above "agency management directives" to statutory responsibilities.<sup>332</sup> As statutory dictates, the above-stated provisions warrant increased prioritization, funding, and implementation criteria rather than a secondary responsibility that regulators jettison or disregard when addressing primary commitments. Environmental justice obligations command heightened emphasis and attention under the proposed legislation as legally enforceable responsibilities.<sup>333</sup> However, the elevated status offered by the Executive Order should be seen as a minimal and moderate step by Congress to address this issue. The proposed legislation introduces no new substantive obligations to federal agencies, instead requiring that agencies give more weight to the obligations contained in the existing Executive Order.<sup>334</sup> Furthermore, the statute neither redefines nor restructures the

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327. *See supra* note 323.

328. *Id.*

329. *See* A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898 on Environmental Justice, XXXI *Environmental Law Reporter* 11133 (October 2001) (with Denis Binder, Colin Crawford, Eileen Gauna, M. Casey Jarman, Bradford C. Mank, Catherine O'Neill, Clifford Rechtschaffen, and Robert R. M. Verchick).

330. *Id.*

331. Exec. Order No. 12,898, 3 C.F.R. 859 (1994) *reprinted as amended in* 42 U.S.C. § 4321 (2001).

332. *Id.* at § 6-609.

333. *See* Env'tl. Justice Act, *supra* note 314.

334. *Id.*

requirements of the Executive Order. This allows agencies to strengthen and expand existing programming as necessary to comply with the codified obligations rather than creating a brand new set of commitments.<sup>335</sup> In some cases, this may lead to an elevated status for existing programs and greater attention to the dictates of the current Executive Order. Without more specific legislative direction, however, it may result in few if any changes to some agencies' approach to the issue rather than the elevation of the issue that the proposed Act appears to intend.

More specifically, as drafted, the Act retains a significant ambiguity that was present in the Executive Order; in the principle directive that requires agencies to "address" the environmental injustices they "identify" without specifying how they are to do so. To be more effective the proposed legislation should provide agencies with greater direction regarding how they should address "disproportionately high and adverse" effects. While administrative law principles dictate that each federal agency interpret this ambiguity through regulation and rulemaking such a gaping ambiguity potentially raises non-delegation concerns.<sup>336</sup>

In the absence of greater detail in a final version of the Act, agencies should re-evaluate their environmental justice strategies in light of the legal elevation of the requirements. In conjunction with the Department of Justice, agency General Counsel's should perform an analysis of the legal authorities currently available to implement the Act along with the necessary regulatory changes required to fulfill the new Congressional mandate. The EPA Office of General Counsel orchestrated such an analysis following the issuance of the Executive Order. The analysis detailed agency legal authority to provide a robust implementation of the Executive Order including regulatory and rulemaking changes. However, agency management subsequently decided that the all but complete analysis be scuttled, the process abandoned, and discussions ceased.<sup>337</sup> The proposed

335. *Id.*

336. 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE § 1.7 (Little, Brown & Company 1994); see also *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

337. As a member of an agency-wide working group on environmental justice, the author worked along with other lawyers across the agency to ascertain the legal authorities available to implement the Order. The robust analysis identified scores of existing legal authorities and appropriate regulatory actions to implement the Order. The agencies decision to abandon this effort undercut the authority and

legislation should engender a similar process across the covered agencies that would meaningfully integrate environmental justice into the legal framework of agencies' administrative regimes. Provision 6-608 in conjunction with the language of 1-101 seemingly contemplates no less in stating that agencies shall implement the mandate "to the extent permitted by existing law."<sup>338</sup> As a minimal and moderate step, however, the Act may leave a vast expanse of claimed environmental injustices untouched unless agencies reinterpret their obligations in light of the heightened legal bona fides of the Executive Order's provisions created by the Act.<sup>339</sup> If agencies move forward with regulatory development of the area, the administrative law process may resolve some of these issues, however, a business as usual approach will offer communities little hope of meaningful change.<sup>340</sup>

One critical part of the re-evaluation that EPA, specifically, should undergo must be to its Title VI program. Because the proposed legislation fails to address the Supreme Court's denial of private rights of action under Title VI, claimants only recourse for redressing disparate racial impacts from federal grant recipient programs rest with the EPA's Office of Civil Rights. Due to its small staff and limited budget, the thorough investigation of complaints often precedes at a glacial pace.<sup>341</sup> Under the proposed legislation, the EPA and other

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status of the program despite attestations by EPA management that environmental justice was an agency priority.

338. § 1-101 states, "To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission..." Exec. Order No. 12,898, 3 C.F.R. 859 (1994) *reprinted as amended* in 42 U.S.C. § 4321 (2001).

339. Some persons still debate the existence of environmental injustices as an actual phenomenon. However, their approach to the question suffers from a fundamental flaw. Instead of viewing environmental injustice claims as the discrete experiences of individuals that warrant consideration, they perceive the matter as a phenomenon that only exists if universally experienced by a statistical majority of the nation's minority and low-income populations. While this broad based analysis has value and evinces disturbing racial trends, it cannot determine the legitimacy of any single community's claims of environmental injustices. What may not be a pattern in the Midwest can certainly be a recurring phenomenon in the Southeast, and what may not be an ongoing phenomenon in the Northeast certainly can still take place.

340. DAVIS & PIERCE, *supra* note 333 at § 1.7.

341. See Luke W. Cole & Caroline Farrell, *Structural Racism, Structural Pollution and the Need for a New Paradigm*, 20 WASH. U. J. L. & POL'Y 265, 270 (2006).

federal agencies will be required for the first time to fulfill their Title VI obligations in light of the agencies' detailed Environmental Justice Strategy and agency wide program evaluation. Rather than a stand alone obligation unrelated to their environmental justice responsibilities, the proposed legislation could prompt agencies to evaluate and consider Title VI as one of the means of implementing the proposed legislation "to the greatest extent practicable and permitted by law."<sup>342</sup>

One glaring limitation of the legislation is its neglect of the judicial rejection of environmentally based discrimination cases. It neither recognizes nor acknowledges the United States Supreme Court's denial of private rights of action under Title VI in *Alexander v. Sandoval*, a matter easily resolved through a simple legislative expression of intent to allow private citizens to use the discriminatory effects standard found in agency regulations in their private discrimination suits brought against federal grant recipients.<sup>343</sup> Further, the proposed legislation offers no civil rights protection against racial discrimination in environmental decision making by private or non-funded public entities. Unlike the civil rights legislation passed by Congress to address the panoply of discrimination issues in the society,<sup>344</sup> the Environmental Justice Act of 2007 takes the modest step of codifying the fourteen year old executive order that requires federal agencies to identify and address their role in producing "disproportionately high and adverse" health and environmental effects on "low income" and "minority populations."<sup>345</sup> To address environmental justice concerns effectively comprehensive legislation that corrects the ambiguities of the existing Executive Order and provides greater direction to agencies regarding their responsibilities will have to be passed. While the proposed legislation does elevate the concerns of the existing Executive Order as a legal matter, it fails to illuminate what role the federal government will play in addressing these concerns as a practical matter.

342. Exec. Order No. 12,898, *supra* note 317, at § 1-101.

343. This standard, used regularly by many federal circuits prior to the Court's decision in *Alexander v. Sandoval*, would allow private citizens to bring discrimination claims under Title VI against state agencies that receive federal funds and have methods of administering their environmental programs that have the effect of discriminating based on race. 40 C.F.R. § 7.35(b).

344. Past civil rights legislation has proscribed race and sex discrimination in public accommodations, employment, housing, and the use of federal funds.

345. Exec. Order No. 12,898, *supra* note 317, at § 1-101.

## VII. CONCLUSION

After going through Hell, environmental justice claimants have little hope of actually ascending to a point of recognition for their injuries and relief through the use of civil rights tools represented by the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>346</sup> However, even Dante found a narrow exit at the base of the Inferno that led the poet and his guide to the base of Mount Purgatory, the next step in the traveler's journey toward the Mount of Joy.<sup>347</sup> Environmental justice claimants may likewise find some glimpses of hope in the proposed Environmental Justice Act of 2007. Unlike the Courts' current construction of relevant civil rights laws that only "purposeful" discrimination warrants judicial recognition and redress, the proposed legislation acknowledges the inadequacy of conducting federal programs in a way that adversely affects minority communities at disproportionately high levels.<sup>348</sup> If passed this legislation may provide those willing to continue on the narrow and arduous path through the painful purgatory of agency interpretation and implementation – a daunting but conceivable, upward path.

To ensure that the concerns of communities overburdened by pollution receive attention, however, Congress needs to act more intentionally. As a first step, Title VI should be amended to allow a citizen's filing suit to use the disparate impact standard found in the EPA's administrative regulations. In so doing, Congress will allow citizens to serve the important role of aiding the EPA in both monitoring and maintaining compliance with the established agency regulations. Further legislative action is also required to set health based limits on the level of pollution discharged in residential communities. Because current EPA policies examine pollution permit requests on a discrete basis, multiple pollution sources can and do overwhelm some residential neighborhoods irrespective of the cumulative risk that may exist. Thoughtful congressional action will be required to protect communities irrespective of race from the potential health threats that can be created by this practice.

Communities would do well to focus their resources on claims with highly disparate racial impacts resulting from non-technical

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346. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (d).

347. ALIGHIERI, *supra* note 2.

348. Alexander v. Sandoval, 532 U.S. 275 (2001); Washington v. Davis, 426 U.S. 229 (1976).

decisions made by agency officials. Even without evidence of racial motive these cases merit a searching review. Likewise, non-technical decisions made by lower level agency officials that include evidence of racial motive and a significant disparate impact require the lowest level of deference and the least evidentiary burden. These cases may afford communities the relief they seek when brought before the courts. Otherwise, persons concerned with disproportionate exposure to pollution should resist the temptation to challenge environmental decisions on civil rights grounds without strong evidence of racial motive or a keen interest in joining other communities in an exit-less inferno.



