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## Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives

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# IS TITLE VI A MAGIC BULLET? ENVIRONMENTAL RACISM IN THE CONTEXT OF POLITICAL-ECONOMIC PROCESSES AND IMPERATIVES<sup>†</sup>

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Kathryn R.L. Rand\*\*

*The legal academy has embraced litigation under Title VI of the Civil Rights Act of 1964 as the new litigation strategy in the struggle for environmental justice. This Article examines the question of whether Title VI really is the "magic bullet" against environmental racism that its proponents claim. Specifically, the authors examine the effectiveness of Title VI litigation within the broader context of the environmental justice movement and against the background of political-economic constraints. In the authors' opinion, Title VI claims share many of the same limitations that have plagued environmental justice litigation under the Equal Protection Clause, although Title VI plaintiffs have a better chance of prevailing in individual suits because of Title VI's less onerous burden of proof. The authors view the efficacy of Title VI litigation as necessarily limited by the fact that environmental racism is, in essence, a political problem: the systematic roots of environmental racism run deep and encompass political-economic factors that Title VI litigation cannot address. Although the authors do not entirely disregard the benefits of Title VI litigation (e.g., publicity for the cause, education of the public and legal community), they are cautious about the recent focus on this strategy and suggest that this type of litigation be used only in concert with other environmental justice strategies. The authors conclude that the environmental justice movement should focus on a diversified strategy embracing grassroots empowerment. Minority communities, disproportionately burdened by environmental racism, would benefit most from an inclusive environmental justice movement that concentrates its efforts on increasing the political and economic power of people of color, as well as their participation in the democratic process.*

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*We don't have the complexion for protection.*<sup>1</sup>

—Richard Moore, Co-Director, Southwest Organizing Project,  
on his Latino neighborhood in Albuquerque

## INTRODUCTION

People at society's margins—often the impoverished or people of color<sup>2</sup>—have the most to gain from the interaction of public and private actors, but the least to offer to those possessing power and wealth. Policy decisions tangibly impact those who may remain faceless to government or industrial interests. Policies can either uplift or devastate the lives of real people at society's margins—whose aspirations and values may be no different from those of the individuals who have the power to make policy.

Public policy reflects and refracts private prejudice.<sup>3</sup> In our democratic society, questions of distributive justice flow from pondering how the desires of private actors (e.g., citizens, corporations, or institutions) are received, challenged, altered, and ultimately transmitted through public policy. When do the needs of those on the margins take some priority over the desires of those who sit squarely in the catbird seat? That is, in a diverse and complex collective, how should benefits and burdens be allocated when benefits are scarce and burdens overabundant? How should governmental

1. Karl Grossman, *The People of Color Environmental Summit*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* 272, 281 (Robert D. Bullard ed., 1994) [hereinafter *UNEQUAL PROTECTION*].

2. This Article employs varied terminology for discussing individuals and groups. Most frequently, the Article uses the term "minority"—indicative of numerical or subordinate status—as a shorthand device for persons of color, in spite of its potentially loaded (and socially constructed) delegitimizing connotations. At the same time, the Article avoids a phrase like "the Black community" because of its common-use tendency to obscure what James E. Blackwell cogently defines as "a highly diversified set of interrelated structures and aggregates of people who are held together by the forces of white oppression and racism." JAMES E. BLACKWELL, *THE BLACK COMMUNITY: DIVERSITY AND UNITY* at xiii (1985). "African American" and "Black" are used interchangeably, "Latino" is used as a general term for those peoples whose diverse natures are joined loosely by primarily Spanish-speaking heritages, and "Native American" is used for those peoples who were indigenous to the United States prior to its colonization.

3. See Thomas V. Tonnesen, *Preface*, in *AMERICAN INDIANS: SOCIAL JUSTICE AND PUBLIC POLICY* at x (Donald E. Green & Thomas V. Tonnesen eds., 1991) ("Behind all public policy are private thoughts, private beliefs, private assumptions, private prejudices . . .").

and non-governmental actors use social resources efficiently in order to reach desired outcomes?<sup>4</sup>

One social resource, varied in applications and results, is technology. Modern forms of technology have had several effects on politics. Aside from beneficial outcomes, “[o]ne [effect] is a growth of knowledge in areas that are not easily accessible to people who lack specialized training in scientific or technical fields, . . . [and a] related effect is the influence of technical and administrative elites whose knowledge, expertise, and ideas frame the issues and structure the choices government institutions make.”<sup>5</sup> Technocratic and scientific policymaking shapes both opportunities and outcomes for individuals and communities whose power is curtailed by a lack of access to information and decisionmaking institutions.<sup>6</sup> Priorities are shaped by concerns that have little tangible meaning to many, and are framed by large corporate or governmental interests that may have dramatic social, political, and economic downsides for those who bear more burdens than receive benefits.

Whether discernible on the basis of intent or effects, racial discrimination appears in many guises. An increasing body of scholarly work focuses on varied manifestations of “environmental racism”—racial or ethnic discrimination in environmental policymaking, administration, or enforcement of laws—and the “environmental justice” movement—a loosely connected series of grassroots and legal actions attempting to redress or prevent disproportionate burdening of impoverished minorities.<sup>7</sup> Most legal scholarship centers on legal strategies, including Fourteenth Amendment equal protection claims or state law, both of which have poor track records and limited future efficacy.<sup>8</sup> At the same time, journalistic and academic accounts of community activism, or the actions of local, state, and federal political bodies, fail to focus on case-specific or macro-

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4. See PETER S. WENZ, ENVIRONMENTAL JUSTICE at xii (1988) (examining the philosophical underpinnings of questions concerning distributive justice using environmental issues as illustrations).

5. DANIEL J. FIORINO, MAKING ENVIRONMENTAL POLICY 5 (1995).

6. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1676 (1995) (“Once toxic standards are delegated to scientists for resolution, interested citizenry, and often the government officials themselves, are largely excluded from the decisionmaking and are forced to pay a high entry cost to discern at what point policy choices were made and what those choices were.” (footnotes omitted)).

7. See, e.g., CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993) [hereinafter CONFRONTING ENVIRONMENTAL RACISM]; ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS (Bunyan Bryant ed., 1995) [hereinafter ENVIRONMENTAL JUSTICE].

8. See *infra* Part III.A.

level political-economic imperatives that may be determinative of discriminatory policies or unsuccessful claims for remediation.

Recently, a stream of analysis has championed increased reliance on litigation under Title VI of the 1964 Civil Rights Act<sup>9</sup> as a tool in the struggle for environmental justice.<sup>10</sup> The jury is still out, however, on the efficacy of legal and administrative actions pursuant to Title VI. This Article situates Title VI litigation within the context of political processes at the federal, state, and local levels. By examining the history of the environmental justice movement and the efficacy of both grassroots mobilizations and legal or administrative efforts, and by probing underlying political-economic constants and variables, this Article sheds light on two challenges facing the environmental justice movement: (1) the difficulties inherent in taking on the vested interest in economic development held by both corporations and political institutions, and (2) the problems faced by communities of color attempting to achieve self-empowerment through collective action.

This Article examines avenues of redress and pollution prevention for impoverished people of color that flow from Title VI litigation strategies within the larger context of the environmental justice movement. Environmental justice issues can serve as tools with which to question status quo distributive policymaking processes and outcomes. Specifically, this Article concerns itself with practical routes toward increasing distributive justice and democratic efficacy.

Part I of the Article discusses the background of the environmental justice movement, locating its impetus within the societal importance accorded economic development—a situation under which minorities have borne the brunt of resultant externalized pollution. It further argues that, at the same time, minorities historically have found little redress through the traditional mainstream environmental movement. In Part II, the Article defines the overarching principles of the environmental justice movement, describing two of the movement's catalysts (a grassroots protest and a large-scale study of hazardous waste sites) and its current characteristics. Part III discusses the role of civil

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9. 42 U.S.C.A. § 2000d (West 1994).

10. See, e.g., James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285 (1995); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 793 (1993); Donna Gareis-Smith, Comment, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57 (1994).

rights litigation in the movement, illustrating the failure of equal protection claims before turning to the standards under which claims might be brought under Title VI of the 1964 Civil Rights Act—a new and highly touted form of environmental litigation. In Part IV, the Article situates Title VI litigative strategies within the context of several political-economic factors constraining Title VI's potential for efficacious redress of environmental harms. Balancing the benefits of Title VI litigation against limitations that are framed by political economy, it suggests reasons for the strategic employment of Title VI litigation. Finally, Part V emphasizes the need for a multipronged tactical approach to pursuing environmental justice that focuses strategically on the political-economic roots of environmental inequities and seeks to empower minorities at the grassroots level.

### I. THE BACKGROUND OF THE ENVIRONMENTAL JUSTICE MOVEMENT

Social movements arise in a dialectical process that occurs between ordinary people and dominant institutions.<sup>11</sup> Minorities, perceiving that they have received the short end of the stick (that is, received a scarcity of benefits relative to burdens), have organized in recent years in response to environmental racism. As the environmental justice movement has expanded, so too have scholars broadened their explanations of the racism that precipitated it.

Underlying such accounts, racial discrimination may be defined as “actions or practices carried out by dominant groups, or their representatives, which have a differential and negative impact on members of subordinate groups.”<sup>12</sup> Environmental racism comprises a subset of discrimination. Professor Bunyan Bryant's identification of the problematique is appropriately specific: Environmental racism, he writes,

refers to those institutional rules, regulations, and policies or government or corporate decisions that deliberately

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11. See generally ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977).

12. Michael Gelobter, *Toward a Model of "Environmental Discrimination,"* in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* 65 (Bunyan Bryant & Paul Mohai eds., 1992) (crediting definition to JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, *DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM* 20-21 (1986)) [hereinafter *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS*].

target certain communities for least desirable land uses, resulting in the disproportionate exposure of toxic and hazardous waste on communities based upon certain prescribed biological characteristics. Environmental racism is the unequal protection against toxic and hazardous waste exposure and the systematic exclusion of people of color from environmental decisions affecting their communities.<sup>13</sup>

Implicit in these definitions of environmental racism, and in the environmental justice movement, is a political-economic framework that assists in shaping the voices of those who are engaged in challenging the status quo.<sup>14</sup>

#### A. Historical Bias Toward Development over Human Rights

Willful acts of despoliation aside, environmentalists nonetheless warn of the effects of unchecked economic development on finite resources.<sup>15</sup> Growth machines, urban networks of interlocking associations and governmental units, “unite behind a doctrine of value-free development—the notion that free markets alone should determine land use.”<sup>16</sup> Members of the “growth coalition” (“boosters,” such as rentiers, developers, financiers, construction interests, the local media, and local cultural institutions) concern themselves with

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13. Bunyan Bryant, *Introduction*, in ENVIRONMENTAL JUSTICE, *supra* note 7, at 5. For a similar definition, credited to Benjamin Chavis, see Grossman, *supra* note 1, at 278 (“Environmental racism is racial discrimination in environmental policy-making, the enforcement of regulations and laws, the deliberate targeting of communities of color for toxic waste facilities, the official sanctioning of the life-threatening presence of poisons and pollutants in our communities, and the history of excluding people of color from leadership of the environmental movement.”).

14. For a model of environmental discrimination that incorporates institutionalized racism, political economy, and analysis of power structures, see Gelobter, *supra* note 12, at 74-75 (arguing that “[d]iscriminatory outcomes should, therefore, be seen as the interaction of internal processes, external structures, and wider ideological and historical contexts and understandings. Only in this way can we understand the pervasiveness and persistence of discrimination despite changes at the institutional and individual levels in the last twenty years.”).

15. See, e.g., ALBERT GORE, JR., *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992). For an additional perspective, see WENZ, *supra* note 4, at 9-10 (discussing Garrett Hardin, *The Tragedy of the Commons*, in ETHICS AND POPULATION 3-18 (Michael D. Bayles ed., 1976)). Wenz observes that while “every litter bit” does not hurt the environment, even non-willful harms may be prevented by personal lifestyle changes and restraint. *Id.* at 10. Such logic may be extended to the corporate and industrial world.

16. JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 32-36 (1987).



both substantive and procedural questions of resource procurement, routing, and allocation, with aggregate economic growth seen as a public good.<sup>17</sup> Yet whether economic growth is in the public interest depends in large part upon which portion of the public one considers, and how one defines their interests.<sup>18</sup>

While economic growth may not inherently result in an unequal distribution of benefits, there is no governmental compulsion to engage a system of allotment based on measures of ultimate outcome. Under a definition of human rights that involves both equal opportunity and equal outcome for all people, developmental interests historically have trumped human rights. “[L]ocal growth under current arrangements is a transfer of wealth and life chances from the general public to the rentier groups and their associates.”<sup>19</sup> Even more important for those living in areas such as Louisiana’s “Cancer Alley,”<sup>20</sup> “as is generally true with geographically uneven development, people’s location at the low end of the stratification of places compounds their individual disadvantages. For someone trapped behind political boundaries, geography becomes destiny.”<sup>21</sup>

Economic growth and development carry a variety of impacts. Among the resultant, often-externalized costs is pollution. Both point and non-point sources of pollution are diverse and their impacts highly contingent on various factors.<sup>22</sup> On the whole, the result for communities of color is a host of undesired outcomes.

## B. Minorities Bear More Burdens and Receive Fewer Benefits

### 1. Empirical Evidence

Recent empirical evidence demonstrates the disproportionate environmental burden placed on communities containing a high

17. See *id.*; see also Harvey Molotch, *The City as Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

18. See LOGAN & MOLOTCH, *supra* note 16, at 32-36.

19. See *id.* at 98, 198.

20. See Fisher, *supra* note 10, at 330 (citing LOUISIANA ADVISORY COMM. TO THE U.S. COMM’N CIVIL RIGHTS, THE BATTLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA . . . GOVERNMENT, INDUSTRY, AND THE PEOPLE 63 (1993), which found disproportionate siting of hazardous waste facilities among impoverished areas with high concentrations of African Americans in the industrial corridor running from Baton Rouge to New Orleans).

21. LOGAN & MOLOTCH, *supra* note 16, at 98, 198. The rhetoric of the argument should not be taken to indicate an element of inevitability, however. Even minorities with low levels of resources and perceived political efficacy can, and do, mobilize politically against corporate interests. See discussion *infra* Part II.

22. See Gelobter, *supra* note 12, at 72 (describing pollution as having “three important physical characteristics: magnitude, location, and duration”).

percentage of minorities. While socioeconomic status should not be discounted as a contributing factor, numerous studies show that race is more clearly linked to the disproportionate impacts of pollution. Not only is race more strongly related than is status to the distribution of environmental hazards, but it also has been found to be the single best predictor of the presence of commercial hazardous waste facilities.<sup>23</sup>

The specifics are convincing, if not downright disturbing. A report by the Louisiana Advisory Committee indicated that state and local systems for permitting, siting, and expanding hazardous waste and chemical facilities in Cancer Alley, the industrial corridor between Baton Rouge and New Orleans, disproportionately affected many African American communities.<sup>24</sup> A 1992 empirical study of commercial toxic waste facilities in Detroit, Michigan, found that eighteen percent of the residents living more than one and one-half miles from commercial hazardous waste facilities were minorities, but that within one mile, the percentage of residents who were minorities increased by two and one-half times, to forty-eight percent.<sup>25</sup> The United Church of Christ's study<sup>26</sup> found that more than fifteen

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23. See generally COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) (finding that a community's racial composition was the key to explaining presence or non-presence of hazardous waste facilities in a given area) [hereinafter UCC REPORT]; Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12, at 163, 167 ("[R]egardless of the environmental hazard and regardless of the scope of the study, in nearly every case the distribution of pollution has been found to be inequitable by income. And with only one exception, the distribution of pollution has been found to be inequitable by race."); *id.* at 169 ("[R]ace has additional effect on the distribution of environmental hazards that is independent of class."); Grossman, *supra* note 1, at 284 (citing evidence that environmental racism follows race rather than class lines). *But see* Douglas L. Anderson et al., *Environmental Equity: Evaluating TSDF Siting over the Past Two Decades*, WASTE AGE, July 1994 (reporting the results of analysis by the Social and Demographic Research Institute at the University of Massachusetts, which revisits the UCC report as finding no statistical differences between the percentages of minorities in host and non-host census tracts); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994) [hereinafter Been, *LULUs in Minority Neighborhoods*] (suggesting that such research generally does not incorporate methodology establishing that host communities were disproportionately minority or impoverished at the time of the site selection); Vicki Been, *Market Dynamics and the Siting of LULUs: Questions to Raise in the Classroom About Existing Research*, 96 W. VA. L. REV. 1069 (1994).

24. See Fisher, *supra* note 10, at 330 (citing LOUISIANA ADVISORY COMM., *supra* note 20).

25. See Mohai & Bryant, *supra* note 23, at 171-72.

26. See discussion *infra* Part II.B.

million African Americans and eight million Latinos lived in communities with one or more hazardous waste sites.

Communities with a single hazardous waste facility were found to have twice the percentage of minorities as communities without such a facility (24 percent vs. 12 percent). Communities with two or more facilities have more than three times the minority representation than communities without any such sites (38 percent vs. 12 percent).<sup>27</sup>

And three of the five largest commercial hazardous waste landfills are located in communities in which minorities comprise the majority of the population.<sup>28</sup>

## 2. Underlying Reasons

Given this empirical evidence, one may legitimately ask the natural follow-up question: Why is it that minorities receive more of the burdens? There are several possible contributing factors, some more benign than others.

As discussed above,<sup>29</sup> patterns of economic development are one root cause. Under conditions of economic growth unequally distributed among geographic locales, it follows that resultant burdens and benefits are themselves inequitably doled out to constituencies.

Environmental and health costs are localized: risks increase with proximity to the source and are borne by those living nearby, while the benefits are dispersed throughout the larger society. Communities that host hazardous waste disposal facilities (importers) receive fewer economic benefits (jobs) than do communities that generate the waste (exporters). The people who benefit the most bear the least burden.<sup>30</sup>

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27. Charles Lee, *Toxic Waste and Race in the United States*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12, at 14-15 (citing UCC REPORT, *supra* note 23).

28. *See id.* The UCC report also documents the overrepresentation of minorities in areas with uncontrolled toxic waste sites—presenting potentially greater risks to those in the area. “[T]hree of every five blacks and Hispanics live in communities with uncontrolled toxic waste sites. The average minority population is four times greater in areas with [uncontrolled toxic waste] sites than in communities without such facilities.” Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 399 (1991) (citing UCC REPORT, *supra* note 23).

29. *See* discussions *supra* Part I.A.1; *see also infra* Part IV.A.2.

30. Robert D. Bullard, *Introduction*, in CONFRONTING ENVIRONMENTAL RACISM,

Under a free enterprise system that allows (or even encourages) the costs of industrial pollution control to be borne by the consumer, the poor will be affected disproportionately.<sup>31</sup>

With unequal growth comes undesirable consequences, such as industrial facilities that pollute. The “Not In My Back Yard” (NIMBY) syndrome often leads to a “Put It In Their Back Yard” (PIITBY) mentality among elected officials and corporate interests alike, resulting in a move to the path of least resistance: “Put It In Blacks’ Back Yard” (PIIBBY).<sup>32</sup> Such burden-shifting is directly related to a systemic lack of democratic efficacy, as “‘Somewhere Else, U.S.A.’ often ends up being located in poor, powerless, minority communities”<sup>33</sup> where people of color often face a “double whammy” of elevated risks and poor health care.<sup>34</sup>

Seemingly incongruent with discriminatory intent, facility siting decisions may be made on the basis of criteria that, on their face, may appear to be racially neutral.<sup>35</sup> In siting a facility, policymakers and private sector business interests generally consider the facility’s physical requirements and the costs of siting, constructing, and operating the facility. Factors include a “sufficiently sized plot of land suitable for building, proximity to roads, water or other transportation networks, proximity to the raw materials or wastes handled by the facility, proper zoning or compatibility with neighboring land uses, and availability of labor resources.”<sup>36</sup> If consistency in applying racially neutral standards is the practical norm, then how does disproportionate burdening of minorities occur? Observers argue that

*supra* note 7, at 11.

31. See WENZ, *supra* note 4, at 1 (crediting Norman J. Faramelli, *Ecological Responsibility and Economic Justice*, in WESTERN MAN AND ENVIRONMENTAL ETHICS 188 (Ian G. Barbour ed., 1973)).

32. See Harvey L. White, *Hazardous Waste Incineration and Minority Communities*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12, at 134-35. By extension, PIIBBY finds a cousin in PIILBY—“Put It In Latinos’ Back Yard”—or by the same token, PIINABY, for Native Americans.

33. Robert D. Bullard, *Environmental Blackmail in Minority Communities*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12, at 85.

34. See Bullard, *supra* note 30, at 11. At the same time, structural discrimination also means that middle-income Blacks, not just those of low socioeconomic status, are disproportionately affected. “Institutional barriers limit mobility options of middle-income and low-income blacks alike and contribute to their concentration in less desirable (in terms of environmental quality) neighborhoods.” ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* at xv (1990).

35. “Race neutrality” in this context assumes that market dynamics—the “invisible hand”—distribute burdens in a “natural” manner. See generally James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547 (1994).

36. *Id.* at 551.

“professional myopia is an important factor explaining the persistence of environmental injustice.”<sup>37</sup>

Risk management strategies involve siting facilities in areas of low population density, which at first glance seems best able to minimize risk. However, areas of low population density often are rural and poor.<sup>38</sup> In particular, southern rural areas of low population density often are poor and predominantly Black. In the Southwest, such areas typically have high proportions of Native Americans and Mexican Americans. Thus, even a facially race-neutral siting decision rule often has a disproportionate impact on minorities and effectively targets them for environmental injustices.<sup>39</sup>

Administrative review processes are themselves non-neutral; in fact, they may be highly politicized. Regulatory agencies that are charged with producing environmental impact statements are “not immune to political influence, particularly in favor of the industries that they are set up to regulate,” and public hearings often are highly technocratic.<sup>40</sup> While “both the corporate or governmental sponsors of a facility and the agency officials in charge of administrative review are trained in the technical aspects of environmental review,”<sup>41</sup> citizens’ groups often are less informed and thus may be confounded by the review process. In any case, information and resource costs, together with other collective action problems, are difficult hurdles to overcome.<sup>42</sup>

37. Conner Bailey et al., *Environmental Justice and the Professional*, in ENVIRONMENTAL JUSTICE, *supra* note 7, at 37.

38. See Conner Bailey & Charles E. Faupel, *Environmentalism & Civil Rights in Sumter County, Alabama*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12, at 150-51. For a general critique of quantitative risk assessment within the environmental justice frame, see Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103 (1996).

39. See Bailey et al., *supra* note 37, at 37; see also Bailey & Faupel, *supra* note 38, at 150-51 (describing siting arguments centered on a Selma Chalk formation that made impoverished and Black-majority communities prime candidates for a hazardous waste facility).

40. Freeman & Godsil, *supra* note 35, at 555 (citing Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027 (1990)).

41. Freeman & Godsil, *supra* note 35, at 554-57. And even with access to meaningful information, citizens’ views may be less valued by decisionmakers. See Kuehn, *supra* note 38, at 131.

42. For example, as two commentators have noted:

To be effective [in organizing and communicating their concerns], citizens from different classes, backgrounds and professions must come together to discuss the issues, agree on a common strategy, and take time out from their regular activities to implement a strategy to counter the small group of experts whose full time job is to get the facility sited and built. The difficulties inherent in this public organization are particularly acute if the community is

Labor and capital resources that make an area attractive to a corporate or industrial interest may not merely be naturally indigenous to a given area; thus, state and local governmental interests are more than eager to make good on economic incentives designed to lure facilities. Using eminent domain or buyouts to “relocate” minority or lower-status residents, changing residential to industrial zoning, or enacting right-to-work laws can be powerful inducements for corporate interests to locate in areas or communities that may be disadvantaged by process, outcome, or both.

Are such considerations race-neutral? On their face, perhaps so. But their impacts are far from evenly distributed by status, race, or ethnicity. Facially race-neutral locational, zoning, or labor force considerations quickly become suspect when either standards of invidious intent or disproportionate impact are applied.<sup>43</sup> Minorities are subject to a “Doctrine of Double Effect,”<sup>44</sup> wherein they are damned by the often-interactive effects of skin color and socioeconomic status. These conditions lend themselves to claims of disparate impact that are just as legitimately made as those that are intent-based.

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politically disenfranchised, fragmented, or has only minimal representation at the decisionmaking level.

Freeman & Godsil, *supra* note 35, at 560 (citing Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027, 1065-68 (1990)); *see also* Rachel D. Godsil & James S. Freeman, *Jobs, Trees and Autonomy: The Convergence of Environmental Justice and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25 (1994). Those who wistfully hearken to the model of the New England town meeting hardly find purchase here; democratic participation and decisionmaking surely suffer under such conditions. But proponents of relatively unfettered economic growth do not.

43. Many location- or community-specific manifestations of racism have historical roots in state sponsorship—e.g., the conditions under which communities of color were segregated or impoverished by policies that facilitated housing covenants and dual labor markets. Hence, one study finds that “market dynamics also play a very significant role in creating the uneven distributions of the burdens [locally unwanted land uses] impose,” suggesting that even improved siting processes would not obviate fundamental problems with status quo market dynamics. *See* Been, *LULUs in Minority Neighborhoods*, *supra* note 23, at 1386-92.

44. The phrase, coined by Professor Wenz, suggests that if an action has two effects, one moral and one immoral, the moral effect wins, and the immoral effect is ignored—in this instance, economic growth is good, and poverty, not racism, is a cause of any undesirable outcomes. Hence “[d]efenders of practices that disproportionately disadvantage nonwhites seem to claim, in keeping with the Doctrine of Double Effect, that racial effects are blameless because they are sought neither as ends-in-themselves nor as means to reach a desired goal. They are merely predictable side effects of economic and political practices that disproportionately expose poor people to toxic substances.” Peter S. Wenz, *Just Garbage*, in *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE* 57, 58 (Laura Westra & Peter S. Wenz eds., 1995) [hereinafter *FACES OF ENVIRONMENTAL RACISM*].

### C. Lack of Inclusion in Traditional Environmental Organizations

Historically, minority participation in mainstream environmental organizations has been limited.<sup>45</sup> Why so? Mainstream environmental groups have been widely accused of frustrating or failing people of color through “environmental elitism,” which may adopt several guises. For example, “(1) compositional elitism implies that environmentalists come from privileged class strata, (2) ideological elitism implies that environmental reforms are a subterfuge for distributing the benefits to environmentalists and costs to nonenvironmentalists, and (3) impact elitism implies that environmental reforms have regressive distributional impacts.”<sup>46</sup> Some have argued that conventional environmentalism “has shifted from a ‘participatory’ to a ‘power’ strategy, where the ‘core of active environmental movement is focused on litigation, political lobbying, and technical evaluation rather than on mass mobilization for protest marches.’”<sup>47</sup> From an environmental justice perspective,

[t]he crux of the problem is that the mainstream environmental movement has not sufficiently addressed the fact that social inequality and imbalances of social power are at the heart of environmental degradation, resource depletion, pollution, and even overpopulation. The environmental crisis can simply not be solved effectively without social justice.<sup>48</sup>

Without a metafocus on fundamental principles of social justice, mainstream environmentalists have overlooked certain redistributive interests that may concern people of color more than Whites.

Regardless of the constituencies or issues of concern to people of color, easy and efficacious collective action is far from a given. Barriers to minority mobilization around environmental concerns continue to include (1) limited time and money, (2) lack of access to technical, medical, and legal expertise, (3) weak political influence, (4) weak media influence, (5) ideological conflict (over, for example,

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45. See, e.g., Dorceta Taylor, *Can the Environmental Movement Attract and Maintain the Support of Minorities?* in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12, at 28.

46. BULLARD, *supra* note 34, at 11 (citing Denton E. Morrison and Riley E. Dunlap, *Environmentalism and Elitism: A Conceptual and Empirical Analysis*, 10 ENVTL. MGMT. 581 (1986)) (emphasis omitted).

47. *Id.* at 1 (quoting ALLAN SCHNAIBERG, *THE ENVIRONMENT: FROM SURPLUS TO SCARCITY* 366-77 (1980)).

48. Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM, *supra* note 7, at 23.

environmental preservation versus job creation), and (6) language barriers.<sup>49</sup>

Yet in recent years, African Americans, Latinos, and Native Americans have demonstrated strong concern for environmental issues affecting the communities in which they live.<sup>50</sup> One author details factors influencing appeal of environmental movements to minority communities: (1) solidarity, shared values and goals, (2) the ability to recognize avenues of advocacy, (3) the ability to mobilize resources (money, expertise, etc.), (4) perception of a problem (e.g., "survival" of wildlife, or health and quality of life for humans), and (5) pre-existing organizations to assist in mobilization.<sup>51</sup> The presence of such factors has contributed, in recent years, to minorities' increased interest and ability to bypass mainstream environmental organizations and strike out on their own in major grassroots mobilizations.

## II. THE GOALS AND PRINCIPLES OF THE ENVIRONMENTAL JUSTICE MOVEMENT

The disproportionate burdens borne by communities of color rarely have served as red flags for existing environmental organizations and policymakers. Constrained environmental regulatory and judicial strategies have failed to overcome the effects of status quo growth politics and institutionalized racism on those whose lives have been most affected. The environmental justice movement has arisen as a response to the failings of a pluralistic

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49. See Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, in *UNEQUAL PROTECTION*, *supra* note 1, at 57; see also Lee, *supra* note 27, at 15-16, 20 (arguing that similar factors may lead to a perception of environmental problems as "luxury concerns"). On perceived minority infighting over the costs and benefits of one pollution-producing site, see Keith Schneider, *Blacks Fighting Blacks on Plan for Toxic Dump*, *N.Y. TIMES*, Dec. 13, 1993, at A12. But the article—and its author—has been roundly criticized for its reportage. See Freeman & Godsil, *supra* note 35, at 547 n.2.

50. See, e.g., BULLARD, *DUMPING IN DIXIE*, *supra* note 34, at 93 (discussing empirical evidence from surveys of nine communities confronted with a major problem involving an industrial facility located in a residential area demonstrating a decided pro-environmental bias among Blacks—overall, two-thirds of the households surveyed rated concern for the environment as more important than jobs).

51. See Taylor, *supra* note 45, at 37, 39. Taylor's last point mirrors Morris' analysis of the Civil Rights Movement, wherein the emergence and sustenance of an outgroup movement depends on whether the group possesses (1) certain basic indigenous resources, (2) social activists with strong ties to mass-based indigenous institutions, and (3) tactics and strategies that can be effectively employed against a system of domination. See MORRIS, *supra* note 11, at 282.



policy process that has marginalized the voices of those in need of access and opportunity.

### A. Environmental Justice Defined

Although the environmental justice movement is diverse in constituencies, strategies, and desired outcomes,<sup>52</sup> scholars and activists have agreed on some basic, overarching principles. The logical flow from conceptions of environmental racism<sup>53</sup> to those of environmental justice incorporates a holistic approach to causation and solutions. Whether spiritually rooted<sup>54</sup> or situated firmly in political economy,<sup>55</sup> definitions of environmental justice cogently demonstrate the interrelatedness of policymakers and policy outcomes.

Much of the legal literature on environmental remedies follows a narrow conception of environmental racism that allows for the equation of equitable application of the laws with environmental justice.<sup>56</sup> Under such a perspective, environmental equity, which “refers to the equal protection of environmental laws . . . [that] should be enforced equally to ensure the proper siting, clean up of hazardous wastes, and the effective regulation of industrial pollution, regardless of the racial and economic composition of the community,”<sup>57</sup> differs from environmental justice in both worldview and scope. While equal protection of the laws is nothing to sneeze at, and using equity concerns to make the connections between environmentalism and economic growth may yield significant results,<sup>58</sup>

52. The catch-all phrase “the environmental movement” often is bandied about in descriptive accounts of environmentalism or environmentalists. Such a phrase may be criticized as coming dangerously close to reifying a monolithic view of what would be characterized more appropriately as distinct and varied “environmental movements” over time, as well as based on activists, strategies, and constituents. *See, e.g.*, Taylor, *supra* note 45, at 28-54 (providing rough historical sketches of changing environmental movements). Nonetheless, acknowledging the diversity of the movement or even its lack of cohesiveness should not preclude one from identifying certain characteristics of “new” grassroots minority involvement that draw upon empirical instances of mobilization. *See, e.g.*, Bullard, *supra* note 48, at 27-38 (discussing case studies of nine environmentally threatened communities of color that formed grassroots groups).

53. *See* discussion *supra* Part I.

54. *See, e.g.*, Grossman, *supra* note 1, at 274-75 (listing the seventeen “Principles of Environmental Justice” from the First National People of Color Environmental Leadership Summit, held in Washington, D.C., in October 1991, which affirm the “sacredness of Mother Earth”).

55. *See generally* ENVIRONMENTAL JUSTICE, *supra* note 7; RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12; UNEQUAL PROTECTION, *supra* note 1.

56. *See, e.g.*, Gareis-Smith, *supra* note 10, at 57.

57. Bryant, *supra* note 13, at 5-6.

58. *See, e.g.*, Roger H. Bezdek, *The Net Impact of Environmental Protection on Jobs and*

environmental equity lends itself to status quo conceptions of resource allocation.<sup>59</sup>

Many mainstream environmental organizations, while well-intentioned, have fallen into traditional pluralistic assumptions concerning the efficacy of interest groups. Their focus on environmental lawmaking and regulation, together with enforcement procedures that rely on litigation, have provided only incremental changes in the ways that the public and private sectors interact. Perhaps more importantly, conventional tactics surrounding environmental regulation and enforcement lack a strategic focus on many methods of prevention that could obviate continued disparate impact on communities of color.

Environmental justice broadens the scope of discourse on policymaking, implementation, and outcomes by incorporating equity as a subset of larger concerns. "It refers to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and productive."<sup>60</sup> Situating social justice firmly within a political-economic framework, "[e]nvironmental justice is supported by decent paying and safe jobs; quality schools and recreation; decent housing and adequate health care; democratic decision-making and personal empowerment; and communities free of violence, drugs, and poverty."<sup>61</sup>

The movement attempts to return elements of democratic control over technocratic decisionmaking processes, with their concomitant emphasis on scientific risk analysis and management.<sup>62</sup> The environmental justice movement addresses "environmental enforcement, compliance, policy formulation, and decisionmaking" while defining "environment in very broad terms, as the places where people live, work, and play."<sup>63</sup> The movement thus propels high-level, often scientifically esoteric policy decisionmaking

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*the Economy*, in ENVIRONMENTAL JUSTICE, *supra* note 7, at 5 (arguing generally that equity protection can have positive economic impacts on diverse groups).

59. See, e.g., BULLARD, *supra* note 34, at 90-91 (arguing that financial compensation for risks incurred from industrial siting decisions often is used as a criterion for environmental "equity").

60. Bryant, *supra* note 13, at 6.

61. *Id.*

62. At least one commentator has observed that "quantitative risk assessment appears to reinforce, if not enhance, the special access and influence that powerful interest groups have on environmental agency decisionmaking." Kuehn, *supra* note 38, at 103, 132; see also FIORINO, *supra* note 5. For a recent and readable discussion of the types of risk assessment currently employed, see John H. Cushman, Jr., *E.P.A. Plans Radical Change in Calculation of Cancer Risk*, N.Y. TIMES, Apr. 16, 1996, at A1.

63. Robert D. Bullard, *Environmental Justice for All*, in UNEQUAL PROTECTION, *supra* note 1, at 11.

processes into the public arena, where a two-way discursive flow can allow citizens to speak to those who would represent them. Environmental justice thus incorporates, as an ultimate goal, making environmental protection more democratic<sup>64</sup> by bringing to the fore the important normative links between politics and ethics.

Specifically, Professor Bullard describes five basic goals of an environmental justice framework: (1) guaranteeing the right of all individuals to be protected from environmental degradation, (2) incorporating a public health model of prevention that obviates threats before harms occur, (3) shifting the burden of proof to polluters to show no discrimination against "protected" classes, (4) allowing for disparate impact (rather than discriminatory intent) analysis to infer discrimination, and (5) redressing disproportionate risk burdens and existing inequities through targeted resources and policies.<sup>65</sup> These goals are to be played out at the local, state, and national levels, and involve active petitioning, often initiated at the grassroots, of diverse legislative, judicial, and executive bodies.

## B. Environmental Justice Described

### 1. The Movement Is Born

Social movements do not become movements overnight, nor are they formed without considerable struggle.<sup>66</sup> The environmental justice movement has been precipitated by the status of people of color as outsiders in dominant society. While environmentalists mobilize for a variety of reasons that include both psychological and structural factors, Professor Bullard argues that "the issues that are most likely to attract the interests of black community residents are those that have been couched in a civil rights or equity framework," focusing on inequality or distributional impacts and favoring social and political "underdogs."<sup>67</sup>

The beginnings of national awareness of the environmental justice movement may be traced to two main catalysts: a 1982 grassroots protest against a landfill in Warren County, North Carolina, and a 1987 study of hazardous waste sites funded by the United Church of Christ Commission for Racial Justice (UCC Commission).

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64. *See id.*

65. *See id.* at 10; *see also* Robert D. Bullard, *Decision Making*, in *FACES OF ENVIRONMENTAL RACISM*, *supra* note 44, at 9.

66. *See generally* MORRIS, *supra* note 11 (detailing the evolution of the Civil Rights Movement).

67. BULLARD, *supra* note 34, at 14.

In 1982, Warren County residents mobilized against the state's plan to dispose of soil laden with polychlorinated biphenyl (PCB) which had been illegally dumped along state highways in a landfill near Afton, North Carolina. Seeking assistance from the Reverend Leon White, a veteran of civil rights struggles in the South, protesters soon engaged in a widespread campaign of non-violent civil disobedience. Although unsuccessful in preventing the siting of the PCB landfill, this series of protests was the first documented African American grassroots environmental justice movement to focus national attention on such a problem, instigating a subsequent investigation of hazardous waste sites by the United States General Accounting Office.<sup>68</sup>

In 1987, the UCC Commission, long active in social advocacy causes, released the first comprehensive national study linking demographic patterns and hazardous waste sites.<sup>69</sup> In addition to its striking findings concerning the disproportionate numbers of impoverished people of color living near hazardous waste sites,<sup>70</sup> Dr. Benjamin F. Chavis, Jr., Executive Director of the UCC Commission at the time of the study, coined the phrase "environmental racism," giving name to the problem.<sup>71</sup>

These early impetuses for environmental justice catalyzed a nascent movement by providing both voice and examples of strategy and information to those who could use them. The movement acquired further legitimacy from avenues parallel to the original Warren County protest and the UCC Commission's study: studies of disproportionate impacts on members of lower-status groups soon were buttressed by grassroots protests by those very groups.

## 2. The Movement Expands

"Like anybody else, people of color are distressed by accidental toxic spills, explosions, and inexplicable patterns of miscarriages and cancers, and they are beginning to fight back . . ."<sup>72</sup> Employing conventional and unconventional political strategies such as petitions and non-violent protests,<sup>73</sup> legal strategies through legislative lobbying, administrative dispute mediation,<sup>74</sup> and litigation using

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68. See Lee, *supra* note 27, at 12; see also Godsil, *supra* note 28, at 394.

69. UCC REPORT, *supra* note 23.

70. See Lee, *supra* note 27, at 14-15.

71. See Godsil, *supra* note 28, at 395.

72. Austin & Schill, *supra* note 49, at 57.

73. See Bullard, *supra* note 48.

74. See Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431 (1994) (arguing for administrative strategies rather than relying solely

environmental and civil rights claims,<sup>75</sup> the environmental justice movement has expanded dramatically within the span of a few short years.

Perhaps the biggest surprise for mainstream environmentalists, industrial and corporate interests, and local governments lies with the rapidity and organizational skills with which numerous and widely varied grassroots interests have mobilized. Current assessments find that the sector of the environmental movement with the fastest growth is grassroots groups in communities of color organized around diverse issues of "waste-facility siting, lead contamination, pesticides, water and air pollution, native self-government, nuclear testing, and workplace safety."<sup>76</sup> By 1991, there were more than 7,000 such environmental justice groups nationwide.<sup>77</sup>

Increasingly, these groups are communicating their strategies and experiences to one another,<sup>78</sup> as well as linking themselves to resources that are already in place. Preexisting indigenous leaders, resources, and institutions are important keys to grassroots mobilization, facilitating, for example, "piggybacking the toxics issue onto the local social action agendas, including neighborhood associations, civic clubs, political groups, and labor unions."<sup>79</sup>

One author emphasizes several directions of focus for grassroots environmental groups: (1) pursue issues pertinent to poor communities, (2) strive for minority groups rather than minority members of White groups, (3) put minorities on an equal level with Whites to avoid minority members solely following White directives and ideology, (4) decline White involvement if necessary, (5) achieve empowerment through organization, and (6) define a new environmental agenda to address local issues and minority concerns.<sup>80</sup> Professor Bullard suggests some additional underlying imperatives for grassroots minority movements: (1) focus on equity and the urban industrial complex, (2) challenge the mainstream environmental movement for its conservative tactics but not its goals, (3) emphasize the needs of the community and workplace as primary agenda items, (4) use indigenous self-taught "experts" in citizen lawsuits instead of relying on legislation and lobbying, (5) adopt a

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on litigation).

75. See *infra* Part III.

76. Bullard, *supra* note 48, at 25.

77. See Dorceta Taylor, *Environmentalism and the Politics of Inclusion*, in *CONFRONTING ENVIRONMENTAL RACISM*, *supra* note 7, at 53, 54.

78. See Bullard, *supra* note 48, at 38.

79. BULLARD, *supra* note 34, at 98; see also Bullard, *supra* note 48, at 38. On the parallel importance of indigenous resources to the Civil Rights Movement, see MORRIS, *supra* note 11, at 278.

80. See Taylor, *supra* note 45, at 41-42.

“populist” stance on environmental issues relying on active grassroots members rather than dues-payers from mailing lists, and (6) embrace a democratic ideology related to the Civil Rights and Women’s Movements.<sup>81</sup>

Given these characteristics and goals, it is not difficult to argue that “grassroots activists have thus been the most influential activists in placing equity and social justice issues onto the larger environmental agenda and democratizing and diversifying the movement as a whole.”<sup>82</sup> From the perspective of the mainstream environmental movement, “diversification makes good economic and political sense for [its] long-range survival,” as it provides broadened perspectives and mirrors the demographic and institutional diversification of the country.<sup>83</sup>

Situating the various goals and strategies of grassroots movements within an analytic framework allows for assessment and translation of both successes and failures to new situations. While successes are varied and storied, the failings of the environmental movement paradoxically may be linked to the kinds of strategies it employs. A forward-looking philosophical emphasis on prevention permeates the movement,<sup>84</sup> but a practical reliance on backward-looking strategies is often the reality. Corporate and industrial interests, often in conjunction with local governmental institutions, continue to have the upper hand in determining the nature of environmental discourse. The industrial siting process, for example, is highly preemptive of input,<sup>85</sup> as public “hearings often are held late in a decision process, after options have been narrowed and the important choices have been made.”<sup>86</sup> Grassroots mobilization often comes at the back end of the deal, politically disadvantaging the already disadvantaged and marginalized. Moreover, “hearings have come to be equated with opposition, which causes many agency officials to look on them with disdain and citizen groups to see them as a last stage for vetoing proposals and preparing for lawsuits.”<sup>87</sup>

The litigation process is also backward-looking, seeking injunctive relief or redress for siting decisions already made, or worse, harms already incurred. Yet diverse tactics are crucial to the success of the environmental justice movement. Recent develop-

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81. See BULLARD, *supra* note 34, at 104 (citing Robert Gottlieb & Helen Ingram, *The New Environmentalists*, THE PROGRESSIVE, Aug. 1988, at 14).

82. Bullard, *supra* note 48, at 39.

83. BULLARD, *supra* note 34, at 110.

84. See, e.g., Bryant, *supra* note 13, at 6; Bullard, *supra* note 63, at 9-10.

85. See Freeman & Godsil, *supra* note 35, at 551-62.

86. FIORINO, *supra* note 5, at 96.

87. *Id.*

ments indicate an increasing emphasis on one litigative strategy: environmental racism claims under Title VI of the 1964 Civil Rights Act,<sup>88</sup> the apparent strategy *du jour* of the environmental justice movement and the focus of this Article.

### III. THE ROLE OF CIVIL RIGHTS LITIGATION WITHIN THE ENVIRONMENTAL JUSTICE MOVEMENT

#### A. Equal Protection Claims

Litigation based on environmental racism often has relied on the Equal Protection Clause of the U.S. Constitution.<sup>89</sup> Although appropriate in theory—after all, environmental racism charges, at least in part, that people of color are not afforded equal protection of the laws—the litigation was uniformly unsuccessful, due to the standard of proof applied to equal protection claims.<sup>90</sup>

The Supreme Court has set forth a stringent standard of proof in cases involving equal protection claims. In *Washington v. Davis*,<sup>91</sup> the plaintiffs challenged a police training admission test as discriminatory under the Equal Protection Clause. Black applicants failed the test, which purported to measure verbal ability, vocabulary, and reading comprehension,<sup>92</sup> four times as often as White applicants.<sup>93</sup> The Court held that although disparate impact was not irrelevant, a valid equal protection claim requires proof of discriminatory intent or purpose.<sup>94</sup> To hold otherwise, the Court reasoned, could invalidate “a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”<sup>95</sup>

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,<sup>96</sup> the Court applied the *Washington v. Davis*

88. 42 U.S.C.A. § 2000d (West 1994).

89. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

90. See Torres, *supra* note 74, at 437 (“The failures owe less to the merits of the claims than to the levels of proof required to prevail in cases of alleged intentional discrimination.”).

91. 426 U.S. 229 (1976).

92. See *id.* at 235.

93. See *id.* at 237.

94. See *id.* at 242 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

95. See *id.* at 248 (citation omitted).

96. 429 U.S. 252 (1977).

standard to governmental decisions and identified five relevant factors in determining whether an action was motivated by intentional race discrimination: (1) the effect of the official action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departures from normal procedures, and (5) the administrative history of the decision.<sup>97</sup> Additionally, the Court opined that even if the plaintiff were able to prove purposeful discrimination, the government would have the opportunity to show that "the same decision would have resulted even had the impermissible purpose not been considered."<sup>98</sup> Thus, the discrimination must not only be intentional, but prejudicial.

The standard of intentional discrimination is a difficult one for any plaintiff to meet. Several factors further decrease the likelihood of a court finding purposeful discrimination in the environmental context. First, siting decisions often are based on facially neutral factors, such as economic concerns or the environmental conditions of an area.<sup>99</sup> Second, the ill effects of the environment are less apparent than other harms.<sup>100</sup> Third, siting decisions appear to present a zero-sum problem to the courts: there will be winners as well as losers because the land use must be sited somewhere.<sup>101</sup> Finally, proving the discrimination in environmental issues often requires complicated statistical analysis, not a strong suit for many judges and attorneys.<sup>102</sup> Two cases, *Bean v. Southwestern Waste Management Corporation*<sup>103</sup> and *R.I.S.E., Inc. v. Kay*,<sup>104</sup> illustrate the particular difficulty of showing discriminatory intent in the context of environmental racism.

In *Bean*, the plaintiffs challenged the site selection for a solid waste facility as racially discriminatory. The approved site was located in a neighborhood that was eighty-two percent Black and within 1700 feet of a predominantly Black high school. In the context of a motion for a preliminary injunction,<sup>105</sup> the court found that the

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97. See *id.* at 266-68.

98. See *id.* at 270-71 n.2.

99. See discussion *supra* Part I.B.

100. See Torres, *supra* note 74, at 444-45.

101. See *id.* at 444.

102. See *id.* With regard to the third factor, commentators have distinguished courts' relative willingness to find discriminatory intent in the context of municipal services on the basis that "everyone wins" when the result is simply extending a good to more people. "[A]s a practical matter, while the judiciary is willing to find for plaintiffs in cases that involve the provision of a social 'good,' the courts seem reluctant to make decisions regarding the placement of a social 'bad' like a LULU." Fisher, *supra* note 10, at 331.

103. 482 F. Supp. 673 (S.D. Tex. 1979).

104. 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

105. To be entitled to a preliminary injunction, a party must show, among other



plaintiffs likely would not be able to prove that the permit decision had been motivated by purposeful racial discrimination. The court was persuaded that the site selection was “unfortunate and insensitive,” but determined that the plaintiffs’ evidence simply did not meet the standard of intentional discrimination.<sup>106</sup>

Similarly, in *R.I.S.E.*, the court was persuaded that the placement of landfills (one of which the court termed “an environmental disaster”) in two counties in Virginia “from 1969 to the present has had a disproportionate impact on black residents.”<sup>107</sup> Nevertheless, the court concluded that the plaintiffs’ evidence was insufficient to show discriminatory intent: “[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>108</sup> “As *Bean* and *R.I.S.E.* illustrate, the burden to establish racially discriminatory purpose or intent, as a legal matter, is tremendous, particularly when the decisions at issue are governmental decisions, as they often are in the environmental context.”<sup>109</sup>

### B. Title VI

Recently, the legal academia has counseled environmental justice activists to turn to litigation under Title VI of the Civil Rights Act of 1964,<sup>110</sup> which prohibits discrimination in federally funded programs, as an alternative to equal protection claims.<sup>111</sup> This strategy, endorsed by the Clinton Administration,<sup>112</sup> was intended to

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things, that it is likely to succeed on the merits of its claim. *Bean*, 482 F. Supp. at 676 (citing *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

106. *Id.* at 680.

107. *R.I.S.E.*, 768 F. Supp. at 1149.

108. *Id.* at 1150.

109. Torres, *supra* note 74, at 442; see also Austin & Schill, *supra* note 49, at 67; Bullard, *supra* note 65, at 18-20; Fisher, *supra* note 10, at 285; Godsil, *supra* note 28, at 413-16 (providing a detailed discussion of *Bean*).

110. “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C.A. § 2000d (West 1994).

111. For a discussion of the three legal options available under Title VI (suing the discriminatory recipient of federal funds, suing the funding agency, or filing a complaint through the funding agency’s administrative procedures), see Colopy, *supra* note 10, at 156-88.

112. In 1994, President Clinton issued Executive Order 12,898, titled “*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,” which directed federal agencies to consider environmental justice issues. Exec. Order 12,898, 3 C.F.R. 859 (1995), reprinted in 42 U.S.C.A. § 4321 (West 1994); see also Clarice E. Gaylord & Elizabeth Bell, *Environmental Justice: A National Priority*, in *FACES OF ENVIRONMENTAL RACISM*, *supra* note 44. The EPA, as a political

avoid the pitfall of the Equal Protection Clause's intentional-discrimination burden of proof and thus remedy environmental racism injuries that exist irrespective of motive.

Title VI requires only a showing of disparate impact,<sup>113</sup> a much less onerous burden of proof than discriminatory intent. Initially, a Title VI plaintiff must show the disparate impact a particular action would have on a community of color.<sup>114</sup> In the environmental context, a plaintiff might show, as in *Bean*, that a siting decision would have a disparate impact on Blacks, regardless of racial animus. After the plaintiff has established this prima facie case, the burden shifts to the defendant to demonstrate a legitimate nondiscriminatory reason for the action.<sup>115</sup> Once the defendant has done so, the burden shifts back to the plaintiff to show that the proffered justification is pretextual.<sup>116</sup> Thus, Title VI prohibits only unjustified disparate impacts.<sup>117</sup>

Upon proving disparate impact under the evidentiary standard outlined above, a Title VI plaintiff is entitled to declaratory and injunctive relief to "identify the violation and enjoin its continuance."<sup>118</sup> If she is successful in proving discriminatory intent, compensatory

body, relates its tasks to its mission. Before Clinton's executive order, the EPA was closed to addressing civil rights violations. Under the current administration, it may be more open to charges of environmental racism than the traditionally conservative judiciary. See Fisher, *supra* note 10, at 313. Yet there is limited (visible) evidence that this has occurred. On the efficiency of executive orders in pursuing environmental justice, see Sebastian C. Pugliese III, *Environmental Justice: Lowering Barriers to Participation*, 1995 WIS. L. REV. 1177 (1995) (arguing that executive orders efficiently channel statistical information to decisionmakers).

113. See *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983). For a discussion of the Court's complicated opinion and its implications, see Colopy, *supra* note 10, at 159.

114. See, e.g., *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

115. See *id.*

116. See *id.* But see Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 939, 971-75 (1990) (arguing that Title VII's less strict regulation of employers should not be applied to Title VI's standards because Title VI regulates public spending rather than the private sphere of employment); Colopy, *supra* note 10, at 163 (arguing that the disparate impact analysis of the Civil Rights Act of 1991 should be applied as the appropriate prima facie standard in Title VI cases).

117. See, e.g., *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) ("Defendants are not *per se* prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification.").

118. *Guardians Ass'n*, 463 U.S. at 596.

relief in the form of money damages is also available.<sup>119</sup> Prevailing plaintiffs also are entitled to reasonable attorney fees.<sup>120</sup>

Title VI requires federal funding before a violation may be found,<sup>121</sup> thus covering all federal agencies as well as state and local agencies receiving federal funding. As most federal environmental laws provide funding for state programs, which in turn extend assistance to local agencies, this limitation generally will be met.<sup>122</sup> Title VI will apply to an entire agency if even one part of the agency “is extended Federal financial assistance.”<sup>123</sup> Thus, most state and local agencies likely are subject to Title VI.

119. See, e.g., *Eastman v. Virginia Polytechnic Inst.*, 939 F.2d 204, 206-07 (4th Cir. 1991) (holding that “intentional discrimination is a prerequisite to an award of any sort of ‘compensatory damages’ to a private litigant in a Title VI case” under *Guardians Ass’n*).

120. See 42 U.S.C.A. § 1988(b) (West 1994).

121. Title VI prohibits discrimination in “any program or activity receiving Federal financial assistance.” 42 U.S.C.A. § 2000d (West 1994).

122. A recent EPA report indicates that federal funding constitutes a large percentage of state budgets for air, water, and hazardous waste programs. U.S. ENVTL. PROTECTION AGENCY, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000, at 9 (1988).

123. 42 U.S.C.A. § 2000d-4a. Section 2000d-4a provides:

For the purposes of this subchapter, the term “program or activity” and the term “program” mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency . . . , system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

In 1994, activist and attorney Luke W. Cole examined the seventeen Title VI complaints filed with the EPA between September 1993 and September 1994.<sup>124</sup> He noted that

[i]nterestingly, few of the complaints have emerged from broad-based, local organizing efforts against environmental racism, and even fewer were brought self-consciously as part of the environmental justice movement. Many complaints, at least a third of all complaints filed thus far, appear to be filed by disgruntled individuals expressing frustration with a local agency. This is not to discount the efforts and discriminatory situations faced by the individuals or ad hoc groups, but instead to demonstrate that the environmental justice movement, as a movement, has yet to invest a serious amount of energy in the Title VI avenue.<sup>125</sup>

Similarly, case law regarding Title VI challenges to environmental impacts remains sparse.<sup>126</sup>

Nevertheless, environmental litigation under Title VI has been touted by the legal academia as a magic bullet for the environmental justice movement.<sup>127</sup> Although this almost uniform endorsement has not been without criticism,<sup>128</sup> its drawbacks have been presumed or identified only generally rather than with a particular eye toward the forces which have given rise to and shaped the environmental

124. See Luke W. Cole, *Civil Rights, Environmental Justice and the EPA*, 9 J. ENVTL. L. & LITIG. 309 (1994).

125. *Id.* at 325 (footnotes omitted). Cole made several observations regarding procedural aspects of administrative complaints under Title VI, including that as there are no enforceable time limits for the EPA to take action, it could take years until a complaint is resolved; because a Title VI complaint potentially jeopardizes a state or local agency's federal funding, it is taken seriously; as with other civil rights laws, Whites also are filing complaints under Title VI; and that it appears that if a complaint is timely and involves a federally funded agency, the EPA will accept it for investigation. See *id.* at 387-89.

126. See Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 532-34 (1994) (noting that "environmental justice cases have relied on the regulations implementing Title VI, rather than the statute itself," and that one such case, which challenged a freeway siting, represented "one of [the environmental justice movement's] only Title VI legal victories thus far"); Michael Janofsky, *Suit Says Racial Bias Led to the Clustering of Waste-Processing Sites*, N.Y. TIMES, May 29, 1996, at A13 (stating that there have been "perhaps only three instances" of environmental suits against states under the Civil Rights Act). But see *Living on Earth* (NPR radio broadcast, July 20, 1996) (reporting that the Chester, Pennsylvania, case is being "closely watched" by other environmental justice organizations).

127. See, e.g., sources cited *supra* note 10.

128. See *infra* Parts IV.C.2 and IV.C.3.

justice movement. This Article situates the legal scholarship endorsing Title VI litigation within the broader picture of the environmental justice movement and political economy.

#### IV. RESITUATING TITLE VI WITHIN POLITICAL ECONOMY

A central insight of political-economic analysis is the complex interaction between public and private interests.<sup>129</sup> Local governing bodies are guided and constrained by economic concerns that cannot be analytically distinguished from political processes.<sup>130</sup> Political-economic analysis yields a critical perspective on societal arrangements that privilege certain segments and disadvantage others.<sup>131</sup> Litigation, rooted in legal institutions that are predisposed toward the status quo, operates in the context of dove-tailed political and economic processes that produced both the issue to be resolved and the means to attempt its resolution. Title VI litigative strategies, as well as the environmental justice movement as a whole, face constant barriers and variable contexts that shape their efficacy. After discussing political-economic factors that frame the movement, this Part details specific benefits and limitations of Title VI litigation.

##### A. Constants

#### 1. Structural and Institutional Racism

Disproportionate impacts will result regardless of the intent behind public or private actions, if discrimination remains pervasive within structural or institutional contexts. Hence, as with other legal or policy-oriented outcomes, the general causes of environmental

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129. See TODD SWANSTROM, *THE CRISIS OF GROWTH POLITICS: CLEVELAND, KUCINICH, AND THE CHALLENGE OF URBAN POPULISM* 33 (1985) (“[W]hile the economic environment largely determines the size and shape of the public sector, the economic environment is in turn shaped by the policies of government.”) (emphasis omitted). For a brief and readable synopsis of the science of political economy, see John H. Moore, *Political Economy in Anthropology*, in *THE POLITICAL ECONOMY OF NORTH AMERICAN INDIANS* 3-15 (John H. Moore ed., 1993) (acknowledging the field’s interdisciplinary nature). For a discussion of urban political economy acknowledging its theoretical roots, see Norman I. Fainstein & Susan S. Fainstein, *Restoration and Struggle: Urban Policy and Social Forces*, in *URBAN POLICY UNDER CAPITALISM* 9 (Norman I. Fainstein & Susan S. Fainstein eds., 1982).

130. See generally SWANSTROM, *supra* note 129; see also CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1946-1988* (1989) (providing historically rooted political-economic analysis of a major southern city); *THE POLITICS OF URBAN DEVELOPMENT* (Clarence N. Stone & Heywood T. Sanders eds., 1987) (linking politics and economics in a series of case studies).

131. See generally *THE POLITICS OF URBAN DEVELOPMENT*, *supra* note 130.

inequities are racism and the marginalized economic and political power of minorities.<sup>132</sup> Yet in the minds of many policymakers, the onus is on minorities to engage in collective action in order to overcome such systemic biases. Mobilization has become increasingly frequent and efficacious,<sup>133</sup> but minorities still face a legacy of exclusion from mainstream environmental groups.<sup>134</sup> Minorities continue to suffer disproportionate levels of social inequities, but are expected to press their claims through methods (collective action, interest groups, litigation) that may remain relatively inaccessible or infeasible. Additional possible explanations for the lack of minority participation in environmental policy include (1) deliberate racial stereotyping, (2) less overall interest in environmental issues, (3) greater concern for economic issues, (4) historical exclusion leading to lessened concern for parks or other "White" preservation issues,<sup>135</sup> and (5) expenditures of limited political resources on issues perceived to be more pressing (such as housing or entitlement policies).<sup>136</sup>

Regardless of the ways in which discrimination is manifested, under prevailing conditions wherein "political and economic power are key factors which influence the spatial distribution of residential amenities and disamenities," and "[e]nvironmental health risks are inextricably linked to political economy of place,"<sup>137</sup> disparate impact analysis is more than appropriate—it is imperative.

## 2. Growth Imperatives: "Progress" Trumps Environmental Concerns

Across the land, historical emphasis on economic growth fueled by economic boosters and growth machines<sup>138</sup> has led to the "[m]odern-day [g]ood [b]usiness [c]limate,"<sup>139</sup> with its concomitant

132. Lazarus, *supra* note 10, at 822.

133. See discussion *supra* Part II.

134. See discussion *supra* Part I.C.

135. See discussion *supra* Part I.C (discussing "environmental elitism" of mainstream environmental groups).

136. See Lazarus, *supra* note 10, at 826 ("These vestiges [of past discrimination] effectively deny minorities the autonomy to choose, either by purchase or through the ballot, the level of environmental quality that they will enjoy or the amount of pollution that they will tolerate.").

137. Bunyan Bryant & Paul Mohai, *Introduction*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 12, at 7 (quoting Robert Bullard & Beverly Wright, *Environmentalism and the Politics of Equity: Emergent Trends in the Black Community*, MID-AM. REV. SOC., Winter 1987, at 21).

138. See discussion *supra* Part I.A.

139. LOGAN & MOLOTCH, *supra* note 16, at 57 (noting that "[t]he jockeying for ca-

“celebration of local growth [that] continues to be a theme in the culture of localities.”<sup>140</sup> While local government’s concern with facilitating growth is not its only function, “[t]he growth ethic pervades virtually all aspects of local life.”<sup>141</sup> Growth politics may be linked to decidedly unequal distribution patterns that disproportionately and negatively impact minorities; policymakers long ago should have disabused themselves of the notion that growth has concrete and identifiable benefits for everyone within a city’s boundaries.<sup>142</sup> Although perhaps including some calculations of winners and losers, economic growth and development are seen as having ultimately positive effects for the polity and its members.<sup>143</sup>

### 3. Incremental Nature of Policy Changes and Litigation

The environmental justice movement, whether manifested in localized grassroots mobilizations or engaged in federal litigative strategies, will continue to run up against the constraints imposed by the incremental nature of policy changes and litigation. Policymaking rarely is revolutionary.<sup>144</sup> Among national political bodies and agencies, incrementalism prevails. When Congress is in session, policy initiatives (major or minor) are subject to committee markup sessions, contentious floor debate, interest group pressures, and political posturing that ultimately mute (or moot) many legislative outcomes. Furthermore, “[m]aking policy in the executive branch is as byzantine and complex as it is in Congress.”<sup>145</sup> At the agency level,

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nals, railroads, and arsenals of the previous century has given way in this one to more complex and subtle efforts to manipulate space and redistribute rents”).

140. *Id.* at 52-63.

141. *Id.* at 13.

142. See generally THE POLITICS OF URBAN DEVELOPMENT, *supra* note 130 (including a series of empirically rooted essays demonstrating the flaws in assuming universal benefits from economic growth and showing differential and often negative impacts on minorities in urban environments).

143. The dynamic admittedly is complex and contingent, as “growth pressures must be filtered through local political systems with particular rules, power arrangements, and perceptions of the governmental market place.” SWANSTROM, *supra* note 129, at 33.

144. Witness the 1994 “Republican Revolution,” which many (regardless of where they stand on the partisan or ideological continuum) acknowledge stalled in the face of traditional policymaking considerations and institutional blockages.

145. FIORINO, *supra* note 5, at 70. As Fiorino further explains:

Congress consists of a collection of specialized committees and subcommittees, a diversity of individuals seeking to do good for the environment or do well in their home districts, and a fragmented oversight process that pulls an agency first one way and then another. The executive apparatus is just as complex. As a technical matter, Congress delegates authority to the administrator to act to protect the environment. But administrators are selected by the

for example, Professor Daniel Fiorino distinguishes five institutional perspectives within the EPA: program, policy, legal, research, and regional.<sup>146</sup> Such institutional tensions are to some degree “deliberately built into the structure of EPA and most large policy making agencies. Whether consciously or not, most agencies incorporate a degree of multiple advocacy in their designs . . . . [The] EPA’s internal tensions reflect the checks and balances present in the American political system.”<sup>147</sup> Such tensions may fail to provide for crucial access by outsider groups; they strongly bias agencies and policymaking bodies toward technocratic professionalized recommendations that reinforce status quo assumptions. Burdens and environmental justice concerns may remain externalized from such a process.<sup>148</sup>

While some decry judicial activism and reputed “policymaking” by the judicial branch, such claims are overstated.

[Federal judges] are powerful, and they can greatly influence agency policies and priorities, but they are constrained by elaborate procedural rules and subject to oversight themselves through the appeals process. They decide issues in the context of a highly structured, adversarial process, and they can act only when litigants bring cases to them for decisions.<sup>149</sup>

The judiciary is bound by the structural limitations of its powers and jurisdiction.

The environmental justice movement faces these constant constraints on efficacious action. Insurgency often is channeled into institutions that mute its potential to alter the manner in which policymaking and policy outcomes play out. The incremental nature of policy changes thus impacts the lives of real people in ways that often are forgotten by those in a position to act on behalf of those in need.<sup>150</sup>

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president and depend on the White House for political and budgetary support, not to mention their jobs. Nor is the White House content to leave as vital an issue as the environment (and thus the economy, growth, and other social ends) to an agency acting under the direction of Congress.

*Id.* at 69-70.

146. *See id.* at 45-47.

147. *Id.* at 47.

148. Hence, the EPA’s increasing reliance on quantitative risk assessment, *see, e.g.*, Cushman, *supra* note 62, may prove to be more harmful to minorities, as “[q]uantitative risk assessment’s reduction of pollution-related disease and death to mere statistics stands in stark contrast to environmental justice’s concern with equity and the political and human aspects of pollution.” Kuehn, *supra* note 38, at 107.

149. FIORINO, *supra* note 5, at 80.

150. One observer trenchantly makes the link:



### B. *The Contingent and Variable Nature of the Political-Economic Climate*

Other political-economic factors influence the potential for headway toward the environmental justice movement's objectives. Such components are contingent and variable, framing the movement's political efficacy.

#### 1. Minority Outgroups and Organizational Structure

Local grassroots mobilization is conditional. Factors include such regional characteristics as a community's racial composition and the historical nature of race relations. Can, for example, prior interactions among people of color and Whites be characterized as confrontational or quiescent, antagonistic or productive? Are there legitimate opportunities for minority voices to be heard in electoral and governmental settings, via multiracial coalitions or otherwise? Are interactions mediated by institutions, or do they occur primarily on an ad hoc basis?<sup>151</sup> Related to a region's historical character is the question of prior claims on social goods. Are there preexisting cleavage issues around which struggle has created interracial wedges? Potential intraracial divisions also may be present. In the pro-growth South (as in the rest of the country), minorities are far from monolithic in their methods of evaluating the importance of economic growth and empowerment versus environmental degradation and concomitant decreased life opportunities. Evidence of these sometimes competing and contradictory factors is seen in Sumter County, Alabama, where observers have found that

[l]ocal controversy surrounding operation of the nation's largest hazardous waste landfill to date has been dissipated by pre-existing struggles for black empowerment, control over education policy, and efforts to boost a flagging economy. In the context of a racially divided

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Although the federal government has responded to claims of environmental inequity, its response has centered around gathering and studying data on the characteristics of communities alleging environmental inequities to determine the extent of the problem. Proving that a problem exists is an appropriate governmental task; however, the government's failure to do more leaves victims living with the negative health and environmental impacts of having an unwanted hazardous facility in their neighborhood.

Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 223, 230 (1995).

151. See discussion of regimes *infra* Part IV.B.2.

population, local opposition to this landfill has had little effect on regulatory agencies or CWM [Chemical Waste Management, Inc].<sup>152</sup>

The results of an ad hoc social movement may be contingent upon the availability of indigenous resources to provide a rapid—and necessary—kick-start.<sup>153</sup> Depending upon local qualities and imperatives, resources may take varying forms. The group Mothers of East Los Angeles successfully linked Latino culture and languages to mobilization efforts, defeating proposals for constructing a state prison and an incinerator in East Los Angeles.<sup>154</sup> In mobilizing against additional sites in Louisiana's Cancer Alley, activists organized a two-state (Louisiana and Mississippi) effort through the Gulf Coast Tenant Leadership Development Project, a preexisting and predominantly African American organization with both local and larger roots.<sup>155</sup> Such an example indicates that exogenous assistance also may be welcomed. Although the October 1982 protests of the Warren County Citizens Group in North Carolina were rooted in indigenous citizens and resources, as participants engaged in self-education about technical issues concerning PCBs, the "presence of national civil rights figures and members of the national Black Congressional Caucus served to link the protest to larger civil rights and 'poor people's' movements."<sup>156</sup>

## 2. State and Local Governmental Regimes

The structure, racial or ethnic composition, and current ideological character of governmental entities are important and highly contingent factors in how policy decisions are made and environmental concerns addressed.<sup>157</sup> At the upper levels of governmental

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152. Bailey & Faupel, *supra* note 38, at 151. A large number of Black residents work for CWM and are relatively well paid, creating tensions among African Americans as well as with Whites. *Id.* at 148-49.

153. See generally MORRIS, *supra* note 11 (discussing the potentially determinative character of indigenous resources within social movements).

154. See Austin & Schill, *supra* note 49, at 62.

155. See Beverly Wright et al., *Coping with Poisons in Cancer Alley*, in UNEQUAL PROTECTION, *supra* note 1, at 121.

156. Ken Geiser & Gerry Waneck, *PCBs and Warren County*, in UNEQUAL PROTECTION, *supra* note 1, at 52.

157. During an industrial siting process, for example, "[t]he opposition or support of local or federal politicians may influence an owner's selection of a particular site, through public relations and media efforts, tax breaks, relationships with a particular industry, or other incentives." Freeman & Godsil, *supra* note 35, at 559. To the extent that siting decisions usually already have been made before they are publicized, such claims primarily are post hoc. See discussion *supra* Part I.B.

influences, "conjoint federalism describes a relationship in which state and federal authority blend and apply concurrently to the objects of regulation."<sup>158</sup> While there is constancy linked to incrementalism,<sup>159</sup> federal programs may shift somewhat with the political tides.<sup>160</sup> But with wide variation from state to state in the quality of environmental programs and levels of fiscal and political support for their administration,<sup>161</sup> states exercise great discretion in their commitments to environmentalism—but vary little in their commitments to economic growth.<sup>162</sup>

Moving further down the governmental queue, the relationship among race, local governments, and growth ideology is complex, but the increasing presence of minority elected officials is indicative of certain cohesive principles that often are overlooked by journalistic accounts of minority electoral success and the relationship of environmental movements to officeholders. Importantly, the uneven distribution of benefits and burdens does not simply result from the actions, deliberate or otherwise, of White governmental officials. Even minority-headed governing coalitions<sup>163</sup> may fall prey to growth politics, leading to an uneven distribution of benefits.<sup>164</sup> How might this occur? While upper-, middle-, and lower-status minority

158. FIORINO, *supra* note 5, at 85.

159. See *supra* Part IV.A.3.

160. See discussion *infra* Part IV.B.3.

161. See CHRISTOPHER J. DUEKSEN, ENVIRONMENTAL REGULATION OF STATE INDUSTRIAL PLANT SITING 218-19 (1983).

162. See Luke W. Cole, *Correspondence, Remedies for Racism: A View From the Field*, 90 MICH. L. REV. 1991, 1993-94 (1992) (stating that states have economic interest in siting just like corporations, but states are more vulnerable to political pressure; nevertheless, states are not neutral go-betweens, and will site despite community outcry); see also discussions *supra* Parts I.A. and IV.A.2.

163. Professor Reed aptly labels these "black urban regimes," although presumably his discussion could apply to other minority-headed coalitions. See Adolph L. Reed, Jr., *The Black Urban Regime: Structural Origins and Constraints*, 1 COMP. URB. & COMMUNITY RES. 138 (1988); see also STONE, *supra* note 130 (discussing Atlanta's electoral and governing coalitions).

164. For example, "[i]n 1987, residents of Los Angeles, California, successfully blocked the construction of a garbage incinerator, the Los Angeles City Energy Recovery Project (LANCER), in a predominantly African American inner-city neighborhood. This resulted from a five-year struggle which involved the repeated mobilization of hundreds of residents for demonstrations and hearings. Their struggle was complicated by the fact that Los Angeles' mayor, Tom Bradley, and other elected officials were African American." Lee, *supra* note 27, at 17 (citing D. Russell, *Environmental Racism: Minority Communities and Their Battles Against Toxics*, 11 AMICUS J. 22 (1989)). On the theory behind differential outcomes under minority-headed governing coalitions, see Reed, *supra* note 163. See also Steven A. Light, *There's More Than Meets the Eye: Southern Cities and Minority Political Empowerment Following the 1965 Voting Rights Act* (unpublished manuscript presented at 1995 American Political Science Ass'n Annual Meeting, on file with author).

voters all may have been integral to an electoral coalition, the maintenance of the governing coalition is of primary concern to any elected officials, including minorities.<sup>165</sup> Effectively, this phenomenon fuses the interests of upper- and middle-status minorities with those of White business elites. Resultant growth coalitions thus are forged within a consensus that defines lower-status interests out of the benefit package.<sup>166</sup>

It is possible to imagine "benefit packages" which include facilities portending high degrees of environmental degradation but also jobs and increased economic growth. Professor Robert Bullard writes that consideration of such trade-offs

is especially true for poor communities that are beset with rising unemployment, extreme poverty, a shrinking tax base, and decaying business infrastructure. Compensation, economic incentives, and monetary inducements have been proposed, for example, as an alternative strategy to minimize citizen opposition to hazardous-waste facility siting. The endorsement of trade-offs usually emanates from city leaders rather than from local citizens.<sup>167</sup>

Regardless of the racial composition of governmental institutions, resistance may be non-existent or weakened by the presence of pro-growth minority leadership and intragroup dissension<sup>168</sup> based on the perceived benefits of employment opportunities. Empirical results concur, and suggest a general perceptiveness among affected minority citizens for which they are infrequently given credit. Surveys of nine residential communities of color in which industrial facilities were located suggested that over half of the respondents "believed that residents in their community were accepting health risks as a trade-off for jobs," thus undergoing what one authority labels "environmental blackmail."<sup>169</sup>

165. See generally THE POLITICS OF URBAN DEVELOPMENT, *supra* note 130.

166. See generally Adolph L. Reed, Jr., *A Critique of Neo-Progressivism in Theorizing About Local Development Policy: A Case Study from Atlanta*, in THE POLITICS OF URBAN DEVELOPMENT, *supra* note 130; Reed, *supra* note 163; see also Clarence N. Stone, *Pre-emptive Power: Floyd Hunter's "Community Power Structure" Reconsidered*, 32 AM. J. POL. SCI. 82-104 (1988).

167. BULLARD, *supra* note 34, at 90.

168. See, e.g., Schneider, *supra* note 49 (describing internecine conflict over the tradeoffs between jobs and environmental degradation in Noxubee County, Mississippi).

169. BULLARD, *supra* note 34, at 90-91. Minorities may act on their information or perceptions of the situation. For example, the Rosebud Reservation-based Good Road Coalition, a Native American group in South Dakota, defeated plans for a garbage landfill on the reservation, as a recall election defeated the landfill proposal and several tribal council leaders. See Austin & Schill, *supra* note 49, at 62-63. Tribal members

## 3. National Actors

At the national level, opportunities to access political and governmental bodies, and alter policy outcomes, are subject to the vagaries of political-economic climate. Legislative, administrative, and regulatory avenues often are relatively closed, while litigative claims of environmental degradation run up against a judicial system that is by and large oriented toward the status quo.

Within the executive branch, the EPA determines the extent of its role in civil rights concerns, which have been negligible and often counterproductive.<sup>170</sup> Until the outset of the Clinton Administration, there were no executive directives surrounding environmental justice issues.<sup>171</sup> To the extent that the environmental justice movement has been successful in its efforts to place the topic of environmental justice on the agenda of federal agencies,<sup>172</sup> it also has been limited by the incremental nature of policy changes within structures that are subject to both bureaucratic and political cross-pressures.<sup>173</sup> In any case, executive orders effectively can be here one day and gone the next, depending on political whims and electoral cycles.<sup>174</sup>

The creation of federal legislation is mediated by institutional composition, structural characteristics, and politicized processes.<sup>175</sup> As things stand, inequities may be more pervasive in environmental law because of a general absence of minority involvement and

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thus mobilized against their own leaders, rather than against an external symbol of oppression.

170. For example, studies have found that "cleanup of toxic Superfund sites takes longer to occur and the level of cleanup is less rigorous in communities of color than in white communities. Those who pollute are likely to pay significantly lower fines if they pollute in communities of color than in white communities. . . . These reports indicate that causal data or health-based assessments are of little value if the community cannot get adequate response and action from government officials" such as those at the EPA. Rebecca Head, *Health-Based Standards: What Role in Environmental Justice?* in ENVIRONMENTAL JUSTICE, *supra* note 7, at 53 (citing Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J. Sept. 21, 1992, at S1-S12). For a general account of the EPA's history, see FIORINO, *supra* note 5, at 38-43.

171. See Lazarus, *supra* note 10, at 829.

172. See *supra* note 112 (discussing Executive Order 12,898).

173. See *supra* Part IV.A.3. For example, backing off from his 1992 green platform, President Clinton signed a 1995 rescission bill allowing timber companies to log lands that were previously off-limits. See Margaret Kriz, *Not-So-Silent Spring*, 1996 NAT'L J. 522, 524.

174. See FIORINO, *supra* note 5, at 70-77 (discussing various presidential administrations' use of mechanisms for executive office control over environmental policy). On recent political dynamics, see generally THE CLINTON PRESIDENCY: FIRST APPRAISALS (Colin Campbell & Bert A. Rockman eds., 1996).

175. See, e.g., JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS (3d ed. 1989) (examining individual floor voting decisions in view of the influence of internal congressional structures and administrative interactions).

interest representation at the national level, centralized decisionmaking (environmental laws are made and enforcement priorities set inside the Beltway), and the role of competing interest groups which reach compromises with industry and focus on nonurban environments.<sup>176</sup> When it comes to the prospects for new legislation, Congress is subject to competing cross-pressures by virtue of its pluralized nature and electoral flux. Additionally, political climate and the partisan or ideological composition of the two houses are important factors in the likelihood of environmental claims acquiring legislative purchase. Under Congress' current ideological composition and the general flow of political tides, major new legislation that incorporates disparate impact standards is unlikely; indeed, even in the somewhat ideologically moderated post-Contract with America legislative environment, existing environmental regulations repeatedly have been threatened.<sup>177</sup>

In the courts, the road toward pressing efficacious environmental justice claims—under Title VI or otherwise—may be strewn with fewer or lesser obstacles, depending upon the composition of the judiciary. Regardless of what one believes about the ability of federal judges to apply the law, their decisions may be mediated by the ideology of the president who appointed them,<sup>178</sup> or colored by changing interpretations of the law itself.

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176. See Lazarus, *supra* note 10, at 806-08.

177. The Contract with America did not explicitly mention the environment, but included proposals to decrease the power of government regulations and to require federal compensation to landowners who faced federal property restrictions. Although these proposals faltered in the Senate, House conservatives recently moved to include provisions to ease water pollution controls and wetland protections by altering the 1972 Clean Water Act. Blocked by a coalition of moderate Republicans and Democrats, another successful challenge occurred through budget restrictions on the EPA's enforcement capabilities. See Kriz, *supra* note 173, at 523-24. Although House Republicans appear to have backed off somewhat from their original antiregulatory stances, environmentalists agree that the threat to environmental agencies, programs, and regulations has not ended.

178. For example, Strategic Lawsuits Against Public Participation (SLAPP suits—legal actions brought in attempts to stifle political speech), as well as takings challenges, are litigation strategies employed by industry/siting supporters. These claims often are heard by the U.S. Claims Court, comprised in large part of conservative Reagan appointees who often side with landowners. See JACQUELINE VAUGHN SWITZER, ENVIRONMENTAL POLITICS: DOMESTIC AND GLOBAL DIMENSIONS 93-95 (1994) (citing Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988), and RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)).

### C. Title VI: A Bullet, Just Not Magic, or Even Silver

Environmental litigation under Title VI is bound to meet with more success than claims under the Equal Protection Clause, if only because of Title VI's less onerous burden of proof. Accordingly, Title VI claims will achieve the benefits of litigation. This is the position taken by much of the recent legal scholarship concerning the environmental justice movement.<sup>179</sup> That position, however, overlooks the forest for the trees by failing to position litigation of any sort within the larger contexts of the environmental justice movement and political economy. The impetuses for and growth of the environmental justice movement and the overarching considerations of political economy indicate that litigation strategies may harm more than help the movement. When viewed within these contexts, Title VI litigation is seen for what it is: a potentially viable legal strategy, but no more. Within legal academia, attorney and activist Luke Cole has spearheaded criticism of litigation, and the corresponding role of attorneys, in the environmental justice movement.<sup>180</sup> His assertions, though perhaps disappointing to well-intentioned lawyers, provide a practical approach to utilizing legal strategies within the environmental justice movement. Cole's approach is bolstered by the conclusions reached in this Part.

#### 1. Benefits

Litigation in general, and litigation under Title VI in particular, is not without its benefits, both to individual successful litigants and to causes championed by particular litigation. In the environmental context, one such benefit is simple, yet important: litigation frames environmental racism as a civil rights violation. The act of filing a lawsuit claiming a civil rights violation has symbolic value: "The mere filing of a formal complaint provides a very powerful and visible statement by minorities regarding their belief that distributional inequities exist in environmental protection."<sup>181</sup> Lawsuits have both legal and political ramifications: they can lift community morale, strengthen and raise the profile of an activist group, and build political momentum.<sup>182</sup> Thus, the courts can play a political role help-

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179. See *supra* Part III.B.

180. For a nonenvironmental critique of Title VI's efficacy, see STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995).

181. Lazarus, *supra* note 10, at 828-29.

182. See Cole, *supra* note 126, at 541.

ful to the environmental justice movement.<sup>183</sup> Even in our increasingly litigious society, lawsuits generate publicity for a cause<sup>184</sup> and accordingly educate the public, perhaps inspiring new activists.<sup>185</sup> Education of the judiciary through litigation (arguably one of the only ways to do so) is another key benefit of litigation.<sup>186</sup> Most obvious, of course, is the possibility of redress. If successful, litigation may prevent a siting and avoid health risks, or, less desirably, redress harms already incurred. A successful lawsuit has more than practical benefits, however, as it represents official validation of a community's claims.<sup>187</sup>

## 2. Limitations

Litigation under Title VI, despite the almost uniform endorsement by the legal academia,<sup>188</sup> nevertheless has the same limitations inherent in litigation in general. In the environmental context, these limitations become particularly important when viewed against the backdrop of political economy and its constants and variables.<sup>189</sup>

### *a. Structural and Institutional Racism*

Most important, litigation removes an issue from the community and places it into the courts, thus seeking to resolve an issue of racism in a forum notorious for favoring affluent Whites.<sup>190</sup> Lawsuits take place in "fora where the abundant resources of private corporations and governmental entities carry the day, and where strategic decisions are placed in the hands of legal and scientific 'experts' rather than members of the affected community."<sup>191</sup> Even more fundamental, the costliness of toxic tort litigation generally precludes minorities and the poor from pursuing suits and settlements.<sup>192</sup> The

183. See SWITZER, *supra* note 178, at 66 ("[T]he courts are now becoming the arena of choice for resolving all types of environmental disputes.").

184. See Cole, *supra* note 126, at 541.

185. See Austin & Schill, *supra* note 49, at 64-65; Cole, *supra* note 126, at 541; Lazarus, *supra* note 10, at 829 (listing political education and gaining allies as political benefits of litigation).

186. See Cole, *supra* note 126, at 541.

187. See Lazarus, *supra* note 10, at 829.

188. See *supra* note 127 and accompanying text.

189. See *supra* Parts IV.A and IV.B.

190. See *supra* Part IV.A.1. *But see, e.g.*, Pugliese, *supra* note 112, at 1203 ("Courts, independent and impartial, are frequently defenders of racial groups injured at the expense of the majority.").

191. Torres, *supra* note 74, at 451.

192. See Austin & Schill, *supra* note 49, at 65.



disadvantages to affected communities work to the advantage of corporate interests:

It is to industry's advantage to litigate environmental regulations because the process has the net effect of stalling the implementation of rules. Industry can demur during the policy formation and adoption stage, thereby avoiding the bad press that comes from such activity, in hopes of moving the courts closer to their position.<sup>193</sup>

Institutional racism ignores or underestimates the real concerns of communities that bear the burdens of environmental racism. This factor comes into play both in recognizing and addressing environmental racism. "Public health and other governmental officials need to change their assumptions about the intellectual abilities of low-income people and minorities to understand complex information and include them as partners in solving community environmental problems as opposed to dysfunctional adversaries lacking the capacity to understand complex scientific information."<sup>194</sup> In the courts, lawyers (on either side of the dispute) and judges similarly may underestimate the ability of affected individuals to grasp the legal and scientific aspects of their cases.

#### b. *Growth Imperatives*

Litigation directly pits the environmental concerns of an individual or a community against economic growth. Judges may be likely to share the generally positive opinion of economic growth and development.<sup>195</sup> Likewise, scientific experts, on whom environmental litigation relies, may "nonetheless succumb to social controls of powerful forces to use science in a discourse to narrate a certain

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193. SWITZER, *supra* note 178, at 67 (citing LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* (1982)).

194. Bunyan Bryant & Paul Mohai, *Summary, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS*, *supra* note 12, at 217-18. As Professor Bryant has observed:

To use the resources and capabilities of community people in the problem-solving process, and thus enhance their cooperation, assumptions about their lack of "smartness" need to be challenged; they must be perceived as smart, concerned, caring, serious enough about being engaged in the problem-solving process, and able to follow through on responsibilities.

Bunyan Bryant, *Issues and Potential Policies and Solutions for Environmental Justice: An Overview*, *in ENVIRONMENTAL JUSTICE*, *supra* note 7, at 13.

195. See *supra* Part IV.A.2.

political and economic reality."<sup>196</sup> More important, because economics, rather than social equity, is the driving force behind environmental decisions, challenges to the legality of those decisions (through civil rights litigation) do not have a real impact on the decisionmakers.<sup>197</sup>

*c. Incremental Nature of Policy Changes and Litigation*

The very nature of a legal victory is tenuous. Statutes may be amended or repealed, and court decisions can be overruled or distinguished. Laws mean little without a social movement to support and continue them; without such a movement, any declaration of victory is premature, and any progress is tenuous.<sup>198</sup> The ongoing erosion of civil rights laws (of which Title VI is a part) serves as an example:

Just as antidiscrimination laws have not yet fully extricated our society from the manifestations of racial discrimination, neither can they wholly deliver us from the environmental dilemmas that overburden people of color. Therefore, if our goal is the alleviation of the disparate environmental burdens faced by people of color, then the Equal Protection Clause and existing antidiscrimination laws can render only partial victories.<sup>199</sup>

As one commentator has pointed out, the courts have been slow to apply the modifications of the Civil Rights Restoration Act and the Civil Rights Act of 1991, thus making litigation under the civil rights laws tougher for plaintiffs than it should be.<sup>200</sup>

A lawsuit may go only as far as its legal claims allow. Title VI's framework will not cover every complaint of environmental racism, as communities and courts may have different ideas about what constitutes a "substantial legitimate justification"<sup>201</sup> such that will validate a challenged decision. Similarly, a community's failure to prove a disparate impact does not necessarily mean that none exists. "[W]hile lawsuits can alleviate the most egregious instances of environmental race discrimination, many disparities that result from

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196. Bryant, *supra* note 13, at 15-16.

197. See Cole, *supra* note 162, at 1997.

198. See STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 109 (1995); Luke W. Cole, *Foreword: A Jeremiad on Environmental Justice and the Law*, 14 STAN. ENVTL. L.J. at ix (1995).

199. Torres, *supra* note 74, at 445 (footnote omitted).

200. See Fisher, *supra* note 10, at 313.

201. See *Elston v. Talladega County Bd.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

environmental decisions and policies can only be addressed through political means."<sup>202</sup> Whether a complaint "fits" within Title VI will determine not only the likelihood of success but the degree of validity the complaint is accorded. The merit of a legal claim is defined by its limits, as *Bean* and *R.I.S.E.* certainly demonstrate.<sup>203</sup>

In the same way, legal claims are bounded by scientism. As one prominent judge recently proclaimed, "Law lags science; it does not lead it."<sup>204</sup> Judges depend on expert testimony to explain scientific aspects of a case.<sup>205</sup> Courts are less open to opinions on the edge, preferring facts and methodology generally accepted within the scientific community.<sup>206</sup> This judicial attitude has the effect of preserving the status quo. In the context of an environmental claim,

[r]elying solely on proof of a cause-and-effect relationship as defined by traditional epidemiology disguises the exploitative way the polluting industries have operated in some communities and condones a passive acceptance of the status quo. Because it is difficult to establish causation, polluting industries have the upper hand. They can always hide behind "science" and demand "proof" that their activities are harmful to humans or the environment.<sup>207</sup>

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202. Torres, *supra* note 74, at 450-51.

203. See *supra* Part III.A.

204. *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (Chief Judge Posner). But see Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEX. L. REV. 1 (1995) (arguing that tort reforms may be necessary for courts to consider conflicting scientific evidence).

205. One commentator has termed agencies' exaggerated representations of scientific findings in the siting process as "the science charade." Wagner, *supra* note 6, at 1617. Professor Wagner calls for "a legal remedy that requires agencies to separate science from policy and entrusts the courts with reviewing the accuracy of these science-policy delineations." *Id.*

206. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993).

207. Bullard, *supra* note 65, at 21 (footnote omitted). Institutional racism intersects with scientism, further weighting outcomes against affected communities. For example, scientists link medical problems to poor diet, cigarettes, and drug and alcohol use instead of toxins. See e.g., Austin & Schill, *supra* note 49, at 67. Karl Grossman points out the irony of human versus animal concerns using the example of the "nine-legged frog." People accept animal deformities and death as result of environmental conditions, while human deformity and death must clear the hurdle of ruling out "fault" in the form of smoking, poor prenatal care, diet, etc., before environmental causes are blamed. Grossman, *supra* note 1, at 282. Newly adopted EPA risk assessment standards are intended to better account for possible shortcomings of epidemiological studies, but the results remain to be seen. See generally Cushman, *supra* note 62.

The paradox of legal standards and scientism is that “certainty” is not required for siting, but is required for preventing or removing a siting.<sup>208</sup>

#### d. Minority Outgroups and Organizational Structure

Litigation generally is individualized. Often only the named plaintiffs may win. Cases resulting in individual settlements or judgments necessarily involve unequal distribution of benefits and thus may divide a community, creating intragroup dissatisfaction.<sup>209</sup> Segments of a community also may disagree about what constitutes a “benefit,” dividing over economic benefits versus environmental harm.<sup>210</sup>

Just as community organization is fundamental to the environmental justice movement, it is fundamental to strategic, rather than piecemeal, litigation. As Luke Cole has observed, Title VI litigation has yet to be employed by organized groups.<sup>211</sup> This, in itself, may undercut the future efficacy of Title VI as a legal strategy, as case law is created without an overarching litigative strategy to guide it, perhaps resulting in negative precedent.<sup>212</sup> “Community groups should be part of any programs that reduce pollution,” including litigation.<sup>213</sup> Title VI litigation has yet to appeal in any widespread manner to minority organizations.

#### e. State, Local, and National Actors

Litigation is affected by state, local, and national actors, both inside and outside the court. The outcome of a case may depend in part on the judge who hears it, and the posture of a case is shaped by

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208. Bryant, *supra* note 194, at 10-14 (“Traditional research prevents us from addressing pollution issues in a timely manner.”). Further, “[a]s scientists begin to obtain more answers to hypotheses through scientific methodology and the quantification of data, they will also continue to broaden their decision-making power, thus leaving communities of color and low-income groups marginalized with few democratic decision-making alternatives.” *Id.* at 11.

209. See Austin & Schill, *supra* note 49, at 68.

210. See Schneider, *supra* note 49.

211. See *supra* notes 124-26 and accompanying text.

212. Compare, for example, the broad and deliberate litigation strategies that resulted in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and *Reed v. Reed*, 404 U.S. 71 (1971). See, e.g., MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987); Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 14 *WOMEN’S RTS. L. REP.* 335 (1992) (describing Ruth Bader Ginsburg’s role in shaping sex discrimination law).

213. Bunyan Bryant, *Summary*, in *ENVIRONMENTAL JUSTICE*, *supra* note 7, at 213.

the arguments presented by the parties. One commentator has charged that the civil rights laws have become inadequate to address racism due to case law created by judges unsympathetic to claims of racism.<sup>214</sup> Local, state, or national political climates may influence both the posture and the outcome of a particular case. More broadly, legal remedies have a national/institutional focus which is at odds with the local grassroots nature of the environmental justice movement.<sup>215</sup>

The EPA emerges as the key national actor in the environmental context. Its approach to environmental racism has gone from assuming a stance of purposeful ignorance<sup>216</sup> to acting as the principal investigator of Title VI administrative claims.<sup>217</sup> As recently as 1992, the EPA took the position that exposure to toxins did not lead directly to adverse health effects, noting the complicating factor of minorities' "heightened sensitivity" to toxic exposure.<sup>218</sup> When agencies on any level employ scientific risk assessment, they "are not held accountable for the costs they impose on society when they issue regulations."<sup>219</sup> The political stance of the EPA obviously impacts its investigation of Title VI complaints.<sup>220</sup>

The courts are not outside the political process.<sup>221</sup> Heralding litigation as the answer to environmental racism assumes open access points within a pluralistic political process that is amenable to change and to overcoming majoritarian or elite imperatives. Such a stance overlooks the fact that by the time a lawsuit is filed, the affected community's lack of economic and political power already has resulted in adverse political decisions.<sup>222</sup> This fact has led many commentators to conclude that legal tactics may distract from a

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214. Cole, *supra* note 162, at 1997.

215. Cole, *supra* note 198 (arguing that the focus on legal strategies flawed the traditional environmental movement).

216. See discussion *supra* Part IV.B.3.

217. See Cole, *supra* note 124.

218. Lazarus, *supra* note 10, at 804-05 & n.64 (1993) (citing 1992 EPA Environmental Equity Report finding (1) that exposure to toxins is not the same as adverse health effects, (2) that there is a lack of data relating race to adverse health effects (rather than just exposure), (3) an admission that minorities are more likely to be exposed to toxins, and (4) that the disproportionality of adverse health effects among races is in part because of the type of activities minorities engage in (for example, migrant workers are likely to breathe pesticides) and the heightened sensitivity of minorities to environmental effects).

219. FIORINO, *supra* note 5, at 116.

220. See, e.g., Cushman, *supra* note 62.

221. HALPERN, *supra* note 180, at 307-09 (discussing courts' application and interpretation of Title VI under various administrations).

222. See, e.g., Torres, *supra* note 74.

community's strongest weapon: political protest.<sup>223</sup> Indeed, one commentator has suggested that the existence of environmental racism shows that environmental laws are working because disparate impact is essentially their intent: the laws were lobbied for, drafted by, and passed by non-minorities seeking to protect their own communities and neighborhoods from exposure to pollutants.<sup>224</sup> Economics, rather than legality, drives the decisions of actors on all governmental levels. Thus, litigation does not address what is in essence a political problem.<sup>225</sup>

### 3. Strategic Employment of Title VI Litigation to Minimize Limitations and Maximize Benefits

Luke Cole, perhaps the most vocal critic in the legal community of litigation strategies within the environmental justice movement, nevertheless would not abandon litigation entirely.<sup>226</sup> Instead, as he terms it, litigation is "[a]nother [s]tone in David's [s]ling."<sup>227</sup>

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223. See, e.g., Fisher, *supra* note 10, at 331-32.

224. Cole, *supra* note 162, at 1995.

225. See, e.g., Cole, *supra* note 162, at 1997 ("[A]ny legal strategy not firmly grounded in, and secondary to, a community-based political organizing strategy is ripe for failure."); Pugliese, *supra* note 112 (arguing that the executive, rather than the courts, is in the best position to efficaciously disseminate empirical evidence and thus influence decisionmakers).

Cole praises what he terms the "power" or "grassroots activists" model of environmental advocacy, arguing that it (1) creates political influence through an active community presence, (2) teaches both use and distrust of the system, (3) teaches communities to take control of their own environments (self-determination), and (4) builds a local movement (which is the necessary foundation of the larger movement). In this model, litigation is only one tool in creating political power, and thus this model comes closest to addressing the real problem of powerlessness, Cole argues, because it goes beyond mere opposition to initiation and implementation of goals. Next best is what Cole calls the "participatory" or "public citizens" model, which manages to educate the community and decisionmakers, builds the movement by bringing in new activists, and holds agencies accountable by bringing them face to face with affected citizens. The least desirable model of environmental advocacy, according to Cole, is what he terms "professional" or "macho law brains." This model relies primarily on litigation, concentrating power and decisionmaking in attorneys rather than the affected community. It fails to educate the community or decisionmakers, and builds only a particular legal argument, not the larger movement. "Most environmental justice activists should agree that the professional model is a waste of time from the perspective of the community." Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 708 (1995).

226. See Cole, *supra* note 126, at 541. Cole does, however, note that he and his colleagues "strongly recommend *against* lawsuits whenever possible." *Id.*

227. *Id.* at 523.

Cole sets out a comprehensive approach for choosing a litigation strategy. First, however, an affected community should ask whether it wants to pursue litigation at all: "Before a community group embarks on a legal course, however, a threshold question must be answered: Will a lawsuit help or hurt the community's struggle?"<sup>228</sup> If the answer is to proceed with litigation, Cole recommends pursuing the following legal claims, in order of preference: (1) traditional environmental law claims, (2) unusual environmental law claims, (3) statutory civil rights claims, and (4) constitutional civil rights claims.<sup>229</sup>

Interestingly, claims under Title VI, which fall under the category of statutory civil rights claims, are Cole's third choice in a disfavored strategy. Cole notes that claims under the civil rights laws may give the court a more complete picture of what is happening in the community—that is, that racism is involved.<sup>230</sup> Close behind Title VI claims in Cole's approach are the uniformly unsuccessful claims under the Equal Protection Clause. Although noting that no plaintiff has prevailed under the Equal Protection Clause in an environmental suit, Cole concedes that like statutory civil rights claims, an equal protection claim may have political import in positing the claim as a civil rights violation.<sup>231</sup>

Cole further cautions that if litigation is to serve the larger environmental justice movement, its employment must be strategic.<sup>232</sup> He suggests, most importantly, to follow the approach outlined above and to use factually strong cases.<sup>233</sup> Additionally, he warns that litigation should be pursued only in context of political organization.<sup>234</sup>

Cole's strategy is in line with the situating of Title VI litigation within political economy and the environmental justice movement. Title VI claims may not prove to be as ineffective as equal protection claims were. Nevertheless, Title VI does not have the powers of the magic bullet the legal academia has presented it to be. Title VI litigation must be pursued cautiously and strategically, with an eye to the larger environmental justice movement; however, this approach is not yet the case.

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228. *Id.* at 524.

229. *Id.* at 526.

230. *Id.* at 530.

231. *Id.* at 538-41.

232. *Id.* at 543-44. As Professor Stephen L. Wasby cautions, however, "[A]lthough organizational litigators attempt 'planned litigation for social change' in which they choose areas of law on which to focus their efforts and cases in which to invest resources, many aspects of that litigation turn out to be unplanned, and much about the litigation is not simple and linear." WASBY, *supra* note 198, at x.

233. Cole, *supra* note 126, at 544.

234. *Id.* at 545.

## CONCLUSION

Recent legal literature has propounded environmental claims brought under Title VI of the Civil Rights Act as an effective strategy for environmental justice advocates. Title VI's champions, however, fail to critically examine both the efficacy of Title VI litigation against the backdrop of political economy, and the effect of reliance on Title VI litigation on the larger environmental justice movement. Situating Title VI litigation within political-economic analysis leads to the same conclusion that a few critics have reached by simply assuming litigation's general drawbacks: Title VI is not a magic bullet, but simply an additional legal strategy with the same limitations and benefits of litigation in general. Examining environmental racism in the context of political-economic processes and imperatives, however, brings to light the particular limitations of litigation within larger social movements.

Title VI claims, even successful ones, do little to change the constant barriers and variable contexts which both give rise to the problem of environmental racism and challenge the environmental justice movement in addressing it. These political-economic factors must be addressed by means which are just that: political and economic.<sup>235</sup> Almost by definition, litigation is not likely to successfully take on the very forces that create and shape the legal claims which make up its form.<sup>236</sup>

Legal fora, as do other political institutions, bear the marks of structural and institutional racism, growth imperatives, and incremental alteration. Litigation is impacted by these marks, but unlike other environmental strategies, it fails to meaningfully address

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235. See HALPERN, *supra* note 180, at 321 (“[L]itigation has not proven to be an effective substitute for political nerve and will.”); WASBY, *supra* note 198, at 107 (“The myth of rights, in exaggerating the change lawyers and litigation can accomplish, interferes with allocation of resources to techniques of *political* mobilization that might more effectively achieve rights.”); Cole, *supra* note 126, at 524 (arguing that the single largest strategic and tactical drawback to legal remedies is that environmental justice necessarily is about politics and economics, not law).

236. Among community activists,

[l]egal expertise is decidedly deemphasized. The grass-roots folks spend a good deal of their time battling experts—bureaucrats, engineers, epidemiologists, lawyers—in an effort to make questions of risk distribution not simply a matter of science and technology but also a matter of politics and social responsibility. They have reason to be wary of undue reliance on their own experts. The stress placed on direct action means that the law and access to legal forums are more important to grass-roots environmentalists than are the lawyers themselves.

Austin & Schill, *supra* note 49, at 64.



them. Until recently, the law, like government, has endorsed environmental racism.

[T]he current environmental protection paradigm has institutionalized unequal enforcement, traded human health for profit, placed the burden of proof on the “victims” rather than on the polluting industry, legitimated human exposure to harmful substances, promoted “risky” technologies such as incinerators, exploited the vulnerability of economically and politically disenfranchised communities, subsidized ecological destruction, created an industry around risk assessment, delayed cleanup actions, and failed to develop pollution prevention as the overarching and dominant strategy.<sup>237</sup>

The bottom line is that the accepted role of courts is to enforce the law, not to achieve social equity.

Variables affecting the political-economic climate impact litigation as well. Importantly, litigation is most effective when employed strategically, as Luke Cole has urged.<sup>238</sup> Strategic litigation requires organization within both an affected community and the larger environmental justice movement. To date, claims brought under Title VI reflect neither. Actors at the local, state, and national levels are influenced more by the economics of their actions than by the legality, further undercutting the efficacy of litigation strategies.

Title VI will not provide a cure-all for environmental inequities any more than other legal strategies. Indeed, the only real difference between claims brought under Title VI and those brought under the

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237. Bullard, *supra* note 65, at 3. Professor Plater, on the other hand, argues that environmental law has been preceded by social activism, not the other way around. “[E]nvironmental law has developed its complex, extended, doctrinal structure in a process dependent upon confrontational, pluralistic citizen activism, operating in every area of governance, but particularly in judicial and administrative litigation.” Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 983 (1994). While Plater’s main thrust concerning a 1960s-era shift toward citizen-generated public interest litigation and congressionally created citizen enforcement provisions is well taken, one must be careful to recall that environmental lawmaking and litigation by their very nature remain inherently esoteric and elitist. Thus, Plater’s “Pluralist Paradigm” may hold true in a general sense, yet in no way suggests that political processes have been easily accessed or altered. Nor is it indicative that grassroots activism has led the way (if it had, minorities and lower-status citizens presumably would have had greater say over how laws and policies would affect them). At the same time that environmental law developed and changed, the modern regulatory state continued its march toward promoting economic growth and development while disproportionately shunting environmental burdens onto its impoverished and minority citizens.

238. See Cole, *supra* note 126; see also *supra* Part IV.C.3.

Equal Protection Clause, in the larger picture of the environmental justice movement, is that Title VI plaintiffs have a better chance of winning individual suits.

These observations should not necessarily lead to the conclusion that litigation strategies should be abandoned altogether by environmental justice advocates. They do, however, strongly caution against relying too heavily on litigation strategies. As Luke Cole warns, an “upsurge in legal activity [is a] potentially dangerous development[] for a movement founded on, and dedicated to, grassroots empowerment.”<sup>239</sup> Instead, the limitations of litigation emphasize the need for a multipronged tactical approach<sup>240</sup> which will empower minorities and facilitate grassroots insurgency, as these elements increase equitable participation in democratic processes. Strategically, the emphasis of the environmental justice movement must remain on the roots, rather than the symptoms, of environmental inequities—economic and political power—thus increasing the pressure for distributive justice.

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239. Cole, *supra* note 198, at ix.

240. For example, Bullard calls for new legislation in the form of a federal “Fair Environmental Protection Act” (modeled on the 1964 Civil Rights Act, 1968 Fair Housing Act, and 1965 Voting Rights Act, as amended in 1988), which would employ a disparate-impact standard, thus addressing both the “intended and unintended effects of public policies, land-use decisions, and industry practices that have a disparate impact on racial and ethnic minorities, and other vulnerable groups.” Robert D. Bullard, *Conclusion: Environmentalism with Justice*, in *CONFRONTING ENVIRONMENTAL RACISM*, *supra* note 7, at 203-06. Pressure then would be placed on the states to follow suit by adopting similar standards.

