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Environmental Injustice and the Problem of the Law

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I. INTRODUCTION

Over the past fifteen years, legal academia has produced a sizeable body of scholarship on the widely acknowledged problem of environmental injustice. Although there have been positive responses in the policy arena, no similar level of concern is evident in the courts. Most legal claims directly addressing environmental injustice fail, recent developments in civil rights case law are discouraging, and current constructions of environmental laws are proving theoretically inadequate to protect communities already subjected to disproportionate toxic exposure or threatened by new pollution. This Comment explores the state of the law of environmental justice and offers an analysis of why the courts have proven so inhospitable to environmental justice claimants.[1]

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1. It is clear, both from court opinions and academic literature alike, that "environmental justice" is now a part of the legal lexicon. *See* Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 125 (2003). *See also* Paul Maynard Hendrick, *The Theory of Legal Relativity: Environmental Justice in the Context of Doctrinal Durability*, 32 U. TOL. L. REV. 137 (2001) (assessing the progress of environmental justice toward durability as a legal doctrine). There is no commonly accepted definition of environmental justice. *See* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,681 (Sept. 2000). In an attempt to encapsulate the various meanings, Professor Clifford Rechtschaffen defines environmental justice as "a political and social movement to address the disparate distribution of environmental harms and benefits in our society, and to reform the processes of environmental decision making so that all affected communities have a right to meaningful participation." Rechtschaffen, *supra*, at 96. Missing from this description, however, is the concern over disproportionate harms suffered by minorities in particular, which many perceive to be the result of "environmental racism." *See, e.g.*, CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993); Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219 (1998); Maria Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 4 VILL. ENVTL. L.J. 449 (1994); Julie H. Hurwitz & E. Quita Sullivan, *Using Civil Rights Laws to Challenge Environmental Racism: From* Bean *to* Guardian *to* Chester *to* Sandoval, 2 J.L. SOC'Y 5 (2001); Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839 (1992). For the Environmental Protection Agency's (EPA's) definition, see U.S. Environmental Protection Agency, Environmental Justice, *at* http://www.epa.gov/compliance/environmentaljustice (last visited Sept. 27, 2004).

Rechtschaffen and others trace the roots of the environmental justice movement to the civil rights movement and the traditional environmental movement, as well as "organizing efforts of Native Americans and labor . . . [and] the local grass roots anti-toxics movement of the 1980s." Rechtschaffen, *supra*, at 96. This history has been well-documented. *See, e.g.*, Bunyan Bryant, *History and Issues of the Environmental Justice Movement, in* OUR BACKYARD: A QUEST FOR ENVIRONMENTAL JUSTICE 3 (Gerald R. Visgilio & Diana M. Whitelaw eds., 2003); Robert D. Bullard, *Environmental Justice for All, in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 1 (Robert D. Bullard ed., 1994); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 213-22 (1994).

Sheila Foster's case study of environmental injustice in Chester, Pennsylvania, is valuable for understanding the problem in the context of a real community. Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775 (1998).

In approaching this question, I begin with two basic premises: that the documented pattern of disproportionate environmental burden on low-income and minority communities in the United States is manifestly unjust, and that the meager protection our legal system has provided these communities to date is deeply troubling. Part II offers a brief introduction to the problem of environmental injustice. Part III discusses how and why neither civil rights law nor environmental law has proven adequate to address environmental injustice, outlines the primary legal theories claimants have advanced, and highlights the ways in which current judicial interpretations of the law undermine these theories in the environmental justice context. Part IV asserts the need for judicial recognition of environmental injustice. To that end, this Comment urges reexamination of how courts approach four key concepts: (1) disparate impact; (2) economic discrimination; (3) the fundamental right to bodily integrity; and (4) "risk."

II. THE PROBLEM OF ENVIRONMENTAL INJUSTICE

This Comment focuses on environmental injustice in the form of the multifaceted cumulative and disproportionately large environmental burden on poor and minority communities.[2] As Professor Daniel Faber has observed, these communities face a "quadruple exposure effect" to toxics and other environmental hazards.[3] The working class, and especially people of color, simultaneously endure the highest rates of exposure to toxics "on the job," the greatest exposure at home in neighborhoods within close proximity to industrial and agricultural operations, and the highest rate of exposure to toxic chemicals in food and consumer products.[4] At the same time, these groups are also most likely to bear the environmental brunt of our collective waste production, as well as spills and faulty cleanup at waste and other industrial sites, by government or waste management corporations.[5]

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2. Lack of access to environmental benefits, although a vitally important aspect of environmental injustice, is beyond the scope of this Comment.

3. Daniel Faber, *Introduction* to THE STRUGGLE FOR ECOLOGICAL DEMOCRACY: ENVIRONMENTAL JUSTICE MOVEMENTS IN THE UNITED STATES 6 (Daniel Faber ed., 1998).

4. *Id.* Workers' occupational exposure to toxics is a serious environmental justice problem with a sizeable literature of its own within the field. *See, e.g.*, Cesar Chavez, *Farm Workers at Risk, in* TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 163-70 (Richard Hofrichter ed., 1993); Charles Noble, *Work: The Most Dangerous Environment, in* TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 171-78 (Richard Hofrichter ed., 1993); Barbara J. Olshansky, *Controlling Exposures in the Workplace, in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 662 (Michael B. Gerrard ed., 1999); Beverly Hendrix Wright & Robert D. Bullard, *The Effects of Occupational Injury, Illness, and Disease on the Health Status of Black Americans, in* TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 153-62 (Richard Hofrichter ed., 1993); George Friedman-Jimenez, *Achieving Environmental Justice: The Role of Occupational Health*, 21 FORDHAM URB. L.J. 605 (1994); Eileen Gauna, *Farmworkers as an Environmental Justice Issue: Similarities and Differences*, 25 ENVIRONS ENVTL. L. & POL'Y 67 (2002); Ivette Perfecto & Baldemar Velásquez, *Farm Workers: Among the Least Protected*, 18 EPA J. 13 (1992). "A job should not be a death sentence." Wright & Bullard, *supra*, at 160.

5. Faber, *supra* note 3, at 6.

This environmental injustice has been exacerbated by discriminatory enforcement of environmental laws. A *National Law Journal* study[6] in 1992 found that average penalties under the Resource Conservation and Recovery Act (RCRA) were 500% lower for violations in minority communities than in white communities.[7] Less dramatic but still substantial disparities in penalty totals were found under the other major environmental laws. The Clean Water Act was "28% lower, the Clean Air Act, 8% lower, the Safe Drinking Water Act (SDWA), 15% lower, and in multi-media actions involving enforcement of several statutes, 306% lower."[8] The study is significant in part for its finding that, although the Environmental Protection Agency's (EPA's) enforcement and clean-up record showed unequal treatment based on income levels, the disparity was more pronounced still when correlated with race. For example, it took EPA 10% longer to designate toxic sites on the national priority list in low-income areas, compared with 20% longer in minority areas.[9] This refutes the speculation that income is the only determinative factor in environmental injustice, and that minorities' exposure is higher merely because they tend to have lower incomes overall. Instead, it suggests that between low-income communities, those with predominantly minority populations have received still less attention from EPA.

Documentation of race and income disparities in pollution exposure has been mounting since the release of the influential 1987 study by the *United Church of Christ's Commission for Racial Justice*, which reported that three out of every five blacks and Latinos, and approximately half of all Asians and American Indians, live in communities with uncontrolled toxic waste sites.[10] A 1994 update to the study found that the concentrations of racial minorities living in close proximity to toxic waste sites had increased.[11] A study of the health effects of pesticides on farm workers by the *World Resource Institute* found that approximately 313,000 of the two million farm workers in the United States—ninety percent of whom are people of color—suffer from pesticide poisoning each year.[12] Of these, between 800 and 1,000 die as a direct result of their pesticide exposure.[13] Studies of blood lead levels in children have shown that "children from poor families are eight times more likely to be poisoned than those from higher income families, and

6. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12. The study reviewed EPA enforcement cases from 1985 to 1991 and EPA's response to Superfund sites on the National Priority List from 1980 to 1992.

7. CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 76 (2002) (citing Lavelle & Coyle, *supra* note 6).

8. *Id.*

9. *Id.* at 77. The study also found that EPA tended to choose the less protective option of "containment" over expensive but safer remediation more often in minority and poor communities than in wealthy white areas. *Id.*

10. *Id.* at 57 (citing COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987)).

11. *Id.* (citing BENJAMIN GOLDMAN & LAURA FITTON, TOXICS WASTES AND RACE REVISITED: AN UPDATE OF THE 1987 REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1994)).

12. Perfecto & Velásquez, *supra* note 4, *reprinted in* RECHTSCHAFFEN & GAUNA, *supra* note 7, at 67.

13. *Id.*

African-American children are five times more likely to be poisoned than white children."[14] A recent study of the Southern California Air Basin found that people of color had a consistently higher cancer risk due to air toxics than did whites, with Latinos having the highest risk.[15] These disparities persisted after controlling for income and for other causes of pollution. Similarly, a study of the distribution of toxic chemicals registered and reported in the Toxics Release Inventory (TRI) found that "[a]ll other things being equal, residential areas with large concentrations of African-Americans and Hispanics are exposed to substantially higher levels of TRI pollutants."[16]

These findings represent just a sampling of what is now known about environmental injustice. The methodologies of these studies have also been the subject of debate.[17] Indeed, EPA concluded in 1992, based on its own review of the research, that "racial minority and low income populations experience higher than average exposures to certain air pollutants, hazardous waste facilities (and by implication, hazardous waste), contaminated fish, and agricultural pesticides."[18]

The environmental predicament behind these statistics comes into sharper relief when we look beyond "populations" and "risk incidences" to the experiences of specific communities. Consider the circumstances that gave rise to two of the best-known environmental justice cases, *Chester Residents Concerned For Quality Living v. Pennsylvania Department of Environmental Resources*[19] and *South Camden Citizens in Action v. New Jersey Department of Environmental Protection.*[20] Chester, Pennsylvania, a city with a population of 39,000, was 65% African-American within 91% white Delaware County.[21] The median family income

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14. RECHTSCHAFFEN & GAUNA, *supra* note 7, at 66 (citing 46 MORBIDITY AND MORTALITY WKLY. REP. 141 (1997)). The persistent problem of lead poisoning, a preventable disease that has disproportionately affected minority children, is a common example of EPA and mainstream environmental groups' pattern of failing to invest the same level of resources and commitment into solving problems for low-income and minority communities. When lead was finally designated a criteria pollutant to be regulated under the Clean Air Act by EPA, it was because of a successful citizen suit—not the agency's own initiative. *Id.* at 139.

15. Rachel Morello-Frosch et al., *Environmental Justice and Southern California's Riskscape: The Distribution of Air Toxics Exposures and Health Risks Among Diverse Communities*, 36 URB. AFF. REV. 551, 552, 562 (2001). *See also* Nancy Brooks & Rajiv Sethi, *The Distribution of Pollution: Community Characteristics and Exposure to Air Toxics*, 32 J. ENVT. ECON. & MGMT. 233, 243-46 (1997).

16. Evan J. Ringquist, *Equity and the Distribution of Environmental Risk: The Case of TRI Facilities*, 78 SOC. SCI. Q. 811, 824 (1997), *reprinted in* RECHTSCHAFFEN & GAUNA, *supra* note 7, at 72.

17. For a general overview of this debate, see RECHTSCHAFFEN & GAUNA, *supra* note 7, at 55-85 (including a specialized bibliography at 56). *See also* Pamela R. Davidson, *Risky Business? Relying on Empirical Studies to Assess Environmental Justice*, *in* OUR BACKYARD: A QUEST FOR ENVIRONMENTAL JUSTICE 83-103 (Gerald R. Visgilio & Diana M. Whitelaw eds., 2003); Timothy Black & John A. Stewart, *Burning and Burying in Connecticut: Are Regional Solutions to Solid Waste Disposal Equitable?*, *in* OUR BACKYARD: A QUEST FOR ENVIRONMENTAL JUSTICE 61-81 (Gerald R. Visgilio & Diana M. Whitelaw eds., 2003). For an annotated bibliography of "studies and articles that document and describe the disproportionate impact of environmental hazards by race and income" in the United States, see COLE & FOSTER, *supra* note 1, at 167-83.

18. RECHTSCHAFFEN & GAUNA, *supra* note 7, at 66 (citing 2 EPA, *Environmental Equity: Reducing Risk for All Communities*, Supporting Document 7-15 (1992)).

19. 655 A.2d 609 (Pa. Cmmw. Ct. 1995), *rev'd* 668 A.2d 110 (Pa. 1995).

20. 274 F.3d 771 (3d Cir. 2001).

21. Foster, *supra* note 1, at 779 & n.8.

was 45% lower and the mortality rate was 40% higher than the rest of Delaware County.[22] The child mortality rate was the highest in the state, and the poverty rate was 25%.[23] The Pennsylvania Department of Environmental Resources approved permits for seven commercial waste facilities in Delaware County, five of them in Chester, between 1986 and 1996.[24] The Chester permits allowed for processing over two million tons of waste per year, while the others permitted only a fraction of that amount.[25] The facilities that obtained permits in Chester include one of the largest trash incinerators in the county, a waste transfer station that brought trucks hauling trash through the city each day, a demolition debris recycling company, an infectious medical waste treatment plant, and a contaminated soil burning plant.[26] In 1995, after long-term sustained local political efforts, frequent protests, and mixed results, Chester Residents Concerned for Quality Living went to court to challenge the DEP's most recently issued permit, for the medical waste plant.[27]

The claims in *South Camden Citizens* arose out of similar events.[28] There, the New Jersey Department of Environmental Protection (NJDEP) approved a cement plant that would emit "particulate matter (dust), mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulphur oxides and volatile organic compounds" in the Waterfront South neighborhood of Camden, New Jersey.[29] Waterfront South was 63% African-American and 28% Hispanic, with a median household income of $15,082.[30] Previous permits had already burdened the neighborhood with a sewage treatment plant, a trash-to-steam plant, and a power plant.[31] Having already designated two Superfund sites in the area, EPA was investigating four other sites within one half of a mile of the proposed facility, and the NJDEP had identified fifteen sites in Waterfront South as contaminated.[32] The residents, 41% of whom were children, "suffer[ed] from a disproportionately high rate of asthma and other respiratory ailments."[33] They challenged the NJDEP's review of the permit and its decision to site the cement plant in Waterfront South as racially discriminatory.[34]

These cases touch on a recurring theme that distresses environmental justice advocates: the "systematic strategy of cost displacement" from polluting industries to people of color and the poor who, as a result, suffer health problems and a reduced quality of life.[35] For years, environmentalists have been calling for gov-

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22. *Id.* at 779.
23. *Id.*
24. *Id.* at 780.
25. *Id.* at 780 n.10 (citing Brent Staples, *Life in the Toxic Zone*, N.Y. TIMES, Sept. 15, 1996, at A14).
26. *Id.* at 781.
27. Chester Residents Concerned for Quality Living v. Dep't of Envtl. Res., 668 A.2d at 111.
28. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002). For a more detailed discussion of this case, see *infra* Part III.A.2.
29. S. Camden v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d at 450.
30. *Id.* at 459.
31. *Id.* at 451.
32. *Id.*
33. *Id.*
34. *Id.*
35. Faber, *supra* note 3, at 4.

ernment to find ways to force polluting industries to internalize the costs of the environmental and public health damage they cause.[36] As the cost displacement continues, questions about why more has not been done to address these misplaced burdens become more urgent and pointed. This is especially pressing in light of the fact that on only a few occasions in the last twenty years have public interest environmental organizations, instead of government or industry, been the parties granted review by the Supreme Court.[37] Although estimating costs is complex, these burdens arguably persist because, as Faber has noted, "it costs capital and the state much less to displace environmental health problems onto people who lack health insurance, possess lower incomes and property values, and as unskilled or semiskilled laborers are more easily replaced if they become sick or die."[38] To be sure, many would prefer to explain environmental injustice in the more "neutral" terms of "economic efficiency," but the discomfort that Faber's blunt statement compels is necessary for honest discourse. The very term "economically efficient" is biased toward consideration of what is efficient for production, not for the public. The term has largely been "equated with industry cost effectiveness."[39] There is no doubt that to some extent what is just and what is economically efficient may be at odds. Indeed, Professor Eileen Gauna hails the environmental justice movement for the "important contribution" of "bring[ing] to the surface the potential conflict between efficiency and equity and the complicated interplay between the two principles."[40] When injustice is rationalized in economic terms, it is essential that we identify what interests are served by the cost savings. Expense, of course, depends on who is paying, and although such a cost displacement is clearly to the financial advantage of polluters, the price tag for the public is high.[41] Any discussion of environmental injustice must directly acknowledge the role of this economic dynamic in producing environmental disparities, and how the law exacerbates this problem.

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36. *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 643 n.81 (1992) (referencing numerous sources asserting what is a "relatively uncontroversial view").

37. Richard J. Lazarus, *United States Supreme Court Roundup*, Environmental Law for ALI-ABA Course of Study 49 (Feb. 11-13, 2004) *available at* WESTLAW, SJ059 ALI-ABA 47, 49.

38. Faber, *supra* note 3, at 5.

39. Eileen Gauna, *An Essay on Environmental Justice: The Past, the Present, and Back to the Future*, 42 NAT. RESOURCES J. 701, 709 (2002).

40. *Id.* at 706.

41. *Id.* at 709. The ongoing trend toward greater reliance on market-based programs and incentives for pollution control illustrates this institutional tolerance of industry transferring costs to the public. If firms that participate in emissions offset and trading programs, for example, can trade pollution rights locally or regionally, there is nothing to prevent concentrations, or "hot spots," from developing in exactly the ways that environmental justice advocates are fighting—in the poor and minority communities that are already exposed. *Id.* at 708. Market-based programs by their nature limit the government's ability to protect the interests of those communities because each trade does not require an evaluation of its impacts. Gauna points out that market programs may very well prove to be inefficient once one considers the environmental, health, and economic costs of toxic hot spots. *Id.* at 709. Because these costs "are diffuse and typically borne by society as a whole rather than the private business sector," they have entered into "the regulatory calculus to a much lesser extent, making a more comprehensive efficiency analysis of this important regulatory strategy illusive." *Id.*

III. THEORIES OF CIVIL RIGHTS AND ENVIRONMENTAL LAW

Despite increased political attention to the problem of environmental injustice, the environmental justice movement in the legal context has been consistently frustrated. Professor Tseming Yang has attempted to link this frustration to paradigmatic differences between environmental law and civil rights law, the two major areas in which environmental justice claims have been advanced.[42] Yang argues that "environmental regulation . . . is primarily directed at protecting the collective from the irresponsible or selfish actions of individuals or small groups," while in civil rights law, the "underlying premise . . . is that prejudice and minority oppression requires the law to focus its protections on minority groups against the majority."[43] This analysis helps to explain why both areas of law have yet to afford full legal recognition of the significance of environmental justice claims. Broadly speaking, environmental law seeks to provide generalized protection from environmental hazards, detached (in theory) from particularized value judgments, by emphasizing uniform national pollution standards, scientific quantification of risk, and "neutral" procedural requirements over specific outcomes.[44] But environmental injustice demands greater concern for social justice within those purportedly neutral frameworks. This demands attention to differing environmental vulnerabilities of groups within the collective, and the ways in which the laws produce less than uniform, far from neutral results. Although civil rights law seeks

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42. It should be noted that, in addition to civil rights and environmental legal theories, common law nuisance and tort claims are alternative approaches with applicability in environmental justice. I choose not to focus on these theories in this Comment because they are remedial in nature and do not serve to prevent or address systemic sources of environmental injustice. It is not uncommon, however, for environmental justice cases to posit several theories, pairing a nuisance claim with an equal protection claim, for example. For more on tort theories in the environmental justice context, see Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485 (1997); FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.10(4)(a)(iv) (1996). *See also* William H. Rodgers, Jr., *Improving Laws, Declining World: The Tort of Contamination*, 38 VAL. U.L. REV. 1249 (2004) (proposing a tort of contamination). For a general overview of the law of nuisance applied to environmental harms, see ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 61-84 (4th ed. 2003).

43. Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 14 (2002). Yang traces this distinction to divergent and dissimilar sources for each area of law: Garrett Hardin's "tragedy of the commons" concept and Rachel Carson's *Silent Spring* in the case of environmental law, and *Brown v. Board of Education*, 347 U.S. 483 (1954), in the case of civil rights law. Yang argues that the legal, doctrinal approaches are rooted in fundamentally different views

> about who the primary beneficiary of the regulatory system ought to be—in environmental law, it is the collective as a whole, while in civil rights law it is racial or minority groups. This is a choice that drives most of the difference between the regulatory paradigms and without which there would otherwise be no significant theoretical obstacles to reconciling these approaches.

Yang, *supra*, at 27.

44. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000); National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1994); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994). *See also* Alyson C. Flournoy, *Building an Environmental Ethic from the Ground Up*, ENVIRONS ENVTL. L. & POL'Y J. 53 (2003) (arguing that the values underlying our environmental laws must be fortified and better articulated to the public in order to maintain their effectiveness).

to define and punish acts motivated by racial prejudice,[45] environmental justice calls for a shift away from a narrow focus on identifying biased action[46] to broader protections for all vulnerable groups,[47] even when injustice results from a complex set of political, economic, social and historical forces not explicitly—though implicitly and structurally—connected to race.

Yet despite the differences in focus, common ground between the civil rights and environmental movements remains substantial, and their concerns overlap in important and mutually strengthening ways. Professor Richard Lazarus observes the crucial similarity that both movements are "redistributive in their ultimate focus" and "challenge the status quo as a means of promoting and protecting the interests of those with less political power, whether they be racial minorities, future generations of persons, or endangered species."[48] In the same vein, Professors Eileen Gauna and Sheila Foster, two of the most prolific legal scholars in the field, assert that civil rights and environmental lawyers working together have the potential to make a dramatic difference for environmentally burdened communities.[49] In what follows, I will outline the major civil rights and environmental law theories and will then move on to discuss how and why courts have rejected them in the environmental justice context.

A. Civil Rights Law

Environmental justice advocates employ civil rights law theories where people of color suffer environmental harm disproportionately to whites.[50] Scholars and advocates tend to view the significant correlation between race and toxic exposure as evidence of environmental racism, both in traditional terms, as racial bias given

45. This is admittedly a broad generalization of the motivations for civil rights legislation. I frame it this way here because I think it reflects the most common view of civil rights law and the basic social value that courts have consistently emphasized as reflected in the intent-focused jurisprudence. It is important, of course, to note the work of scholars who have contributed significant critical interpretations to the origins of civil rights law. *See, e.g.*, Mary L. Dudziak, *Desegregation as a Cold War Imperative, in* CRITICAL RACE THEORY: THE CUTTING EDGE 106-17 (Richard Delgado ed., 2d ed. 2000) (demonstrating how *Brown v. Board of Education* served U.S. foreign policy interests during the Cold War); SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (Derrick Bell ed., 1980) (arguing the theory of interest convergence, that white self-interest, and not just concern for racial justice, motivated general white acceptance of desegregation, and that without this convergence of white and black interests, the institutions of white power would not have allowed it); Alan D. Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

46. *See* discussion *infra* Parts III.B.1 and IV.A.

47. Judicial interpretations of the Equal Protection Clause of the Fourteenth Amendment and civil rights statutes do not provide protection from discrimination against the poor. *See* discussion *infra* Part IV.B, addressing the implications of this exclusion in the environmental justice context.

48. Richard J. Lazarus, *Pursuing 'Environmental Justice': The Distributional Effects of Environmental Protection*, 87 NW. U.L. REV. 787, 853 (1992).

49. Eileen Gauna & Sheila Foster, *Environmental Justice: Stakes, Stakeholders, Strategies*, 30 HUM. RTS. 2, 4 (2003).

50. Although disparities correlate strongly with race and income, race is the more predictive variable when controlling for economic and other factors. Rechtschaffen, *supra* note 1, at 97.

effect through the law, and in the broader terms of institutional racism.[51] The definition of discrimination that has emerged in American civil rights law is much narrower, however. With the aim of preventing public officials from abusing their authority by acting out of personal prejudice, the courts have strictly targeted intentional discrimination. The focus of the civil rights inquiry is the alleged "racist" decision makers, not the racially discriminatory results of their decisions. In the environmental justice context, as the discussion that follows will show, this narrow judicial orientation has repeatedly functioned to legitimize blatant inequities when they could not be traced to a single racially biased decision maker. The courts have largely refrained from engaging in the kind of analysis that an issue this complex demands, and instead have resorted to stock reasoning models that are unsuited and inadequate to the claims. It is essential that we do not collapse the courts' treatment of these issues into a conclusion that environmental policy does not implicate civil rights. Indeed, the fact that courts have mostly ignored the social justice implications of environmental policy should be considered a matter of serious legal concern.

1. Equal Protection

Although equal protection seems to be the most logical remedy for environmental injustice, this theory has been one of the most disappointing failures. The Equal Protection Clause of the Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws."[52] The Fifth Amendment provides a parallel prohibition against discriminatory action by the federal government.[53] However, the Supreme Court has interpreted the Equal Protection Clause narrowly to address governmental actions motivated by a "discriminatory purpose."[54] In 1976, *Washington v. Davis*,[55] followed by *Village of*

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51. "Institutional racism" acknowledges that racial discrimination often derives structurally from our social, economic, political and legal institutions. *See* RECHTSCHAFFEN & GAUNA, *supra* note 7, at 49. *See also* discussion *infra* Part IV.A. Laura Pulido explains:

> [T]he racialized structure of the United States results in a benefit to whites. White privilege is so hegemonic that few whites are even cognizant of it. What appears to be natural and fair to whites may be reinforcing the inequality and subordinated status of nonwhites. This level of racism often escapes notice and articulation in favor of more discrete and visible patterns of discrimination. Yet understanding that white privilege exists . . . is crucial to understanding and challenging racism.

LAURA PULIDO, ENVIRONMENTALISM AND ECONOMIC JUSTICE: TWO CHICANO STRUGGLES IN THE SOUTHWEST 18 (1996).

52. U.S. CONST. amend. XIV, § 1.

53. Washington v. Davis, 426 U.S. 229, 239 (1976) ("the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups").

54. *Id.* (upholding a D.C. police department's verbal skills test which black officers failed four times as often as white officers because the test was neutral on its face). In the words of Justice White, "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.*

55. 426 U.S. 229.

Arlington Heights v. Metropolitan Housing Development Corp.[56] in 1977, established that the disproportionate impact of a governmental action on a racial group does not entitle that group to Fourteenth Amendment protection without proof of intent to discriminate. Justice White stated the Court's approach this way in *Washington v. Davis*:

> [A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.[57]

In *Arlington Heights*, the Court confirmed that "impact alone is not determinative," and provided a non-exhaustive list of factors for courts to consider when evaluating discrimination claims based on disproportionate impact.[58] This list included historical background of the challenged decision, the specific sequence of events leading up to the decision, departures from the normal procedural sequence or from the substantive factors usually considered important, and legislative or administrative history leading up to the decision—all of which, the Court surmised, "might afford evidence that improper purposes are playing a role."[59] Justice Powell reviewed these factors in *Arlington Heights* and, finding nothing "that would spark suspicion," concluded that plaintiffs had not met their burden of proving that discriminatory intent motivated the town's decision to deny a rezoning request that would have permitted a racially integrated housing development.[60] "This conclusion ends the constitutional inquiry," he stated. "[T]hat the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance."[61]

This intent requirement has proven formidable for environmental justice claimants.[62] The first major case that asserted environmental justice claims using an equal protection theory was *Bean v. Southwestern Waste Management Corp.*,[63] in which community members challenged the Texas Department of Health (TDH) for issuing a permit for a solid waste landfill in a mostly African-American area on the outskirts of Houston. The plaintiffs alleged that the permit was part of a pattern of discriminatory siting decisions by the Department—they presented evidence that more than two-thirds of the solid waste sites in Houston were located in the predominately minority-populated eastern part of the city, and that in the con-

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56. 429 U.S. 252 (1977) (upholding town's denial of a request to rezone a parcel to permit a racially integrated low- and moderate-income housing development).

57. 426 U.S. at 242.

58. 429 U.S. at 266.

59. *Id.* at 267-68.

60. *Id.* at 269-70.

61. *Id.* at 271.

62. Tseming Yang argues that the limited understanding of discrimination as the result of "specific actions with evil intent," reflected in *Washington v. Davis* and *Arlington Heights*, may have originated in *Brown v. Board of Education*'s analysis of segregation. Yang, *supra* note 43, at 13. See *infra* Part IV.A for further discussion of the intent requirement.

63. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd* 782 F.2d 1038 (5th Cir. 1986).

text of such a pattern, the permit at issue constituted racial discrimination.[64] Their claims failed for several reasons. First, TDH was not the permitting agency for all of the landfills in the city, so plaintiffs' evidence of a discriminatory pattern on the part of TDH was undermined, even though the pattern did exist.[65] Second, the court held that plaintiffs failed to prove that racial animus motivated the issuance of the landfill permit. Restating the standard set in *Washington v. Davis* and *Arlington Heights*, the court stated that "plaintiffs must show not just that the decision to grant the permit is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race."[66] Although the court acknowledged the possibility that "[s]tatistical proof can rise to the level that it, alone, proves discriminatory intent," it did not find that plaintiffs' evidence rose to that level.[67] The court focused on the quantitative data provided by the parties, which it found to be flawed, over the strongly suggestive qualitative information presented.[68]

Similarly, in *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Commission*,[69] which also involved a landfill permit in a predominately African–American area, the court was reluctant to recognize disproportionate impact as a sufficient equal protection purpose. Although the facts were less compelling in this case than in *Bean*,[70] the *East Bibb* opinion demonstrates how, under current law, the other factors that inevitably are a part of a land use decision—such as the fact that the Commission "reacts to applications from private landowners"—defeat equal protection claims and render proof of racial motive practically impossible short of an unlikely openly racist statement by a commissioner.[71] Obviously, this will rarely, if ever, be found, so in the land use

64. *Id.* at 677-78.

65. Hurwitz & Sullivan, *supra* note 1, at 20. "All the city-owned landfills, six of the eight municipal solid waste incinerators, and three of the four privately owned landfills were located in predominantly African American neighborhoods, although African Americans comprised less than 30 percent of the population of Houston." *Id.*

66. Bean v. S. W. Waste Mgmt. Corp., 482 F. Supp. at 677.

67. *Id.* As an example of a case in which discriminatory intent was considered proven by statistical evidence alone, the court cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the same case cited in *Washington v. Davis*, 426 U.S. at 241, for the proposition that a "statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Id.* See *infra* page 222 for a summary of *Yick Wo*.

68. *See* Bean v. S. W. Waste Mgmt. Corp., 482 F. Supp. at 678-79. For example, plaintiffs presented evidence that a landfill permit request at the same site was denied in 1971 and the court openly wondered what happened since that time to change town officials' position. The court took note of the plaintiffs' assertion, that it was because the high school that bordered the site had changed from a predominantly white student body in 1971 to predominantly minority in 1979, but did not take this information into account in the discriminatory intent analysis. *Id.*

69. 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

70. The only other landfill in the county was in a largely white area; however, plaintiffs pointed out that the two census tracts containing landfills were within a county district in which black residents comprised seventy percent of the population. *Id.* at 884-85. The court concluded, however, that the existence of only two landfills in the county, one of which was located in a white area, tended "to undermine the development of a 'clea[r] pattern, unexplainable on grounds other than race.'" *Id.* at 884 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). At the same time, granting the permit for the landfill in the predominantly black census tract was "not a 'single invidiously discriminatory act' which makes the establishment of a clear pattern unnecessary." *Id.* at 885 n.5 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. at 266 n.14).

71. *Id.* at 885.

context specifically, in which many factors are always present—zoning, demographic shifts, land prices, etc.—the causal connection between a particular decision and its impact are obscured. As in *Bean*, the plaintiffs in *East Bibb* lost in part because the defendant Commission was not responsible for all decisions cited by plaintiffs to establish a pattern of discrimination, so the court limited its inquiry.[72] Although it is appropriate to differentiate decisions by one agency from another when considering a pattern on the part of that agency, it does not follow that evidence of a pattern is irrelevant to the question of whether plaintiffs have been subject to government discrimination. The obvious problem with limiting the inquiry is that it insulates decision makers. Even when discriminatory patterns undeniably exist, there is no redress as long as the decisions that produced the patterns came out of several agencies.

We see the same analytical approach in *R.I.S.E., Inc. v. Kay*,[73] yet another challenge to a landfill permit on equal protection grounds. The community group *Residents Involved in Saving the Environment (R.I.S.E.)* sued the County Board of Supervisors for granting a permit for a regional landfill in a predominately African-American community.[74] The regional facility was intended to replace three smaller landfills, all of which had been operating in other black communities within the county.[75] At the same time, the one landfill in a white area was being closed down.[76] Although the District Court explicitly acknowledged that "[t]he placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents," it employed the factors from *Arlington Heights* to analyze and reject the equal protection claim.[77] Reviewing the administrative history of the decision to authorize the site, the court found nothing "unusual or suspicious" and concluded that the Board "balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner."[78]

Arguably, the *Bean* and *R.I.S.E.* cases were wrongly decided even under the standards articulated in *Washington v. Davis* and *Arlington Heights*.[79] In both those cases, the disproportionate waste burden placed on African-American residents was so consistent and indisputable as to constitute a "clea[r] pattern, unex-

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72. Philip Weinberg opines that "plaintiffs in both suits [*East-Bibb* and *Bean*] should have sued the state or county governments more generally—though that would likely have led to motions to dismiss the agencies not directly responsible for the challenged permits." Philip Weinberg, *Equal Protection, in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 12.

73. 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

74. *Id.* at 1145-46.

75. *Id.* at 1146-48.

76. *Id.* at 1149.

77. *Id.* The new regional landfill was sited in an area that is eighty-five percent African-American, while racial composition around the three landfills to be supplemented by the regional facility was between ninety and one hundred percent African-American. *Id.* at 1148-49.

78. *Id.* at 1149-50.

79. The *R.I.S.E.* court seemed particularly insensitive to the residents' claim when, even after explicitly recognizing that African-Americans in the County had borne the burden of the area's waste disproportionately for nearly thirty years, it stated that "[a]t worst, the Supervisors appear to have been more concerned about the economic and legal plight of the County as a whole than the sentiments of residents who opposed the placement of the landfill in their neighborhood." *Id.* at 1150. Surely the court should have been able to recognize that the objections of the black community in this case were more than simple "sentiments" of opposition.

plainable on grounds other than race" and thus a constitutional offense.[80] *Yick Wo v. Hopkins*[81] and *Gomillion v. Lightfoot*[82] are two frequently cited cases that provide the test for demonstrating intent through disproportionate impact alone.[83] In *Yick Wo*, the Court overturned a conviction under a facially neutral ordinance regulating laundries in wooden buildings to address fire hazards, finding that discriminatory enforcement of the law showed the requisite intent, as the vast majority of laundries were owned by Chinese and only Chinese were prosecuted.[84] In *Gomillion*, the Court recognized racial gerrymandering, which sought to keep nearly all black voters from local voting in Tuskegee, Alabama, as clear evidence of discriminatory purpose.[85]

The choice of these cases does less to establish a useful threshold for determining when disproportionate impact "really" signifies discrimination than it does to show that courts are more apt to perceive racist intent behind facially neutral regulations when the disproportionate impact against a racial group is in the form of unequal or targeted enforcement. Similarly, courts have been more willing to infer discriminatory intent in equal protection cases involving unequal municipal services, such as sewer lines and street maintenance.[86] As the range of factors that may contribute to an unequal environmental burden increases, courts draw what seems to be, from the standpoint of those burdened, a useless distinction between intentional and unintentional discrimination to decide which burdened parties deserve relief. Practicing lawyers recognize that, right or wrong, the courts' current

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80. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

81. 118 U.S. 356 (1886).

82. 364 U.S. 339 (1960).

83. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. at 266; Washington v. Davis, 426 U.S. 229, 241 (1976); Bean v. S. W. Waste Mgmt. Corp., 482 F. Supp. 673 678 (S.D. Tex, 1979), *aff'd* 782 F.2d 1038 (5th Cir. 1986). *Yick Wo* is considered by some to be the "[o]riginal [e]nvironmental [r]acism [c]ase." *See, e.g.*, Denis Binder, *Index of Environmental Justice Cases*, 27 URB. LAW. 163, 167 (1995).

84. 118 U.S. at 373-74.

85. 364 U.S. at 346-48. *See also* Lane v. Wilson, 307 U.S. 268, 275-77 (1939) (invalidating as discriminatory an Oklahoma law designed to prevent blacks from voting by requiring anyone wishing to vote to register within twelve days or be permanently ineligible); Guinn v. United States, 238 U.S. 347, 366-67 (1915) (invalidating as discriminatory an Oklahoma law designed to prevent blacks from voting by imposing a literacy test for voters, exempting only those whose grandfathers had voted). Both *Guinn* and *Lane* were cited in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 266.

86. *See generally* Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986) (finding intent to discriminate where 30% of streets in black neighborhoods were unpaved, compared with 18% in white neighborhoods, and 50% of black homes had no sewer connection, compared with 28% of white homes); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978) (finding intentional discrimination in the provision of street paving, parks, and access to water); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) (inferring intent to discriminate where 98% of people living on unpaved streets in the town were black and only 8% of black homes compared with 90% of white homes had sewers). Some have advocated for aligning land use-based environmental justice claims more closely to the language used in municipal services cases. *See generally* Sten-Erik Hoidal, *Returning to the Roots of Environmental Justice: Lessons From the Inequitable Distribution of Municipal Services*, 88 MINN. L. REV. 193 (2003).

approach to equal protection analysis holds little promise for environmental justice claimants.[87]

2. Title VI of The Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination by programs and governmental entities that receive financial assistance from the federal government.[88] State environmental agencies receive funds from EPA, and Title VI provides a mechanism for citizens to challenge state environmental programs, policies, and decisions, including permits, on discrimination grounds.[89] The key provisions are §§ 601 and 602. Section 601 of Title VI provides that no person 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."[90] In the environmental justice context, the utility of suits brought under § 601 is limited by the five-to-four holding of *Guardians Ass'n v. Civil Service Commission*,[91] in which the Supreme Court held that § 601 requires the same showing of discriminatory intent that *Washington v. Davis* requires in equal protection cases.

Section 602 authorizes federal agencies and departments that provide federal money to promulgate regulations to implement the requirements of § 601.[92] Un-

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87. Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 526 (1994) (ranking equal protection claims last among the legal theory choices for environmental justice claimants). From a practical perspective, Cole believes that "while the cases bringing Constitutional claims [such as *Bean*, *East Bibb*, and *R.I.S.E.*] . . . may have had political value, their legal value at this point is largely in showing us what not to do." *Id.* at 544 n.100. At the same time, he asserts that "[i]n the ideal world, the Supreme Court would overturn *Washington v. Davis* and do away with the intent standard." *Id.* at 541 n.87. For further discussion of the intent requirement, see *infra* Section IV.A.

A recent rare victory at the district court level provides a useful framework for pursuing equal protection claims where an historical pattern of discrimination can be shown. In *Miller v. City of Dallas*, 2002 U.S. Dist. LEXIS 2341, at *11 (N.D. Tex. Feb. 14, 2002), the court used the factors from *Arlington Heights* to analyze an allegation by residents of Cadillac Heights, a mostly Hispanic and African-American neighborhood, that the City of Dallas maintains a pattern of environmental inequality where they live. The court denied the City's motion for summary judgment and the parties settled. *Id.* at *53. According to Attorney Michael Daniel:

> The court found the following facts compelling: zoning for the neighborhood is residential, but the area lies immediately adjacent to heavy industrial uses; the city considered overt racial segregation as a legitimate policy goal for land use decisions through the 1940s; and the city knew that Cadillac Heights would be an industrial area when it designated the area a "Negro development."

Michael Daniel, *Using the Fourteenth Amendment to Improve Environmental Justice*, 30 HUM. RTS. 15, 15 (2003).

88. 42 U.S.C. §§ 2000d to 2000d-7 (1994).

89. Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 23. See Mank for an excellent general overview of Title VI. *Id.*

90. 42 U.S.C. § 2000d (1994).

91. 463 U.S. 582 (1983).

92. Section 602, in relevant part, states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of [§ 601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1 (1994).

der this mandate, federal agencies are empowered to prohibit financial recipients from using the funds in support of projects or practices that produce discriminatory effects, regardless of the intent.[93] Until 2001, advocates and scholars touted § 602 as a promising theory for environmental justice claimants arguing race discrimination.[94] This optimism was validated briefly by *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,[95] a rare environmental justice victory.

South Camden is a classic environmental injustice case arising from New Jersey Department of Environmental Protection (NJDEP) approval of a cement grinding facility in the "Waterfront South" neighborhood of South Camden, New Jersey.[96] Over ninety percent of the South Camden residents were low-income African-Americans and Latinos; the neighborhood already hosted "two Superfund sites, several contaminated and abandoned industrial sites, and many currently operating facilities, including chemical companies, waste facilities, food processing companies, automotive shops, and a petroleum coke transfer station."[97] In addition, the NJDEP had recently granted permits for three additional facilities: a regional sewage treatment plant, a trash-to-steam incinerator, and a power plant.[98] Residents organized to oppose the cement grinding site plan and sought a preliminary injunction in federal district court to prevent construction of the facility. They argued that the NJDEP, as an agency that receives federal financial assistance, violated Title VI by granting air permits to the facility without considering the discriminatory effect as required by EPA's regulations promulgated under § 602.[99]

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93. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983). *See also* Mank, *supra* note 89, at 23. Numerous federal agencies have promulgated these sorts of regulations under § 602, including the Departments of Agriculture, Defense, Energy, and the Interior. Cole, *supra* note 87, at 532.

94. *See, e.g.*, Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 313 (1994) ("[Title VI] is a potentially powerful tool for community groups engaged in local environmental justice struggles because, under EPA regulations, it bars disproportionate *impact* in the administration of environmental programs, including siting and enforcement"); Mank, *supra* note 89, at 24 ("EPA's Title VI regulations offer the best way to bring legal challenges to state or local permits on environmental justice grounds"). *See also* Lazarus, *supra* note 48, at 839; Cole, *supra* note 87, at 531; Hurwitz & Sullivan, *supra* note 1, at 43.

95. 145 F. Supp. 2d 446 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939, 939-40 (2002).

96. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001).

97. *Id.* at 775.

98. *Id.*

99. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 489 (D.N.J. 2003). EPA's Title VI regulations state, in pertinent part:

> (b) A recipient shall not use criteria or methods of administering its program which have the *effect of subjecting individuals to discrimination* because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.
>
> (c) A recipient shall not choose a site or location of a facility that has the *purpose or effect of* excluding individuals from, denying them the benefits of, or *subjecting them to discrimination* under any program to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

40 C.F.R. § 7.35 (2003) (emphasis added).

The court found that, among other things, the NJDEP failed to consider the racial composition of Waterfront South, its cumulative environmental burden, and residents' preexisting health problems.[100] Based on these findings, the court concluded that this "failure to consider the totality of the circumstances surrounding the operation of [the] proposed facility, violates the EPA's regulations promulgated to implement Title VI . . . [and] Plaintiffs have established a prima facie case of disparate impact discrimination based on race and national origin in violation of the EPA's regulations."[101]

The *South Camden* victory was short lived. Just five days after the New Jersey District Court ruled in their favor, the Supreme Court decided *Alexander v. Sandoval*,[102] a Title VI civil rights case wholly unrelated to environmental justice issues,[103] and squarely invalidated the theory upon which the *South Camden* plaintiffs had won their case. Much like the plaintiffs in *South Camden*, the *Sandoval* plaintiffs sought to enforce Department of Justice (DOJ) Title VI regulations.[104] Contrary to scholars' hopes and the plaintiffs' interest in both cases, the Supreme Court held that Title VI did not provide them with a "freestanding private right of action to enforce regulations promulgated under § 602" in the absence of clear intent within the statute to create such a right.[105] Scalia's reasoning for this conclusion, despite precedent for a contrary holding,[106] began with the following definitive statement:

> [T]hree aspects of Title VI must be taken as a given. First, private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages. . . . Second, it is similarly beyond dispute . . . that § 601 prohibits only intentional discrimination. . . . Third, we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.[107]

Scalia proceeded to reason that, "[i]t is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations."[108]

With this analysis, Scalia effectively converted the plaintiff's claim for relief on the basis of § 602 regulations, although the regulations constituted the agencies' interpretation of the § 601 mandate, into a claim for an implied right of action—an independent, controversial subject of extensive Supreme Court jurispru-

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100. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d at 451.

101. *Id.* at 451-52.

102. 532 U.S. 275 (2001).

103. The plaintiffs in *Alexander v. Sandoval* alleged that the Alabama Department of Public Safety's policy of administering state drivers' license exams only in English constituted discrimination against test-takers for whom English is a second language. *Id.* at 279.

104. *Id.* at 278-79. The DOJ, under § 602 authority, had "promulgated a regulation forbidding funding recipients to 'utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin. '" *Id.* at 278 (quoting 28 C.F.R. § 42.104(b)(2)(2000)).

105. *Id.* at 293.

106. *See* Lau v. Nichols, 414 U.S. 563 (1974).

107. Alexander v. Sandoval, 532 U.S. at 279-81.

108. *Id.* at 285.

dence.[109] Yet, the dissent forcefully pointed out that "[the Supreme Court] has already considered [this] question . . . and concluded that a private right of action exists."[110] The dissent went on to cite numerous Circuit Courts of Appeal cases holding "either explicitly or implicitly . . . that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations."[111]

Through the *Guardians* and *Sandoval* opinions, the Supreme Court has constrained the availability of Title VI protection to match its narrow interpretation of the Equal Protection Clause, virtually precluding environmental injustice from being recognized as a legitimate civil rights concern under Title VI. With *Guardians'* requirement of intent to enforce § 601, a burden environmental justice claimants can rarely meet, and *Sandoval*'s elimination of the private right to enforce § 602 regulations, Title VI has little to offer.[112] Foreboding dicta in *Sandoval* regarding the appropriate scope of § 602 regulations is especially disturbing from an environmental justice perspective. Scalia makes clear that he questions whether it is even valid for federal agencies to "proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."[113] Although he assumes the regulations' validity for purposes of his analysis in the case, he is explicit that the opinion does not rule on that question, noting that "petitioners have not challenged the regulations here."[114] Nonetheless, he took

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109. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964), *overruled by* Cort v. Ash, 422 U.S. 66 (1975); Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986); Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991).

110. Alexander v. Sandoval, 532 U.S. at 295 (Stevens, J. dissenting) (citing Lau v. Nichols, 414 U.S. 563 (1974), Cannon v. Univ. of Chicago, 441 U.S. 677 (1979), and Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983)). For a brief overview of the pre-*Sandoval* uncertainty regarding whether a private right of action exists to enforce Title VI regulations, see Mank, *supra* note 89, at 33-35. For a more detailed analysis, see Bradford C. Mank, *Is there a Private Right of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999).

111. Alexander v. Sandoval, 532 U.S. at 295 n.1 (Stevens, J. dissenting). The dissent cites the following cases that demonstrate the position explicitly: Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936-37 (3d Cir. 1997) (holding that Title VI includes an implied private right of action for disparate impact discrimination under § 602 regulations), *cert. granted*, 524 U.S. 915 (1998), *cert. vacated*, 524 U.S. 974 (1998), Powell v. Ridge, 189 F.3d 387, 400 (3d Cir. 1999) (affirming the conclusion in *Chester* that an implied private right of action exists under § 602), David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988), Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), and seven other cases that implicitly held that a private right of action exists under § 602. The dissent also notes New York City Environmental Justice Alliance v. Giuliani, 214 F.3d 65, 73 (2d Cir. 2000), as a case "suggesting that the question may be open." *Id.*

For detailed accounts of the interplay between *South Camden* and *Sandoval*, see generally Erin Daly, *New Hurdles for Environmental Justice Plaintiffs*, 17 NAT. RESOURCES & ENV'T 18 (2002), John Dibari, *How the* Sandoval *Ruling Will Affect Environmental Justice Plaintiffs*, 76 ST. JOHN'S L. REV. 1019 (2002), and Michael D. Mattheisen, *The Effect of* Alexander v. Sandoval *on Federal Environmental Civil Rights (Environmental Justice) Policy*, 13 GEO. MASON U. CIV. RTS. L.J. 35 (2003).

112. It has been noted that *Sandoval* did not only frustrate the interests of environmental justice claimants, but "[t]he regulatory machinery established by EPA and the Department of Justice to remedy disparate impacts of environmental regulations . . . was set back substantially" as well. GRAD, *supra* note 42, § 9.10(5)(d)(iii)(P)(v)(A).

113. Alexander v. Sandoval, 532 U.S. at 281.

114. *Id.* at 281-82.

the opportunity to highlight what he perceives to be "considerable tension" between the view expressed by five Justices in *Guardians*—that § 602 regulations can prohibit disparate impact—and the Court's interpretation of § 601 as forbidding "only intentional discrimination."[115]

After *Sandoval*, although the courts are closed to environmental justice claimants seeking to enjoin federally financed agencies from ignoring EPA regulations, there remain two options for enforcing § 602 regulations. First, claimants can pursue the issue by filing a Title VI administrative complaint to EPA.[116] There are multiple drawbacks to this approach: time limits on EPA's investigation of the complaints it accepts are not realistically enforceable, and EPA is not required to involve claimants in the investigation, leaving them uninformed about the process.[117] Moreover, the main remedy is limited to the withdrawal of funding from the recipient, which may implicate serious policy considerations for EPA if the recipient uses federal funds for other important purposes in a non-discriminatory manner.[118] This reality could create an incentive for agencies to declare claims meritless so as to avoid jeopardizing other programs. Claimants have no ability to challenge EPA determinations if an administrative complaint is wrongly dismissed. Title VI remedies are not available against federal agencies, only their recipients, and courts have interpreted the Administrative Procedures Act to prevent a plaintiff from suing a federal agency for funding a discriminatory recipient if available remedies were adequate.[119] The *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*,[120] issued by EPA in 1998 and revised in 2000, is still in use despite wide criticism that it fails to clarify what is and is not a discriminatory effect under Title VI regulations.[121] In short, administra-

115. *Id.* (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) and Regents of Cal. v. Bakke, 438 U.S. 265 (1978)).

116. For a detailed analysis of Title VI administrative complaints to EPA and their treatment between 1993 and 1994, the first wave of environmental justice Title VI complaints, as well as a general overview of the actual process of filing a complaint, see Cole, *supra* note 94, at 309. For recent information, see the status summary table of *Title VI Complaints Filed with EPA* (Nov. 21, 2003), *available at* http://epa.gov/civilrights/docs/t6csnovember2003.pdf (last visited Oct. 2, 2004).

117. Cole, *supra* note 94, at 321.

118. Mank, *supra* note 89, at 28.

119. *Id.* at 29. For more on the advantages and disadvantages of Title VI administrative complaints as a tool for addressing environmental injustice, see generally Cole, *supra* note 94, at 321; Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285 (1995); Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787 (1999); James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994).

120. *Available at* http://epa.gov/civilrights/docs/interim.pdf (last visited Oct. 3, 2004).

121. For a summary of the criticism of EPA's *Interim Guidance*, see Mank, *supra* note 110, at 44-45. *See also* Sheila Foster, *Piercing the Veil of Economic Arguments Against Title VI Enforcement*, 10 FORDHAM ENVTL. L.J. 331 (1999); Bradford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 11,144 (Dec. 2000).

Two prominent Title VI complaints highlight the problems with EPA's petition review process. *See* Mank, *supra* note 89, at 45-50. One involved an approval by the Louisiana Department of Environmental Quality to locate a Shintech plastics facility in St. James Parish, Louisiana, in the eighty-five-mile corridor between Baton Rouge and New Orleans, an industrial and

tive complaints under Title VI have some value, but they are insufficient to address environmental injustice without access to judicial review. The second option for enforcing Title VI regulations, valid in some circuits, is to bring an enforcement action under 42 U.S.C. § 1983.[122]

3. 42 U.S.C. § 1983

Under 42 U.S.C. § 1983 (1994), "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." In his *Sandoval* dissent, Justice Stevens noted that "[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief" because the section permits legal action against state and municipal officials to enforce federal statutory rights.[123]

To sustain a § 1983 claim, the Supreme Court requires plaintiffs to allege a violation of a federal right, not just a violation of federal law.[124] In *Blessing v. Freestone*, the Court outlined three factors for determining whether the statutory provision in question gives rise to a federal right:

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heavily polluted stretch commonly known as "Cancer Alley." *Id.* at 45. The other challenged a Prevention of Significant Deterioration (PSD) permit under the Clean Air Act issued by the Michigan Department of Environmental Quality for a proposed Select Steel Corporation steel mill in Flint, Michigan. *Id.* at 48. The Shintech matter became so politically divisive, and EPA delayed a decision for so long, that the company eventually withdrew its proposal for the St. James Parish site before EPA ever issued a final reply on the merits. *Id.* Although this was a victory for environmentalists and St. James Parish residents who opposed the facility, it demonstrated how endless delays by EPA can hinder the proper functioning of the administrative process and the range of political considerations that influence decision makers. In Michigan, EPA moved fast to dismiss the complaint challenging the Select Steel PSD permit, and issued a decision that was arguably in direct conflict with its own Title VI *Interim Guidance*. *See* Gina M. Van Detta, Note, *The* Select Steel *Analytic Shortcut: An Outcome Predictive Analytic Model Exposes the Flaws of the* Select Steel *Approach to Title VI*, 25 N.C. CENT. L.J. 1, 20 (2002).

122. Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act) has more specialized application but deserves mention. 42 U.S.C. §§ 3601-3619 (1994). The Fair Housing Act prohibits the refusal to sell, rent, or "otherwise make unavailable or deny, a dwelling to any person because of race, religion, sex, familial status, or national origin." *Id.* § 3604(a). The Fair Housing Act's potentially broad scope reaches governmental actions that directly affect the availability or environmental quality of housing to minorities. In addition, the Act prohibits discrimination "in the provision of services or facilities" connected with housing. *Id.* § 3604(b). Under the right circumstances, this section provides an alternative theory to the Equal Protection Clause for arguing unequal distribution of environmental benefits. *See* Cole, *supra* note 87, at 534-38; Lazarus, *supra* note 48, at 839-40. *See also* Flores v. Vill. of Bensenville, 2003 U.S. Dist. LEXIS 4693, at *15 (N.D. Ill. Mar. 25, 2003) (dismissing a Title VIII claim upon finding that the town's provision of services had been consistently "dilatory" and "there [was] no evidence to suggest that it responds more quickly to . . . non-Hispanic individuals"); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 508 (D.N.J. 2003) (dismissing a Title VIII claim for failure to state a cognizable claim under the statute); El Pueblo Para el Aire y Agua Limpio v. County of Kings, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. Super. Ct. (Sacramento County) Dec. 30, 1991) (failing to decide a Title VIII claim on the merits because the company chose a new site for the waste facility first).

123. Alexander v. Sandoval, 532 U.S. 275, 300 (2001) (Stevens, J., dissenting).

124. Blessing v. Freestone, 520 U.S. 329, 340 (1997).

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.[125]

After the *Sandoval* opinion, *South Camden* plaintiffs took just this approach. The New Jersey District Court issued a second opinion, granting the preliminary injunction against the DEP based not on a private right of action under Title VI § 602, but using the enforcement rights provided by 42 U.S.C. § 1983.[126] The court carefully analyzed whether the *Sandoval* holding foreclosed the possibility of such a claim, and concluded it was limited to "the determination that § 602 itself does not create a right of private action."[127] This interpretation was consistent with the Third Circuit's decision in *West Virginia University Hospitals, Inc. v. Casey*, which held that "valid federal regulations as well as federal statutes may create rights enforceable under § 1983,"[128] as well as its recent *Powell v. Ridge* opinion, which expressly validated plaintiffs' right to assert a § 1983 claim for a violation of § 602 regulations.[129] Relying on the factors outlined in *Blessing*, the court held that EPA's Title VI regulations *did* create an actionable federal right for the *South Camden* plaintiffs—the regulations were intended to benefit a class that included the plaintiffs; the regulatory language was not ambiguous; and the regulations constituted mandatory obligations on federal funding recipients.[130]

On appeal, nowever, partially following Scalia's suggestive dicta in *Sandoval*, the Third Circuit reversed the district court, thereby overturning *Powell v. Ridge*.[131] In so doing, the Third Circuit held that "federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute."[132] The court reasoned that if intentional discrimination is required to establish a right under § 601, "it does not follow that the right to be free from disparate impact discrimination can be located in § 602. In fact, it cannot. In sum, the regulations, though assumedly valid, are not based on any federal right present in the statute."[133]

This opinion has been sharply criticized. Professor Brian D. Galle highlights a troubling contradiction in the Third Circuit's reasoning. To hold "that congressional intent can be demonstrated only where the acts covered or obligations demanded by the regulation match those of the underlying statute," is, he argues, "an

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125. *Id.* at 340-41 (citations omitted). Essentially the same factors, in a slightly different order, were previously set forth in Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418, 423-24 (1987), and refined in Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 509 (1990).

126. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001).

127. *Id.* at 518 (emphasis omitted).

128. *Id.* at 527 (citing West Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 18 (3d Cir. 1989)).

129. *Id.* at 518 (citing Powell v. Ridge, 189 F.3d 387, 403 (3d Cir. 1999)).

130. *Id.* at 535-42.

131. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001).

132. *Id.*

133. *Id.*

odd standard to impose upon regulations that are, by assumption, valid."[134] He asserts that the principles of federalism and judicial deference weigh heavily in favor of allowing federal agencies to designate their own regulations for private enforceability.[135] Others have argued that the "*Chevron* doctrine," which directs federal courts to defer to reasonable administrative interpretations of federal law, should be sufficient to require recognition of § 1983 actions based on regulations.[136] In a somewhat different vein, Erin Daly complains that "[r]equiring the plaintiff to establish not just the existence of a federal right but the congressional intent for that right to be enforceable through Section 1983" is too substantial and unpredictable a demand.[137] Moreover, she points out that *Blessing* created a presumption in favor of plaintiffs, that if a federal right exists, § 1983 is available to enforce it—the Third Circuit opinion "eliminates that advantage."[138]

Nonetheless, the implication for *South Camden* plaintiffs and other environmental justice claimants in the Third Circuit is that EPA's disparate impact regulations do not support a right enforceable through a § 1983 action. The circuits are split on the question, leaving many environmental justice claimants in the same predicament.[139] The Supreme Court denied certiorari to *South Camden* and has

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134. Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 179 (2003).

135. *Id.* at 165. Galle provides an excellent overview of the evolution of the § 1983 private right of action leading up to the current tension surrounding its availability for enforcing disparate impact regulations. *See also* Melissa A. Hoffer, *Closing the Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After* Sandoval *and* Gonzaga, 38 NEW. ENG. L. REV. 971 (2004) (arguing that the laws clause of § 1983 should be construed to include valid agency regulations).

136. *See* David J. Galalis, *Environmental Justice and Title VI in the Wake of* Alexander v. Sandoval*: Disparate Impact Regulations Still Valid under* Chevron, 31 B.C. ENVTL. AFF. L. REV. 61 (2004).

137. *See* Daly, *supra* note 111, at 62.

138. *Id.* (citing Blessing v. Freestone, 520 U.S. 329 (1997)).

139. *Compare* Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003) (holding that a Department of Transportation Title VI regulation does not create an individual federal right enforceable under § 1983), S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001) (discussed *supra* pages 224-25), Harris v. James, 127 F.3d 993 (11th Cir. 1997) (finding that Medicaid recipients do not have a federal right to enforce a transportation requirement using § 1983 when the requirement appears in a federal regulation, not the Medicaid Act), and Smith v. Kirk, 821 F.2d 980 (4th Cir. 1987) (holding that an administrative regulation, in this case a Social Security Administration regulation promulgated under 42 U.S.C. § 422, cannot create an enforceable § 1983 interest not already implicit in the enforcing statute), *with* Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002) (holding that preliminary injunctions can be sought to enforce § 602 regulations using § 1983), Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994) (holding that a Federal Communications Commission regulation creates a private right of action under § 1983), and Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985) (holding that § 1983 is available to enforce agency obligations created in Department of Housing and Urban Development grievance procedure regulations implementing the U.S. Housing Act).

There is useful discussion of this circuit split in *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 783-84 (E.D. Mich. 2001), and in the dissent by Senior Circuit Judge Kravitch in *Harris v. James*, 127 F.3d 993, 1014 (11th Cir. 1997). A strong argument for the validity of § 1983 as a mechanism for enforcing federal regulations as "federal rights" under Title VI can be found in Bradford C. Mank, *Using Section 1983 to Enforce Title VI Regulations*, 49 U. KAN. L. REV. 321 (2001). *See also* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 516-29 (D.N.J. 2001) (Orlofsky, J., supplemental opinion), *rev'd* S. Camden v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001). His clarifying discussion of the differences between the *Cort v. Ash* implied right of action test and the *Blessing v. Freestone* § 1983 test is particularly useful. *Id.* at 520-25.

yet to address the issue definitively.[140] Last year, the Ninth Circuit followed the Third Circuit's lead and changed its position, observing that recent Supreme Court cases "have strengthened the legal foundation underlying the Third, Fourth, and Eleventh Circuits' holdings and eroded the legal foundation underlying the D.C. and Sixth Circuits' holdings."[141] These decisions are important precedent that may undermine efforts to protect minority communities from disproportionate environmental burdens using § 1983. If the Supreme Court takes up a case addressing this circuit split, two important legal issues could be at stake: the scope of federal "rights" that § 1983 can enforce and the constitutional validity of disparate impact regulations for addressing racial discrimination.

B. Environmental Law

When we conceptualize the law of environmental justice, it is important to do so expansively, and not limit it to cases brought under civil rights theories. Such a limitation is not only inaccurate, but it perpetuates the division between the environmental movement and the civil rights movement,[142] and the division between nature in its traditional "wilderness" sense and the environment as defined in environmental justice terms, namely "wherever we live."[143] Environmental justice lawsuits include those brought under racial discrimination laws and environmental laws—whatever the legal strategy employed, the fundamental goal, of course, is to address environmental harm and inequity.[144] Depending on the circumstances, enforcing the basic environmental laws such as the National Environmental Policy Act (NEPA),[145] Clean Air Act (CAA),[146] the Clean Water Act (CWA),[147] or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[148] can be as effective, if not more effective, for these communities, though these laws receive far less attention in the environmental justice literature. Advocates can serve the important function of ensuring that the laws are enforced equitably without necessar-

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140. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 536 U.S. 939 (2002).

141. Save Our Valley v. Sound Transit, 335 F.3d at 937 (referring to Alexander v. Sandoval, 532 U.S. 275 (2001) and Gonzaga Univ. v. Doe, 536 U.S. 273 (2002)).

142. *See supra* note 1.

143. This conception of "environment" is central to the environmental justice movement world view. *See generally United Church of Christ Commission for Racial Justice Proceedings of the First National People of Color Environmental Leadership Summit* at xiii (Oct. 24-27, 1991), *reprinted in* RECHTSCHAFFEN & GAUNA, *supra* note 7, at 22-24.

144. *See* Binder, *supra* note 83, at 164 (noting that "some cases seemingly present no environmental justice issues on their face, but the underlying reality is to the contrary"). *See also* Denis Binder, *Environmental Justice Index II*, 2 CHAP. L. REV. 309 (2000) (listing the range of theories underlying environmental justice cases as including: First Amendment, Fourth Amendment, Fifth Amendment, Eighth Amendment, Thirteenth Amendment, Fourteenth Amendment/Due Process, Fourteenth Amendment/Equal Protection, Fifteenth Amendment, Commerce Clause, Title VI of the Civil Rights Act of 1964, Fair Housing Act, Administrative Procedure Act, Federal Aid to Highway Act, National Historic Preservation Act, Resource Conservation and Recovery Act (RCRA), and National Environmental Protection Act (NEPA)). Civil rights laws and environmental laws are the most common.

145. 42 U.S.C. §§ 4321-4347 (1994).

146. 42 U.S.C. §§ 7401-7671q (1994).

147. 33 U.S.C. §§ 1251-1387 (2000).

148. 7 U.S.C. §§ 136-136y (2000).

ily asserting discrimination.[149] Such an approach is vital for addressing environmental injustice in low-income communities where the racial composition may be mixed or predominantly white.[150]

This recognition invites us to conceive of environmental justice as the solution to environmental discrimination, such as in waste facility siting decisions, as well as to broader environmental concerns, such as air or water pollution generally. By linking our concern for environmental injustice more closely with our concern for the earth, we advance both goals, because environmental injustice harms not just the communities that suffer the injustice, but the environment at large as well. To the extent that we fail to consider environmental justice a moral responsibility, and fail to make a conscious effort toward equitable distribution of environmental harms, we perpetuate ineffective pollution control and tolerate ongoing environmental degradation. The fact that environmental injustice is not always visible to the public at large has led to complacency over the level of pollution our laws allow. The toxic exposure that communities like Waterfront South or Chester endure is only "tolerable" because white, wealthier people do not live there.[151] Who can imagine an incinerator being built in the rich Camden or Philadelphia suburbs? The result is that the environment continues to be polluted at a rate that is unsustainable and in many cases irrevocable. By giving a voice to those suffering the worst environmental injustices, and demanding the right to participate in decision making that affects them, the movement furthers social *and* environmental objectives.

Luke Cole, perhaps the foremost among practicing environmental justice lawyers,[152] developed a "litigation hierarchy" that ranks the various theories for bringing environmental justice claims.[153] Recognizing the practical reality that "we as a movement are not winning civil rights cases," he proposes the following order of preference: "(1) Environmental laws, especially those which focus on procedure, applied in a traditional manner; (2) Environmental laws, particularly those which mandate public participation . . . ; (3) Civil rights laws, particularly Title VI and Title VIII of the Civil Rights Act of 1964; (4) Constitutional claims, based on the equal protection clause of the Fourteenth Amendment."[154] Strategically, he as-

149. One of the key components of success in using the environmental laws to achieve environmental justice is "building community enforcement capacity." RECHTSCHAFFEN & GAUNA, *supra* note 7, at 292. Gauna has argued that "courts should augment fees awarded to attorneys successfully prosecuting environmental justice enforcement cases." *Id.* at 293. Technical assistance, such as the Superfund technical assistance provisions and community training, can enable communities to monitor their own environmental quality. *Id.* at 293-94. Again, however, it must be stressed that it is not the responsibility of citizens to spend their time and money to monitor whether or not EPA is doing its job to protect them from environmental hazards.

150. For a discussion of the exclusion of income as a basis for heightened scrutiny under civil rights laws, see *infra* Section IV.B.

151. *See supra* notes 3-18.

152. Luke Cole is staff attorney for the *California Rural Legal Assistance Foundation*, General Counsel for the *Center on Race, Poverty, and the Environment*, and has written many of the best articles in the field. He took part in a number of the cases cited in this Comment, including *South Camden*.

153. Cole, *supra* note 87, at 526.

154. *Id.* As a practicing environmental justice lawyer, he reminds those who may be more social justice-oriented than environmental law-oriented that "[t]o be a good environmental justice lawyer, one must be a good environmental lawyer. This nuts-and-bolts knowledge of arcane statutes is the least sexy part of environmental justice law, to be sure, but perhaps the most important." *Id.* at 528.

serts, this makes the most sense because in the environmental justice context, environmental law challenges have a track record of success.[155]

This hierarchy does not mean, however, that environmental laws are adequate—generally or in the environmental justice context. One serious impediment to addressing environmental injustice through environmental law is the orthodox emphasis placed on detached scientific and economic decision-making, as if the structure and process of the decision-making process itself is not related to the ethically problematic outcomes it produces.[156] Another, more obvious problem is that environmental laws actively authorize activities that pose known environmental and health dangers. Indeed, pollutant levels that are literally killing people do not necessarily violate our environmental laws.[157] Further, environmental laws have typically failed to address the problem of multiple exposures and cumulative effects on health, which are central to environmental injustice, by providing permits to pollute based on whether or not the applicant polluter meets the standards set by law, irrespective of what has already been permitted for other individual polluters.[158]

1. Substantive Enforcement

Environmental injustice is often accompanied by violations of federal and state environmental laws and regulations.[159] In such cases, lawyers can state a claim on substantive statutory and regulatory grounds alone, or in addition to discrimination claims. In light of the inhospitable reception of civil rights claims in most courts, more environmental justice advocates may begin opting for this approach when it is available. The challenge, of course, is that governmental action with significant discriminatory effects may often be in legal compliance with environmental standards.

Most of our environmental laws require polluters to obtain technology-based permits that meet specified standards and to comply with regulations in their operations under the permit. The CAA, for example, requires permits for major industrial sources of air pollution, as well as tailored permits for new stationary sources, sources in areas designated for "Prevention of Significant Deterioration," sources in areas where the air does not meet national ambient air quality standards, and sources that emit specific toxic pollutants.[160] Similarly, the CWA requires permits for any discharge into navigable waters under its National Pollutant Discharge Elimination System (NPDES).[161] The RCRA regulates the construction and operation of hazardous waste disposal facilities and the location, design, operation and closure of municipal waste landfills.[162] The Toxic Substances Control Act (TSCA) requires permits for and regulates the disposal of Polychlorinated Biphenyls (commonly referred to as PCBs), and other toxic chemicals.[163]

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155. *Id.* at 527.

156. *See, e.g., infra* Section IV.D of this Comment for a discussion of the ethical problems associated with risk assessment.

157. Cole, *supra* note 36, at 643.

158. Examples include Clean Water Act NPDES permits and Clean Air Act emissions permits.

159. *See supra* page 212 for *National Law Journal* findings of disparate enforcement.

160. *See* 42 U.S.C. §§ 7401-7671q (1994) and implementing regulations.

161. *See* 33 U.S.C. §§ 1251-1387 (2000) and implementing regulations.

162. *See* 42 U.S.C. §§ 6901-6992k (1994) and implementing regulations.

163. *See* 15 U.S.C. §§ 2601-2692 (1994) and implementing regulations.

Permits and other statutory requirements at the federal and state levels are prime targets for environmental justice advocates. For example, a local community group "dedicated to promoting environmental justice" in Hartford, Connecticut, challenged the DEP's approval of two new source review air permits and discharge permits.[164] Community groups in Arkansas challenged the Arkansas Department of Environmental Quality's approval of an air permit and hazardous waste permit that authorized the construction and operation of the Pine Bluff Chemical Agent Disposal Facility, arguing that the air permit violated state law and that the waste permit violated the RCRA.[165] In addition, they charged that the facility would "create new, and exacerbate existing, disproportionate pollution impacts on minority and low-income populations."[166] In California, advocates sued plumbing distributors under the state's Safe Drinking Water and Toxic Enforcement Act for discharging lead into drinking water.[167] The *United Farm Workers of America* and community groups recently challenged EPA's re-registration of two highly toxic insecticides under FIFRA, charging that the agency used a flawed risk-benefit analysis and data on worker exposure residues "that deviate from the data and methods used consistently by EPA in the past."[168]

In addition, the major environmental laws contain citizen suit provisions that allow individuals and community groups to bring private enforcement against polluters to require them to comply with the law or to sue EPA if it fails in its mandatory enforcement duties.[169] These are valuable tools for controlling pollution at operating facilities, through CAA, CWA, or RCRA, for example, as well as for forcing toxic remediation at contaminated sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[170] For ex-

164. Organized N. Easterners & Clay Hill & N. End, Inc. v. Capital City Econ. Dev. Auth., 2001 WL 761009, at *9 (Conn. Super. Ct. June 7, 2001) (plaintiffs lacked standing but the court nevertheless decided their claims on the merits).

165. Pine Bluff for Safe Disposal v. Ark. Pollution Control and Ecology Comm'n, 127 S.W.3d 509, 512-15 (Ark. 2003) (upholding both permits). *See also* Blue Legs v. EPA, 668 F. Supp. 1329, 1330-31 (D.S.D. 1987) (alleging EPA's failure to comply with RCRA and the Indian Health Care Facilities Act by approving the operation of fourteen garbage dumps on an Oglala Sioux reservation).

166. Pine Bluff for Safe Disposal v. Ark. Pollution Control and Ecology Comm'n, 127 S.W.3d at 521 (dismissing the environmental justice claim).

167. Mateel Envtl. Justice Found. v. Edmund A. Gray Co., 9 Cal. Rptr. 3d 486, 488 (Cal. Ct. App. 2003).

168. Compl. for Declaratory & Injunctive Relief at 2, United Farm Workers of Am., AFL-CIO v. EPA, Civ. No. CV04-0099C (W.D. Wash. filed Jan. 13, 2004), *available at* http://www.earthjustice.org/urgent/documents/FIFRA_complaint.pdf (last visited Oct. 4, 2004).

169. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Clean Water Act, 33 U.S.C. § 1910 (2000); Clean Air Act, 42 U.S.C. § 7604 (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994).

170. *See* 42 U.S.C. §§ 9601-9675 (1994); 40 C.F.R. §§ 300-311 (2003). For more on citizen suits, see Ellen P. Chapnick, *Access to the Courts*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 363-68; Heidi Gorovitz Robertson, *Controlling Existing Facilities*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 493-99; Larry Schnapf, *Cleaning Up Abandoned or Inactive Contaminated Sites*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 522-41; Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 40 (1995); Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefits*, 10 WIDENER L. REV. 413 (2004).

ample, in *Ecological Rights Foundation v. Pacific Lumber Co.*, an environmental justice group joined a CWA citizen suit against a lumber company for violations of its NPDES permit.[171] However, these provisions have limitations for addressing environmental injustice: standing can be a challenge when the goal is to prevent future harm; remedies are limited to forcing the polluter or agency to comply with the law, excluding compensatory or punitive damages; and it is often difficult if not impossible for affected communities to determine whether a violation is taking place.[172] While support for private enforcement is increasing,[173] enforcement at the state and federal level is decreasing,[174] leaving us with a legal framework that places too great a burden on local communities to self-protect against environmental harm.

2. Public Participation Provisions

Environmental laws and regulations at the federal and state level require agencies to involve the public in decision making by holding open meetings, ensuring access to information, providing comment periods, responding to comments, and in some cases, holding public hearings.[175] To challenge an agency's failure to comply with public participation requirements is essentially procedural—it attacks the way in which the agency made a decision, not the substance of that decision. However, doing so can produce substantive results. For example, in *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, a community group contested the siting of a toxic waste incinerator by arguing that the County had violated the public participation provisions of the California Environmental Quality Act (CEQA).[176] CEQA requires a public comment period to address environmental impact reports (EIRs) prepared for proposed facilities. Kings County published the EIR in English, even though Kettleman City, the proposed site for the incinerator, was ninety-five percent Latino and forty percent monolingual Spanish-speakers.[177] Community residents argued that to comply with CEQA in Kettleman City required Spanish translation of the EIR documents.[178] The judge agreed and over-

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171. 61 F. Supp. 2d 1042 (N.D. Cal. 1999) (granting summary judgment for company on standing grounds), *rev'd*, 230 F.3d 1141 (9th Cir. 2000).

172. Robertson, *supra* note 170, at 494. The major Supreme Court cases that address the standing requirements for citizen suits are *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (denying environmental group standing to sue under the Endangered Species Act for lack of injury in fact) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) (holding that environmental groups' reasonable concern about the effects of discharges in violation of a CWA permit satisfied the injury in fact requirement of standing).

173. *See, e.g.*, RECHTSCHAFFEN & GAUNA, *supra* note 7, at 273, 292.

174. *See* Clifford Rechtschaffen, *Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,803 (Oct. 2000).

175. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2000); Clean Water Act, 33 U.S.C. §§ 1365, 1344(o), 1342(j) (Westlaw 2004); National Environmental Policy Act, 42 U.S.C. §§ 4332(C), 4368 (1994); Resource Conservation and Recovery Act, § 42 U.S.C. § 6974 (Westlaw 2004). NEPA and state laws modeled on NEPA require public participation throughout the environmental impact review process. *See infra* Part III.B.3.

176. 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. Super. Ct. (Sacramento County) Dec. 30, 1991).

177. Cole, *supra* note 87, at 529.

178. *Id.*

turned the County's approval of the incinerator based on this and other claims.[179] Yet not all courts have been as sympathetic. In *Alabama ex. rel. Siegelman v. EPA*,[180] the Eleventh Circuit rejected the charge that EPA failed to provide a meaningful opportunity for public involvement during site permitting "by (1) making it difficult for members of the public to obtain information about the permit application; (2) failing to provide such information in a form understandable to the public; and (3) failing to conduct more than a 'pro forma' public information meeting on the day of the public hearing."[181]

The need for more meaningful public participation in environmental decision-making, especially for those who will bear the burden of those decisions, has been well-documented.[182] Luke Cole argues that the strategic use of public participation provisions can serve both to protect vulnerable communities from environmental harms, as in *El Pueblo*, and also to bring "those communities together to realize and exercise their collective power."[183] At the same time, there is a danger in relying too heavily on public participation in government environmental decision making as an answer to the problem of environmental injustice. There seems to be an implicit assumption in environmental law that if procedures are diligently followed, and public participation provisions are part of that process, resulting environmental decisions are fair. A disturbing logic underlies this assumption—if we can say that communities had ample opportunity to "be involved," it is not the agency's fault if they do not take that opportunity; therefore, the agency is not

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179. *Id.* at 529-30. Cole recommends that when trying a new legal twist in court as he did in *El Pueblo*, it is advisable to do so in the context of other "more traditional allegations of violations of environmental law." *Id.* at 530.

180. 911 F.2d 499 (11th Cir. 1990). *See also* N. Baton Rouge Envtl. Ass'n v. La. Dep't of Envtl. Quality, 805 So. 2d 255, 262 (La. Ct. App. 2001) (in which plaintiffs charged that the DEQ failed to comply with state rule requiring the agency "to respond to all reasonable public comments" regarding a proposed Exxon facility; the court disagreed, holding that DEQ's solicitation of a response by Exxon to environmental racism claims was sufficient); Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 681 (D.C. Cir. 2004) (in which plaintiffs and city claimed that FAA violated NEPA by failing to make certain information public, including the cost-benefit methodology, the federal funding applicant/defendant, and consultant draft work product; the court found the claims meritless).

181. 911 F.2d at 506.

182. *See* Foster, *supra* note 1, at 831-40. In the context of facility siting, Foster has argued for a shift "from the current pluralistic, interest-group representation model to a more deliberative model of participation in the siting process." *Id.* at 834. She proposes to evaluate the legitimacy of government efforts to involve the public by asking the following:

> (1) whether those most affected by the decision either have an opportunity to participate directly or to be represented in each phase of the decision-making process; (2) whether the community is informed adequately about all available information regarding the proposed action and whether such information is accessible; (3) whether the agency is responsive to community knowledge and concerns; and (4) whether decision-making power and influence is shared between those asked to bear the greatest risk, those who stand to benefit the most, and the institutions, administrators, and technical experts responsible for the ultimate decision.

Id. at 834-35 (footnote omitted). *See also* Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995); Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459 (2002); Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENVTL. L. & LITIG. 207 (2002).

183. Cole, *supra* note 182, at 689.

responsible for disproportionate exposure to those communities. But if a decision is unfair, it is (or should be) beside the point to say that we arrived at it fairly. As Kuehn puts it, "procedural justice requires looking not just to participation in a process but to whether the process is designed in a way to lead to a fair outcome."[184]

An overemphasis on public participation as a solution to environmental injustice places too much responsibility on local communities to protect themselves against environmental harm. Especially for people who have never participated in local politics or administrative proceedings, organizing to speak out effectively and coherently can be difficult. Heavy work schedules, limited education, family responsibilities, and mistrust of government may all be barriers that need to be overcome. Because it is essential that communities be informed, voice their concerns, and be integrally involved in decision-making that affects their lives directly, those in positions of authority must take it upon themselves to become educated about what polluted communities are enduring and what environmental justice implications will stem from their official actions. They need to guard against the momentum that can amass behind a project *before* the public is involved, so that public participation does not become an empty ritual. Ultimately, it is government and the courts, not the members of environmentally burdened communities, who need to take responsibility for addressing distributional inequities.[185]

3. Procedural Claims Under NEPA

NEPA requires an Environmental Impact Statement (EIS) for major federal actions significantly affecting the environment.[186] A major federal action is construed broadly to include actions "which are potentially subject to [f]ederal control and responsibility," such as government projects, adoption of official policy, permits for non-governmental projects, and projects or programs that receive federal funding.[187] NEPA's implementing regulations call for a preliminary Environmental Assessment (EA) to be performed to discern whether a federal action could have a significant impact on the environment.[188] If there is potential for such an impact, the federal agency must complete a detailed EIS, documenting the environmental impact and presenting a range of alternatives, including "no action."[189] If not, the agency issues a Finding of No Significant Impact (FONSI).[190] NEPA is designed to ensure informed federal decision-making, not to mandate the most environmentally sensitive choice among alternatives. Therefore, NEPA challenges target the process of decision-making, from the scope of impact considered to the timing of the inquiry, not the ultimate decision. Because NEPA does not provide an independent right of action, NEPA challenges are brought under the Administrative Procedures Act. Courts uphold agency decisions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[191]

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184. Kuehn, *supra* note 1, at 10,681.
185. *See* Lazarus, *supra* note 48, at 850.
186. 42 U.S.C. § 4332(C) (1994).
187. 40 C.F.R. § 1508.18 (2003).
188. *Id.* § 1501.3.
189. *Id.* §§ 1502.1-1502.25.
190. *Id.* § 1501.4.
191. 5 U.S.C. § 706(2)(A) (2000).

In 1994, President Clinton issued an Executive Order titled *Federal Actions to Address Environmental Justice in Minority and Low-Income Populations*[192] directing federal agencies to address "disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations."[193] This brought environmental justice to the attention of federal agencies, and it became common to challenge the adequacy of an agency's EIS or a FONSI decision for failing to consider the environmental justice implications of the federal action. The Eighth Circuit has stated, in the NEPA context, that "[t]he purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations. To accomplish this, an agency must compare the demographics of an affected population with demographics of a more general character . . . ."[194] Other courts have simply paraphrased the language set forth in the Executive Order.[195] Yet the Executive Order has limited utility—although it injected the issue of environmental injustice into routine federal consideration, it did not provide a private right of action and courts do not enforce its mandates.[196] This alone should not limit courts' consideration of environmental justice impacts under NEPA, however. Without using the term environmental justice, NEPA regulations support environmental justice inquiries, but are limited to "the natural and physical environment and the relationship of people with that environment," stating that "economic or social effects are not intended by themselves to require preparation of an environmental impact statement."[197] Unfortunately, perhaps because of this exclusion, not all courts have required consideration of environmental justice to find an EA or EIS adequate. As one district court judge put it, "the concept of 'environmental justice' is not a fundamental right, and does not alone give rise

192. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), *amended by* Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Jan. 30, 1995).

193. *Id.* at 7629. For more on this Executive Order, see Bradford C. Mank, *Executive Order 12,898*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 39.

194. Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520, 541 (8th Cir. 2003).

195. *See* Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 688 (D.C. Cir. 2004) ("[A]n 'environmental justice' analysis [is] intended to evaluate whether the project would have disproportionately high and adverse human health or environmental effects on low-income and minority populations"); Spiller v. Walker, 2002 WL 1609722, at *19 (W.D. Tex. Jul. 19, 2002) ("An environmental justice analysis determines whether there are any disproportionately high adverse human health or environmental effects on minority or low-income populations.").

196. The Order states that it "is intended only to improve the internal management of the executive branch and . . . shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order." Exec. Order No. 12,898, *supra* note 192. *See, e.g.*, Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. Fed. Energy Regulatory Comm'n, 143 F.3d 165, 173 (4th Cir. 1998) (refusing to consider a claim under Executive Order 12,898 because petitioners advanced it for the first time on appeal); Sur Contra La Contaminacion v. EPA, 202 F.3d 443, 449 (1st Cir. 2000) (holding that an agency's noncompliance with the Executive Order is not appropriate for judicial review).

197. 40 C.F.R. § 1508.14 (2003). *See* One Thousand Friends of Iowa v. Mineta, 250 F. Supp. 2d 1064, 1072 (S.D. Iowa 2002). For a useful overview of socioeconomic impact assessment under NEPA, see Sheila Foster, *Impact Assessment*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 256-78.

to judicial review by this or any other court."[198] Disturbingly, another court recently held that it lacked jurisdiction to review the environmental justice portion of an EIS completed by the Navy.[199] Some courts have resisted the assertion that the federal government's recognition of environmental justice as a problem expands the scope of what agencies must consider under NEPA.[200] Although the Executive Order did not expressly expand this scope, some have argued that courts should view it in these terms given the Supreme Court's position that the adequacy of an agency's NEPA inquiry "is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood."[201]

When courts do evaluate the extent to which an EIS considered environmental justice implications of a project, the cases show that they are requiring little on the part of agencies before deferring to their decisions. For example, in *Communities Against Runway Expansion, Inc. v. FAA*, community groups and the City of Boston challenged Federal Aviation Administration (FAA) site selection for a new runway at Logan Airport.[202] Boston argued that the FAA's environmental justice analysis was arbitrary and capricious because its definition of "potentially affected area" was too large, including all of Suffolk County, and did not properly consider the disparate impact of the project. The court held that the environmental justice analysis was discretionary, and regardless, the inquiry was satisfactory for NEPA purposes because the FAA's methodology "was reasonable and adequately explained."[203] In sum, it does not appear to be difficult for government agencies to take a cursory look at environmental justice issues and have a decision upheld.[204]

The decision by the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission in In re *Louisiana Energy Services* is a non-judicial example to the contrary.[205] The three-judge board denied a license for a proposed uranium

198. One Thousand Friends of Iowa v. Mineta, 250 F. Supp. 2d at 1084.

199. Citizens Concerned About Jet Noise, Inc. v. Dalton, 48 F. Supp. 2d 582, 604 (E.D. Va. 1999).

200. *See, e.g.*, New River Valley Greens v. U.S. Dep't of Transp., 1996 U.S. Dist. LEXIS 16547 (W.D. Va. 1996), *aff'd*, 129 F.3d 1260 (4th Cir. 1997).

201. Mank, *supra* note 193, at 125 (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 552-53 (1978)).

202. 355 F.3d 678 (D.C. Cir. 2004).

203. *Id.* at 688-89. *See also* Coliseum Square Ass'n, Inc. v. Dep't of Hous. & Urban Dev., 2003 WL 1873094, at *1, 4 (E.D. La. Apr. 11, 2003). In that case, plaintiffs argued that HUD's FONSI decision and subsequent approval of a Wal-Mart Superstore site within a public housing project was inadequate under NEPA because HUD did not adequately consider "issues of environmental justice," among other things. *Id.* The HUD consultant's report, which found a "net positive effect on the minority and low-income population," satisfied the court that the issue was adequately considered for NEPA purposes. *Id. See also* Friends of Pioneer St. Bridge Corp. v. Fed. Highway Admin., 150 F. Supp. 2d 637, 652 (D. Vt. 2001). In that case, plaintiffs challenged the FHWA's categorical exclusion of a bridge project from NEPA requirements, citing, among other things, a failure to consider environmental justice issues in that determination. *Id.* The court found it sufficient that after plaintiffs raised the issue to FHWA in a letter, the project manager attached an analysis to the CE re-evaluation stating that the properties "did not constitute a 'low-income neighborhood.'" *Id.*

204. It should be noted, however, that many agencies have added substantial environmental justice evaluations to their EA and EIS. *See, e.g.*, Spiller v. Walker, 2002 WL 1609722 (W.D. Tex. Jul. 19, 2002) (recognizing that federal agencies devoted an "entire chapter" of an EA to "environmental justice concerns").

205. *In re* Louisiana Energy Services, L.P., 45 N.R.C. 367, 1997 NRC LEXIS 20 (1997) (final initial decision).

facility immediately adjacent to Center Springs and Forest Grove, Louisiana, where nearly 100% of the population is low-income and African-American, based on a deficient EIS.[206] In particular, the Board required a disparate impact analysis and investigated the possibility that racial bias influenced the siting process.[207]

Environmental justice claimants also bring NEPA challenges on traditional grounds, such as scope, timing, consideration of alternatives, and quality of analysis, often in conjunction with other environmental organizations.[208] This was the approach taken in *Warren County v. North Carolina*, in which Warren County challenged the State's decision to locate a landfill there for the disposal of PCB-contaminated soil by seeking judicial review of the adequacy of the State's EIS for the project.[209] Although this challenge was unsuccessful, the case is often cited as the one that launched the environmental justice movement in earnest.[210] NEPA challenges can be frustrating because they are strictly procedural in nature, leaving plaintiffs with nothing if a court finds the agency's EIS or FONSI decision satisfactory under the statute. However, they can serve as a way to force mitigating measures that increase the safety of a project that communities could not obtain by political means alone.[211]

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206. *Id.* at *1, 3-4.

207. Foster, *supra* note 197, at 276. For a detailed overview of In re *Louisiana Energy Services, L.P.*, see *id.* at 272-78.

208. *See, e.g.*, Tex. Comm. on Natural Res. v. Van Winkle, 197 F. Supp. 2d 586 (N.D. Tex. 2002) (joining Friendship Homeowners Association for Environmental Justice, the Sierra Club, Friends of the Earth, Dallas County Audubon Society, and Citizens for a Safe Environment, among others, as plaintiffs to challenge an Army Corps of Engineers EIS for the Dallas Floodway Extension project).

209. 528 F. Supp. 276, 280 (E.D.N.C. 1981). Plaintiffs also argued that the site approval by EPA was defective because it contained impermissible waivers of EPA regulations and that the disposal of PCBs constituted a public nuisance. *Id.* at 280.

210. *See* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 35-38 (1990).

211. The court spoke to this in *Spiller v. Walker*, in which it deferred to the federal government's FONSI for the Longhorn gas pipeline in Austin, finding it sufficient under NEPA. 2002 WL 1609722, at *20-21 (W.D. Tex. Jul. 19, 2002). In its conclusion, the court acknowledged the inadequacy of a NEPA action to protect plaintiffs, community members and the City of Austin, but noted that pursuing the claim was still worthwhile:

> What the Plaintiffs and City really want—no gasoline flowing through the Pipeline, certainly not through 52-year-old pipe, through our backyards and over our aquifers—would not be accomplished through an EIS. . . . The undersigned personally is extremely concerned Longhorn will begin pushing high-grade gasoline through the Pipeline in less than a month, which it has assured the Court it intends to do. The Court finds no consolation whatsoever in the fact that Longhorn is a limited partnership with limited liability and has only $15 million of liability insurance. Had the Court been granted more discretion, at a very minimum the undersigned would find it reasonable to order Longhorn to replace the 52-year-old pipe in all populated areas and in areas that affect people's drinking water supply. However, the Court has no such discretion and recognizes the importance of staying within the sharp boundaries of judicial review. . . . [T]he Court hopes [plaintiffs and the City] find some reassurance in Longhorn's "unprecedented" mitigation measures for the Pipeline, which likely would not have come about but for their fervent and articulate NEPA challenge. The mitigation measures are a product of the effective process. Time will only tell if the mitigation measures will be sufficient to contain the dangers inherent in this decrepit Pipeline, and the people and critters in its threatening shadow can only hope and pray that they will.

IV. THE ROLE OF THE COURTS

Environmental injustice is a widespread and complicated environmental and social justice problem that is by no means the judiciary's sole responsibility to solve. Many activists and policy makers are working to understand and address environmental injustice at the local, state, and federal levels.[212] The courts do have an important role, however—to provide access to justice when policymakers fail environmentally burdened communities. As the last Section demonstrated, current judicial interpretations of environmental and civil rights law have served mostly to deny this access to environmental justice claimants. This Section raises key concepts and principles that deserve reexamination by courts in the environ-

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> . . . The Plaintiffs won relief in several ways. First, the government finally admitted its responsibility and selected the DOT's Office of Pipeline Safety as the responsible agency. Plaintiffs then obtained an in-depth investigation of the Pipeline and resulting EA, which took over a year and a half. Plaintiffs also in the process received significant mitigation concessions from Longhorn along with a commitment that the OPS will ensure the completion of those mitigation features and closely monitor this Pipeline that puts in jeopardy thousands of people who live above it and many more thousands of people who depend upon the water it runs through. . . . All costs will be taxed to the Defendants, as this Court determines the Plaintiffs and City were the prevailing parties, notwithstanding a take nothing judgment.

Id. The opinion concludes with a warning:

> The undersigned hears frequently of his many weak personality traits, but memory is not among them. Regardless of the OPS's claim to fame of having only nine employees to monitor all pipelines in the southwest United States, the undersigned will not forget OPS's commitment to enforce Longhorn's mitigation measures and monitor *this* Pipeline.

Id. at 21 n.8.

212. Community groups working against environmental injustice where it takes place have done the most to advance the environmental justice cause, bringing the cases cited in this Comment and raising broad social and political awareness of the problem. Law professors and other scholars have responded by focusing significant attention on environmental injustice and its economic and racial implications. Universities have established centers for the study of environmental justice, and legal aid organizations are taking up the issue on behalf of the poor. States have passed laws and adopted policies, with varying degrees of effectiveness, which acknowledge environmental injustice. *See generally Environmental Justice for All: A Fifty-State Survey of Legislation, Policies, and Initiatives*, 2004 A.B.A. SEC. INDIVIDUAL RIGHTS & RESPONSIBILITIES (Steven Bonorris ed.) *available at* http://www.abanet.org/irr/committees/ environmental/statestudy.pdf (last visited Oct. 6, 2004). President Clinton's 1994 Executive Order, *see* Mank, *supra* note 193, established the goal or at least the concept of environmental justice firmly within the culture of federal policymaking. In the last year alone, four bills have been introduced at the federal level that seek to address environmental injustice in some way. *See* Healthcare Equality and Accountability Act, S. 1833, 108th Cong. (2003) (introduced by Senator Tom Daschle); Calfed Bay-Delta Authorization Act, S. 1097, 108th Cong. (2003) (introduced by Senators Dianne Feinstein and Barbara Boxer); Water Supply, Reliability, and Environmental Improvement Act, H.R. 2828, 108th Cong. (2003) (introduced by Representative Clavert Kern); Environmental Justice Act of 2003, H.R. 2200, 108th Cong. (2003) (introduced by Representatives Mark Udall and Hilda Solis). It is worth mentioning that even if no new legislation is passed to address the problem directly, many environmental laws include significant EPA discretion in implementation. For an overview of EPA's discretion in permitting from an environmental justice perspective, see Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999). For a recent summary of EPA efforts to address environmental injustice, see Barry E. Hill, *Environmental Justice Action Plans at the Environmental Protection Agency*, 30 HUM. RTS. 9 (2003).

mental justice context. First, I argue for increased recognition of disparate impact within equal protection jurisprudence and discuss why the intent requirement is so problematic. Second, I assert the need for heightened scrutiny of economic discrimination, and suggest that the lack of it has hindered legitimate civil rights claims. Third, I encourage greater consideration of how the fundamental right to bodily integrity arises in the environmental justice context. Fourth, I consider the environmental justice implications of the courts' treatment of "risk."

A. Disparate Impact and the Intent Requirement

The fact that environmental hazards correlate with race, even when there is no discernable conscious racism at play, underscores how institutional racism operates in the society to the detriment of people of color without a cabal of racists acting deliberately. To require burdened communities to prove intentional discrimination to have a cognizable claim is, in effect, to say that absent such proof, even clearly demonstrated inequities are, in fact, just—that these people have no legitimate grievance. The problem of environmental injustice casts the Supreme Court's intent-focused equal protection doctrine as inadequate and out of step with modern understandings of how historic white privilege and racial subjugation are perpetuated.

It is important to remain aware that the intent requirement for equal protection claims is a judicial creation. The language of the Equal Protection Clause forbids states from denying any person "equal protection of the laws." It does not allocate this protection based on whether a discernable motive can explain the denial. Indeed, prior to *Washington v. Davis,*[213] a number of Supreme Court cases had led to confusion among lower courts on this point. Five years earlier, the Court suggested in a statutory context, that plaintifs did not have to prove intent to discriminate where discriminatory effect was evident. *Griggs v. Duke Power Co.*[214] suggested that a showing of disproportionate impact by a plaintiff would shift the burden to the government defendant to justify the challenged measure.[215] The same year, in *Palmer v. Thompson*, the Court treated inquiry into decision-makers' motivations as inappropriate.[216] These were interpreted by some courts to establish that discriminatory purpose was irrelevant to the analysis of equal protection claims.[217] *Washington v. Davis* rejected this reading and limited the *Griggs* holding to the statute at issue in that case. The Court's rationale for establishing the intent requirement, and rejectiing disparate impact as sufficient basis for equal protection claims, was less reasoned than it was functional:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps 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.[218]

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213. 426 U.S. 229 (1976).

214. 401 U.S. 424 (1971) (a Title VII employment discrimination case).

215. *See also* Evans, *supra* note 1, at 1277-78.

216. 403 U.S. 217 (1971) (upholding a decision by the city of Jackson, Mississippi to close all city pools rather than racially integrate them).

217. *See* Evans, *supra* note 1, at 1277.

218. Washington v. Davis, 426 U.S. at 248.

Yet the opinion invites contradictory conclusions. At once, the Court acknowledged that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," but set the standard for finding such an inference arbitrarily high, using *Yick Wo* as the threshold example.[219] Stevens concurred in the opinion, but also clearly recognized that the same approach to discerning whether discrimination has occurred varies by context.[220] His concurrence captures the problem with the intent requirement and articulates one of the best rationales for judicial willingness to view disparate impact as evidence of discrimination within the meaning of the Equal Protection Clause:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process.... My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is ... dramatic ... it really does not matter whether the standard is phrased in terms of purpose or effect.[221]

Both *Washington v. Davis* and *Arlington Heights* have been heavily criticized by scholars and civil rights activists who point to the inadequacy of an Equal Protection Clause that fails to address covert forms of racism.[222] A prime example, now infamous in the environmental justice community of scholars and activists, is a report prepared for the California Waste Management Board by consultants Cerrell Associates in 1984.[223] In its report, Cerrell openly recommended the Board locate polluting industry and waste facilities in lower socioeconomic neighborhoods because it is politically expedient: "[A]ll socioeconomic groupings tend to resent the nearby siting of major facilities, but middle and upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeco-

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219. *Id.* at 241.

220. *Id.* at 252-53 (Stevens, J., concurring). One of the key reasons is that the test was widely used throughout government, which tended to undermine plaintiffs' allegations that the D.C. police department's use of the test was discriminatory. *Id.* at 245-46. Verbal communication was also held to be a legitimate subject for the department to test given the high level of interaction between police officers and the public. *Id.*

221. *Id.* at 253-54 (Stevens, J., concurring).

222. *See, e.g.*, Evans, *supra* note 1; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1986); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Saleem, *supra* note 1. *But see* Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329 (1995).

223. *See* Evans, *supra* note 1, at 1257 (citing CERRELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING (1984)).

nomic strata neighborhoods should not fall within the one-mile and five-mile radius of the proposed site."[224] One could argue that decisions made according to the Cerrell directive are not motivated by intent to discriminate against people of color, who will often comprise the majority of those living outside the "middle and higher" socioeconomic neighborhoods, but rather a desire to complete a project quickly. Yet the obvious and ugly subtext of such a calculation is that a systematic approach to siting environmentally hazardous facilities in poor areas is not just acceptable, but prudent.

Moreover, as Justice Stevens noted in his concurrence quoted above, the law normally presumes that an actor intends the natural consequences of his actions.[225] This is a common legal premise that is widely acknowledged in tort and criminal law, which the Supreme Court has inexplicably abandoned in the civil rights context.[226]

Sheila Foster offers another vital critique of the intent-focused view of discrimination, that "[t]he insistence on establishing a linear, causal connection . . . is premised on a static, atomistic conception of agency which disaggregates individuals and institutions from their social context."[227] Her more sophisticated understanding of agency does justice to those governmental decision makers who operate within institutions that are structurally discriminatory—it does not charge

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224. *Id.* (quoting CERRELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING (1984)).

This recommendation by Cerrell Associates implicitly acknowledges the NIMBY (Not In My Backyard) syndrome, a stance that has become associated with environmental injustice as a mechanism by which white communities with political power have shifted the burden of environmental hazards onto poorer, less politically powerful communities. Yet if NIMBY sentiments were disassociated from political power, or if those in power were to preach "Not in Anybody's Back Yard" instead, the result would be a broad-based toxics reduction, which is the larger goal of environmental justice. *See* Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, *in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 70 (Robert D. Bullard ed., 1994) (discussing the threat that politically powerful white NIMBY groups pose to communities of color). The NIMBY dilemma highlights what is both the strength and the weakness of distribution-oriented analysis of environmental injustice: it recognizes the fact that minority low-income communities should not endure disproportionate environmental harms, but it fails to address the production of those harms, as if spreading the risk across us all is the desirable and "equitable" result we seek. Environmental justice demands that we dispense with the assumption that toxic pollution in the quantity it is currently being generated *will* and *must* be in someone's backyard.

225. Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring).

226. See the following explanation of intent from the *Restatement (Second) of Torts:*

> If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases still further, and amounts only to a risk that the result will follow, it becomes ordinary negligence.
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> . . .

RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

Similarly, in the criminal law context, "the natural-and-probable-consequences doctrine simply states the obvious, i.e., that it is reasonable for a juror, like anyone else, to infer that a person ordinarily intends the foreseeable consequences of his actions." JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 138 (2d ed. 1999).

227. Foster, *supra* note 1, at 791-92 (footnotes omitted).

that they are personally racist—while also recognizing the harm they perpetuate. We saw the effects of the stilted reasoning she criticizes in *Bean* and *R.I.S.E.* The courts openly acknowledged the disproportionate waste burden carried by the plaintiffs, yet professed to follow *Washington v. Davis* and *Arlington Heights* in holding that, without more, their burden was not constitutionally significant.[228]

Finally, on a theoretical note, it is racially problematic for the entire equal protection analysis to focus on the alleged wrongdoer—typically a white-run government body with the power to deny equal protection—and not on the people of color whom the Fourteenth Amendment is meant to protect from harm.[229] Under the *Washington v. Davis* framework, claimants may assert the right to be free from harm at the hands of government if and only if the treatment is accompanied by a particular attitude on the part of the government actors. The harmed party's condition and rights are defined according to the contours of the injuring party's "neutral on its face" agenda, though the result for the harmed party is exactly the same. The cynical message is: put yet another waste dump in the black neighborhood and you're fine as long as you say it was the most environmentally suitable site and offer to listen to complaints before signing the permit.

The expediency of resorting to an intentional/unintentional distinction is not a valid reason for resorting to an oversimplified analysis of the Equal Protection Clause or Title VI of the Civil Rights Act of 1964.[230] The Court's concern in

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228. See the following acknowledgements from the *Bean* court:

> The opening of the facility *will affect* the entire nature of the community—its land values, its tax base, its aesthetics, the *health and safety of its inhabitants*, and the operation of Smiley High School, located only 1700 feet from the site. Damages cannot adequately compensate for these types of injuries.
>
> . . . .
>
> . . . [T]he decision of TDH seems to have been insensitive and illogical. Sitting as the hearing examiner for TDH, based upon the evidence adduced, this Court would have denied the permit.

Bean v. S. W. Waste Mgmt. Corp., 482 F. Supp. at 677, 681 (emphasis added). Yet the court concluded:

> From the evidence before me, I can say that the plaintiffs have established that the decision to grant the permit was both unfortunate and insensitive. I cannot say that the plaintiffs have established a substantial likelihood of proving that the decision to grant the permit was motivated by purposeful racial discrimination in violation of 42 U.S.C. § 1983. This Court is obligated, as all Courts are, to follow the precedent of the United States Supreme Court and the evidence adduced thus far does not meet the magnitude required by *Arlington Heights* . . . .

Id. at 680 (footnote omitted).

Similarly, in *R.I.S.E.*, the court recognized that "[t]he placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents." R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149 (E.D. Va. 1991).

229. Alan Freeman refers to this as the "perpetrator perspective" in civil rights law. *See* Freeman, *supra* note 45, at 1052-57. *See also* ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 2 (2001) ("The contemporary logic of American antidiscrimination law has . . . contributed to the development of arbitrary and inarticulate doctrine. It has sustained a deep insensitivity to entrenched social inequalities . . . .").

230. This is so whether the plaintiffs bring a claim under the Equal Protection Clause or the Civil Rights Act of 1964, now that the Supreme Court has imputed the intent requirement to its interpretation of Title VI. *See supra* Part III.A.2. As with the Fourteenth Amendment, the language of Title VI § 601 does not distinguish between intentional and unintentional discrimination.

Washington v. Davis, that government policies with disproportionate benefits to "affluent whites" are called into question by disparate impact analyses, is overdetermined. Environmental justice communities deserve more astute analyses of their predicament from the courts—more subtle approaches that reject historical pretenses that merely serve to "lock their subordinated and disadvantaged status into place."[231] Both the Constitution and federal law mandate that courts protect against racial discrimination but in this important area, however neat the analysis, the courts have largely failed.

B. Economic Discrimination

Economic disadvantage is an essential part of the environmental injustice problem that courts consistently neglect to consider when they evaluate these claims. Excluding poverty from legal consideration is at odds with what we know about the distributional patterns of environmental burdens, it undermines our civil rights laws, and it perpetuates status quo environmental injustice.

Virtually without exception, activists, scholars, government agencies, and courts alike acknowledge that environmental justice addresses the disproportionate environmental burden on people of color *and* people with low incomes, including whites. Nevertheless, the issue of economic disadvantage completely drops out of the courts' analyses for equal protection purposes.[232] In *San Antonio Independent School District v. Rodriguez*, the Supreme Court explicitly refused to apply heightened scrutiny to claims based on alleged economic discrimination.[233] The case was a class action suit by Mexican-American parents on behalf of poor families, alleging that the school financing system, based on property taxes, produced unconstitutional disparities in per-pupil spending between school districts.[234] The lower courts, which treated income as a suspect classification requiring strict judicial scrutiny, held education to be a fundamental constitutional interest, and invalidated the Texas scheme, but the Supreme Court reversed.[235] The Court held that "wealth discrimination" was not an adequate basis for strict scrutiny because the poor "have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[236] The Court proceeded to analyze the case under the rational basis standard and upheld the

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231. Yang, *supra* note 43, at 31.

232. In the Title VI context, courts are constrained by the scope of Title VI protection to "race, color, or national origin." 42 U.S.C. § 2000d (1994). But see *supra* note 212 for recent proposals in Congress to address both racial and economic discrimination in the environmental justice context.

233. 411 U.S. 1 (1973). This position was first articulated, though with less detail, in *James v. Valtierra*, 402 U.S. 137 (1971).

234. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. at 4-5.

235. *Id.* at 18.

236. *Id.* at 28. The Court's choice of the term "wealth discrimination" as opposed to "poverty discrimination" is itself troubling, as the Court seems committed to resisting any genuine recognition of the disparities it perpetuated in this case. Similarly, when considering whether education is a fundamental interest, the Court worries "how, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?" *Id.* at 37.

finance system, concluding it "rationally further[ed] a legitimate state purpose or interest."[237]

Environmental justice advocates believe that low-income communities are much more vulnerable to the "political process" than the Court does. The Cerrell Associates' recognition that "middle and upper socioeconomic strata possess better resources to effectuate their opposition"[238] to waste facilities is a testament to the fact that discrimination based on socioeconomic status stems from just the sort of "political powerlessness" the Court cites as deserving "extraordinary protection." In the environmental justice context, at least in facility siting and statute enforcement, disproportionate exposure to environmental dangers along racial *and* economic lines is an accepted fact. As long as the courts continue to refuse to examine the role economic disadvantage plays in producing these disparate burdens, communities advancing civil rights arguments can only tell part of their story.[239] This is particularly important to environmental justice claimants attempting to demonstrate the harm of disparate impact—to racially balanced or white impoverished communities, the courts' current disregard of economic disadvantage makes civil rights theories unavailable, even though the discriminatory effect is the same as it would be if the area were populated predominantly by people of color. The fundamental point—that everyone, rich and poor, black and white, should share equally in the risks posed by environmental pollution—is dodged, again and again.

Although a full review of the Court's suspect class jurisprudence is beyond the scope of this Comment, it is clear that environmental justice calls for a heightened degree of scrutiny for economic discrimination claims, especially when combined with racial discrimination claims. In contrast to ensuring access to public education, medical care, shelter, or food, many instances of environmental injustice involve isolated government decisions that can be readily addressed by the courts. Compared with education, hunger, or homelessness, which the Supreme Court views as presenting a "myriad of 'intractable economic, social, and even philosophical problems,'"[240] for which the ultimate solution should "come from the lawmakers and . . . the democratic pressures of those who elect them,"[241] whether or not to approve a waste facility in an already burdened low-income area is not so complicated. A broad judicial order that government provide basic food, shelter or equal education would involve public policy mandates for complex, expensive new government programs. In such cases, the argument that this would be judicial overreaching is understandable. By contrast, scrutiny of economic discrimination based on the disproportionate impact of specific environmental decisions does not demand nearly as much or raise questions about judicial encroachment. Although racial classifications are of the highest concern and command the

237. *Id.* at 55.

238. *See* Evans, *supra* note 1, at 1257.

239. *See, e.g.*, Terence J. Centner et al., *Environmental Justice and Toxic Releases: Establishing Evidence of Discriminatory Effect Based on Race and Not Income*, 3 WIS. ENVTL. L.J. 119, 141 (1996) (noting the obstacles to compiling sufficient evidence of discrimination based solely on race).

240. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. at 42 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970) (holding that there is no fundamental right to shelter)).

241. *Id.* at 59.

strictest scrutiny from the courts,[242] the Supreme Court has recognized quasi-suspect status for other categories, such as gender. In that context, the Court puts the burden on the State to offer an "exceedingly persuasive" justification for the challenged measure, showing that it serves "'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[243] The realities of environmental injustice, and the role that economic disadvantage plays in the distribution of environmental hazards, provide a strong argument for similar judicial scrutiny of economic discrimination claims.

C. The Fundamental Right to Bodily Integrity

The right to bodily integrity is one of the rare substantive due process rights that courts have consistently recognized as fundamental to the Constitution's guarantee that no state shall "deprive a person of life . . . [or] liberty . . . without due process of law."[244] There is arguably nothing more essential to a person's life and liberty than health, and although most people would admit that some amount of pollution is necessary for the production of clear public benefits, environmental justice critiques the "necessity" of many environmental burdens, and demands that

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242. Justice Marshall's dissent in *San Antonio* explains why the Court has considered economic classifications less troubling than others:

> That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The "poor" may not be seen as politically powerless as certain discrete and insular minority groups. Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups[, b]ut [it] is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. While the "poor" have frequently been a legally disadvantaged group, it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests.

Id. at 121-22 (Marshall, J., dissenting) (citations omitted).

From this more moderate and reasoned perspective, Marshall found the case for economic discrimination in the property tax-based school financing scheme convincing, in part because "insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control, it represents . . . a more serious basis of discrimination than does personal wealth." *Id.* at 122 (citations omitted).

243. United States v. Virginia, 518 U.S. 515, 516 (1996) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (holding that Virginia Military Institute's gender-separated education facilities violated the Equal Protection Clause)).

244. U.S. CONST. amend. XIV. *See, e.g.*, the following cases cited in support of this proposition in Stadt v. Univ. of Rochester, 921 F. Supp. 1023, 1027 (1996): Albright v. Oliver, 510 U.S. 266, 273 (1994) (finding that "the protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity"); Schmerber v. California, 384 U.S. 757, 773 (1966) (stating that "the integrity of an individual's person is a cherished value of our society"); Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (finding that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

necessary burdens be shared so as not to deprive minority and low-income people of their life and liberty. Which and how much of the environmental health hazards allowed by current law lead to real public benefit is obviously highly debatable. My point here is that the right to bodily integrity is implicated to the extent that government participates in consistently overburdening certain people with environmental harms that are known to cause serious health problems.

The Michigan District Court's recent Memorandum Opinion and Order in *Lucero v. Detroit Public Schools* affirmed this view.[245] The case arose from a decision by the Detroit Board of Education to construct a new school on a contaminated site. The facility would consolidate two existing elementary schools—one comprised of 61% Hispanic and 13% African-American children, the other serving 58% African-American and 21% Hispanic children.[246] The Board of Education proceeded with its plans despite the findings of a report by the University of Michigan's School of Natural Resources and Environment, documenting the industrial history of the site and indicating the potential presence of "volatile organic chemicals (VOCs), semi-volatile organic chemicals, petroleum-related materials, polychlorinated biphenyls (PCBs), chlorinated solvents, various heavy metals and radioactive paints."[247] Families of the children who would be attending the school alleged environmental racism and brought suit against the Superintendent of the Detroit school system for failing to consider all possible alternative sites and making site plans without ensuring the children's safety.

This appears to be the only environmental justice case to argue this theory to date, and it met with success—the court accepted the plaintiffs' constitutional argument that the Fifth and the Fourteenth Amendments can be invoked to protect "the right to be free of state-sponsored invasion of a person's bodily integrity."[248]

Judge Denise Page Hood, who authored the order, cited three recent federal cases involving non-consensual medical experimentation[249] to inform her analysis, noting that "while not completely on point, these opinions support Plaintiffs' proposition that 'exposure to toxic contaminants that are then drawn into the lungs, blood stream and body organs of exposed children, where they could remain for a lifetime, is certainly a bodily invasion.'"[250] The court analogized the legal requirement that children attend school in a toxic setting to other involuntary "inva-

245. 160 F. Supp. 2d 767 (E.D. Mich. 2001).

246. *Id.* at 771.

247. *Id.* at 772.

248. Lucero v. Detroit Pub. Sch., No. 01-CV-72792-DT, 20 (E.D. Mich. Sept. 30, 2003) *available at* http://www.sugarlaw.org/info/BeardSchoolOpinionSept03.pdf (last visited Oct. 6, 2004). On similar grounds, though articulated in terms of substantive due process without naming bodily integrity specifically, the Legal Aid Society of Orange County, California, brought an action on behalf of homeless people to stop the spraying of the pesticide malathion in Los Angeles. Talevich v. Voss, 734 F. Supp. 425 (D. Cal. 1990) (denying motion for preliminary injunction).

249. Bibeau v. Pac. N. W. Research Found., 188 F.3d 1105 (D. Or. 1996), *dismissed on other grounds*, 980 F. Supp. 349 (1997); Stadt v. Univ. of Rochester, 921 F. Supp. 1023, 1027-28 (W.D.N.Y. 1996); *In re* Cincinnati Radiation Litig., 874 F. Supp. 796, 810-11 (S.D. Ohio 1995).

250. Lucero v. Detroit Pub. Sch., No. 01-CV-72792-DT, 21 (E.D. Mich. Sept. 30, 2003) (quoting Pls.' Reply Brief at 14), *available at* http://www.sugarlaw.org/info/BeardSchoolOpinionSept03.pdf (last visited Oct. 6, 2004).

sions of bodily integrity that the Supreme Court has deemed unconstitutional."[251] In evaluating the defendants' motion to dismiss, the court held that plaintiffs' factual allegations were sufficient, if proven, "to support a predictable constitutional claim in Plaintiffs' right to personal security and bodily integrity."[252]

According to the court, the key inquiry for assessing the claim on the merits would be whether defendants' actions were "outrageous and shocking," noting that "where, as alleged here, an official has the opportunity to deliberate over a matter, the judiciary will be 'shocked' if that 'official acts in a way that exhibits deliberate indifference to others' rights.'"[253] Clearly, the difficulty of proving the degree of risk posed by an environmental hazard remains an impediment. The court explained that, "a policymaking official is deemed to be deliberately indifferent when he disregards an obvious *risk of a harm* that is likely to result in the violation of constitutional rights."[254]

Although the fundamental right to bodily integrity is unlikely to be interpreted as broadly as some believe it should be—it would be untenable, for example, to argue that all polluting activity amounts to toxic trespass—*Lucero* shows that under certain circumstances, there is a strong argument to be made for applicability. Where school grounds are contaminated and children are compelled by law to expose themselves to that contamination when they attend the school, the analogy to forcible poisoning is raised.[255] To the extent that the exact dangers posed by the contaminated soil are unknown or uncertain, school officials cannot legitimately assert that there is not an "obvious *risk* of harm." As the *Lucero* plaintiffs charged, defendants' decisions created "unacceptably high risks" that students at the new school "will be exposed to chemical contaminants which can cause cancer, learning disabilities, hormone disruptions and other serious impairments of bodily functions" and that defendants "were well aware of the dangers of these contaminants, particularly for children."[256] In effect, exposing children to the genuine possibility of serious health problems is not dissimilar to non-consensual experimentation,

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251. *Id.* In support of this assertion, the court referenced *Riggins v. Nevada*, 504 U.S. 127, 129 (1992) (holding it was a violation of the Fourteenth Amendment to forcibly administer antipsychotic medication during trial), *Washington v. Harper*, 494 U.S. 210, 229 (1990) (characterizing the "forcible injection of medication into a nonconsenting body" as a "substantial interference with that person's liberty"), *Winston v. Lee*, 470 U.S. 753, 766 (1985) (holding that surgical removal of a bullet from a criminal suspect's body without his consent and without a "compelling need" violated the Fourth Amendment), *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that government violated defendant's Fourteenth Amendment rights by forcibly extracting drugs from his stomach), and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding forced sterilization unconstitutional).

252. Lucero v. Detroit Pub. Sch., No. 01-CV-72792-DT at 21.

253. *Id.* at 22 (citing Waller v. Tripett, 179 F. Supp. 2d 724, 731 (E.D. Mich. 2001)).

254. *Id.* (citing Farmer v. Brennan, 511 U.S. 825, 840-42 (1994)).

255. A similar argument might fruitfully have been made in the *Bean* case, in which the court refused to invalidate the permit for a solid waste site within 1,700 feet of a high school with no air conditioning. Bean v. S. W. Waste Mgmt. Corp., 482 F. Supp. 673, 679 (S.D. Tex. 1979).

256. Lucero v. Detroit Pub. Sch., No. 01-CV-72792-DT at 22 (citing Brief of Resp't at 16).

which has been the subject of much of the bodily integrity case law.[257] In In re *Cincinnati Radiation Litigation*, the court explained that the cases in which violation of bodily integrity was held to be permissible required the government "to provide more than minimal justification for its action."[258] The court stated that "[w]hen an individual's bodily integrity is at stake, a determination that the state has accorded adequate procedural protection should not be made lightly," noting that bodily invasions "often cannot be readily remedied after the fact through damage awards in the way most deprivations of property can."[259] Among the crucial factors for assessing whether the government action involves "needless severity" is "the *risk of irreversible injury to health,* and the danger to life itself."[260]

Again, the biggest obstacle to such claims is the problem of uncertainty—whether the potential for environmental harm amounts to "speculative dangers" or "risk of harm likely to result" from exposure.[261] To environmental justice advocates, placing the burden on plaintiffs to prove the risk of harm they face creates an inappropriate presumption in favor of profit-driven polluters. The obstacle is not always insurmountable, however, and in cases that involve environmental harm affecting public schools, prisons, military bases, and public housing, where it can be readily argued that exposure is involuntary, approving a project that poses a genuine risk with uncertain likelihood begins to resemble forcible experimentation. In *Lucero,* the record was clear that no one knew with certainty what effect the soil contaminants would have on the black and Latino children who needed to attend the school, but the risks were genuine—they had a fundamental right to bodily integrity not to be "guinea pigs." How and when environmental injustice implicates the fundamental right to bodily integrity is a question that courts and advocates should explore further.

D. The Concept of "Risk"

The identification, assessment, and management of "risk" is central to the administration of our environmental laws, and courts have played an important role in defining "risk" in various contexts. In light of the abundant documentation that toxic exposure is not shared evenly across the population, current perspectives on how to assess risks and what risks are "acceptable" are dated and perpetuate environmental injustice.

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257. *See, e.g., In re* Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995) (denying motion to dismiss bodily integrity claim by cancer patients who were subjected to non-consensual military radiation experiments between 1960 and 1972).

258. *Id.* at 813. *See also* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that the state interest in preventing a small pox epidemic justified compulsory vaccinations); Schmerber v. California, 384 U.S. 757 (1966) (holding that blood-alcohol tests of auto accident victims by hospitals were reasonable).

259. *In re* Cincinnati Radiation Litig., 874 F. Supp. at 813.

260. *Id.* at 814 (citing Schmerber v. California, 384 U.S. at 772) (emphasis added).

261. *See* Lucero v. Detroit Pub. Sch., No. 01-CV-72792-DT at 23.

Conceptually, "risk" and the process of "risk assessment" are ethically problematic and riddled with scientific uncertainty.[262] The term "risk" itself suggests the possibility that harm will not occur, yet chemicals and pollutants are routinely approved at exposure levels that are known to cause harm and even death. It is well known that there is little or no data on most chemicals, providing plainly insufficient bases for reliable assessments of the health dangers they may pose.[263] As a result, risk assessment functions as a seal-of-approval of sorts, suggesting safety, when in many cases, this is a groundless representation at best. In addition to the significant problem of inadequate data, risk assessment accuracy is limited by a number of other factors. First, risk assessments have typically been based on the abstraction of an "average" adult male, failing to take account of the range of factors that affect a person's susceptibility to harm.[264] Only very recently, for example, thanks to pressure from Congress, President Clinton, and the scientific community at large, has EPA attempted to assess the complex and heightened risks to children as a vulnerable subpopulation.[265] Second, risk assessment fails to address cumulative or multiple exposures and the synergistic effects among pollutants—a particular concern to communities like Chester or South Camden.[266] Third, risk assessment has not accounted for distributional patterns of exposure to the risks in question.[267] Research methodologies employed to support risk assessments have also been directly criticized for obscuring the suffering associated with pollution behind their overly technical approach. Through "popular epidemiology," environmental justice activists have demonstrated a viable alternative to what they term "classical" epidemiological research.[268]

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262. A detailed account of the risk assessment process is beyond the scope of this Comment. For useful critiques of scientific risk analysis, see Carl F. Cranor, *Risk Assessment, Susceptible Populations, and Environmental Justice*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 4, at 308; Barry Commoner, *The Hazards of Risk Assessment*, 14 COLUM. J. ENVTL. L. 365 (1989); Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562 (1992); Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103; Brian D. Israel, Note, *An Environmental Justice Critique of Risk Assessment*, 3 N.Y.U. ENVTL. L.J. 469 (1995).

263. CARNEGIE COMM'N ON SCI., TECH., AND GOV'T, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING, *reprinted in* KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE 62-63 (1995). *See also* Hornstein, *supra* note 262, at 573 ("In all, the dominant legal critique has been instrumental in nature: that risk assessments do not, or cannot, reliably calculate expected losses"); Rodger C. Field, *Risk and Justice: Capitalist Production and the Environment*, *in* THE STRUGGLE FOR ECOLOGICAL DEMOCRACY, *supra* note 3, at 96 ("Precisely because of the constant introduction of new chemicals, it is impossible to answer the question demanded by a risk-based statutory scheme: what pollutants are harmful and at what levels?").

264. Kuehn, *supra* note 262, at 125.

265. *See* Michael Schon, Comment, *Susceptible Children: Why the EPA's New Risk Assessment Guidelines for Children Fail to Protect America's Future*, 36 ARIZ. ST. L.J. 701, 723 (2004). EPA issued Supplemental Guidance for Assessing Cancer Susceptibility from Early-Life Exposure to Carcinogens in 2003. *Id.* at 701-02 n.5. As of October 2004, EPA had still not released the final version of the document. *See* http://cfpub2.epa.gov/ncea/cfm/recordisplay.cfm?deid=55868&CFID=566547&CFTOKEN=30447443 (last visited Oct. 7, 2004).

266. Kuehn, *supra* note 262, at 118-19.

267. *Id.* at 128.

268. *See* Patrick Novotny, *Popular Epidemiology and the Struggle for Community Health in the Environmental Justice Movement*, *in* THE STRUGGLE FOR ECOLOGICAL DEMOCRACY, *supra* note 3, at 140-41.

Agency implementation of environmental statutes and judicial review of agency rulemaking and decisions are bound by the language of the statutes in question. The analysis may differ statute to statute because Congress has treated risk as a relative concept, depending on the context in which it is to be avoided or minimized. For example, the Clear Air Act (CAA) empowers EPA to set national ambient air quality standards to protect public health with "an adequate margin of safety,"[269] while under the Resource Conservation Recovery Act (RCRA), EPA must regulate hazardous waste "cradle-to-grave,"[270] including the activities of any private firm that generates, transports, stores, or disposes of such waste "as may be necessary to protect human health and the environment."[271] Consistent with principles of federalism and judicial deference, courts generally defer to agency interpretations so long as they do not conflict with or exceed the clear and unambiguous statutory mandate in question, and, where ambiguity exists, so long as the agency construction is reasonable.[272] What is a "reasonable" construction is often the crux of judicial review: what, for example, is a "safe" level of exposure to known carcinogens?

In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, a divided Supreme Court played a formative role in shaping environmental policy by addressing this very question in the context of the Occupational Safety and Health Act.[273] The toxic chemical benzene is known to cause cancer as well as blood disease and nervous system malfunction.[274] When no safe exposure level could be determined, the Occupational Safety and Health Administration (OSHA) set an exposure limit on airborne benzene of one part per million to ensure compliance with the statutory mandate to ensure a "safe" working environment.[275] The Court invalidated the regulation, holding that the agency only had statutory authority to prevent "*significant* risk of harm," because the word "'safe'" in the authorizing legislation was not, according to the Court, "the equivalent of 'risk-free.'"[276]

The agency argued that because there is no absolutely safe level for a carcinogen, the burden should be on industry to prove the safety of its chemical.[277] Rejecting this approach, the Court held that the burden was on OSHA to show with "substantial evidence" that at levels above its standard, benzene presented a "significant risk of material health impairment," even while acknowledging that only a zero exposure limit would suffice to protect every single worker from leukemia.[278]

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269. CAA, 42 U.S.C. § 7409(b)(1) (1994).

270. Am. Chemistry Council v. EPA, 337 F.3d 1060, 1065 (D.C. Cir. 2003).

271. RCRA, 42 U.S.C. § 6922(a) (1994).

272. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984) (reinforcing the principle of judicial deference to agency decisions).

273. 448 U.S. 607 (1980).

274. *Id.* at 617-20.

275. *Id.* at 624-25. The language of the Occupational Safety and Health Act directed the OSHA Secretary to set standards "'reasonably necessary and appropriate to provide safe or healthful employment'" for toxic materials that would assure "'to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.'" *Id.* at 639 (quoting 29 U.S.C. §§ 652(8), 655(b)(5) (1994)).

276. *Id.* at 642, 662 (emphasis added).

277. *Id.* at 652.

278. *Id.* at 636, 653.

The opinion failed to provide guidance for determining what is a "significant risk," even suggesting that a one-in-one-thousand risk "might well" be considered significant.[279] The fact that applying this risk level to the general population would result in approximately 300,000 deaths per year left many wondering: "How many additional deaths would be required before the plurality would find a risk *clearly* significant?"[280] What is clear is that, absent statutory language mandating zero-risk, the zero-risk standard is judicially invalid,[281] and the burden on agencies to justify toxics regulation on behalf of the public is heavy, to the benefit of polluters.

Industrial Union and its progeny have focused agency risk assessment on what some have termed the "de minimis" or "negligible risk" standard, which has usually been defined numerically as one case of cancer per million people exposed.[282] Of course, to say that this risk level is de minimis, or negligible, depends on a limited, solely economic view of the dispensability of human life. To the person who contracts cancer, the "risk" is hardly "de minimis." Jay Michaelson thus attacks the de minimis standard for allowing courts and federal agencies to hide behind scientific data in making what are essentially ethical decisions about people's health and well-being.[283] Science is easily enlisted to support a pretense that it provides objective, rational, "true" assessments. This "scientific packaging," Michaelson asserts, "may be what justifies in the public eye what would otherwise be an unjustifiable activity: allocating cancer or death to some people, so that the rest of us may enjoy shiny oranges or clean stovetops."[284] A de minimis determination allows "science" to obscure the real consequences of our environmental policies—it shields us from having to "admit that we are choosing oranges over people."[285]

Even if one rejects the view that no deaths are tolerable, environmental justice demands a reconceptualization of risk in environmental decision making that incorporates all we now know about how toxic exposure is borne across the population. In other words, if it is acceptable to establish de minimis risks, the levels set under current approaches are *still* too high given the patterns of exposure. To say that there is a one-in-one-million chance of contracting cancer through exposure to a given pollutant assumes that all of us have an equal chance of being that unfortunate one; yet environmental justice research has demonstrated that a person of color is much *more* likely to be *the* one.[286] Viewed this way, current risk assessment is anything but neutral.

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279. *Id.* at 655.

280. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 148 (2004).

281. See, for example, *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1153 (D.C. Cir. 1987), in which the D.C. Circuit rejected the zero-risk standard in the CAA context, citing *Industrial Union*.

282. Jay Michaelson, *Rethinking Regulatory Reform: Toxics, Politics, and Ethics*, 105 YALE L.J. 1891, 1899 (1996). *See also* CARNEGIE COMM'N, *supra* note 263, at 64 (regarding "risk assessment" determinations).

283. Michaelson, *supra* note 282, at 1903.

284. *Id.* at 1902.

285. *Id.* at 1903. Community activists who have experienced the hard reality of these choices have challenged these kinds of "acceptable risk" standards under the rallying cry, "our children are . . . significant." Novotny, *supra* note 268, at 142.

286. *See* discussion *supra* Part II.

Courts, however, have not only recognized risk assessment as reasonable, but have encouraged its use. Indeed, as attorney Mark Eliot Shere asserts, the judiciary has played a significant role in encouraging the current emphasis on risk assessment as a "neutral" method of deciding what substances to regulate and when.[287] He argues that the Supreme Court's opinion in *Industrial Union* "provided risk assessment with a solid legal foundation," which has been "further strengthened by subsequent cases in the D.C. Circuit . . . essentially mandat[ing] that administrative agencies use risk assessment to translate narrative environmental standards into numeric criteria."[288] He contrasts the strong judicial support for risk assessment in administrative decision making with the dearth of reference to risk assessment in environmental statutes, suggesting that "the language of the environmental laws provides little support for the current regulatory reliance on risk assessment."[289]

In recent years, with the increased use of cost-benefit analyses in policymaking,[290] the concept of risk has, in some contexts, evolved to also include consideration of factors wholly unrelated to protecting health and the environment. Perhaps the most prominent case in this vein is *Corrosion Proof Fittings v. EPA*, in which the D.C. Circuit invalidated an EPA ban on asbestos.[291] EPA had determined, after reviewing over 100 studies, that asbestos is a "potential carcinogen at all levels of exposure."[292] Accordingly, the agency concluded that asbestos exposure poses "an unreasonable risk to human health and the environment" and imposed a staged ban on most commercial uses of the substance.[293] The court vacated the regulation, however, holding that EPA failed to consider the costs and benefits of alternative control measures. According to the court, the Toxic Substances Control Act required the agency to conduct a cost-benefit analysis to arrive

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287. *See* Mark Eliot Shere, *The Myth of Meaningful Environmental Risk Assessment*, 19 HARV. ENVTL. L. REV. 409, 421-30 (1995) (discussing current case law trends).

288. *Id.* at 420-21 (referencing Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986) and Natural Res. Def. Council v. EPA, 824 F.2d 1146 (D.C. Cir. 1987)).

289. *Id.* at 417. Shere's dissatisfaction with risk assessment as a methodology is its unreliability. He considers it to be "no more than the elaborate quantification of long chains of controversial assumptions." *Id.* at 416. It is important to note, however, as he correctly does, that "the malleability of risk assessment allows it to be used to support both pro-and anti-regulatory views." *Id.* at 427. His own ultimate conclusion illustrates this well—he proposes to "separate health issues from the other important issues of environmental regulation, putting the health issues back into the hands of health professionals and keeping the true environmental issues for environmental regulators." *Id.* at 480. This proposal is, of course, antithetical to environmental justice values, which are based on the fundamental premise that the environment is "where we live, work, and play," and that so-called "true" environmental issues are inseparable from our health and our built environment.

For a well-argued critique of the role of science in environmental decision making, how it might be made more effective, and judicial review of EPA science-based decisions, see E. Donald Elliott, *Science in the Regulatory Process: Strengthening Science's Voice at EPA*, 66 LAW & CONTEMP. PROBS. 45 (2003).

290. *See* Thomas O. McGarity, *Economic Dynamics of Environmental Law and the Static Efficiency: The Goals of Environmental Legislation*, 31 B.C. ENVTL. AFF. L. REV. 529, 551 (2004) (discussing recent "cost-benefit supermandates" from Congress and their impact on environmental law).

291. 947 F.2d 1201, 1207 (5th Cir. 1991).

292. *Id.* at 1207.

293. *Id.* at 1208 (referencing 15 U.S.C. § 2605(a) (1994)).

at what were "unreasonable" risks, which involves determining "if the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation itself imposes upon manufacturers and consumers."[294] The court reasoned that unless the agency could offer "substantial evidence" that the dollar value of the lives protected bore "a reasonable relationship to the costs imposed" by the ban, it could not satisfy the statutory threshold of showing that the ban was "reasonably necessary" to prevent harm.[295]

The court attempted to distance itself from the ethical strain of the decision, asserting that it did "not sit as a regulatory agency that must make the difficult decision as to what an appropriate expenditure is to prevent someone from incurring the risk of an asbestos-related death."[296] But the court's suggestion that the

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294. *Id.* at 1222 (quoting Forester v. CPSC, 559 F.2d 774, 789 (D.C. Cir. 1977)).

The way in which courts engage in cost-benefit analyses themselves can be quite disturbing. Consider, for example, this "balancing" analysis, affirmed by the Court of Appeals of Louisiana, in *North Baton Rouge Environmental Association v. Louisiana Department of Environmental Quality*:

> [W]eighing all [the] factors, is permitting a thirty-four or so ton ozone release in the East Baton Rouge area when we're not in attainment a violation of the [state's constitutional duty as public trustee of the environment]? That requires a balancing effect. Exxon itself has been one of those industries which has significantly reduced emissions. It has done little things, like paid people to be on jury duty, which we always appreciate. The question is, even though I don't like the fact that we're putting thirty-four tons of ozone back in the air when we're not in attainment, should Exxon, which has done a lot to reduce emissions, be the one that suffers the consequences of our not being in attainment? . . . In balancing the pros and cons . . . the court finds that this small amount, which seemed to me when we took over this case to be a large amount, . . . that thirty-two tons is a small amount compare to a couple of days of automobile pollution, does not outweigh the other consideration.

805 So.2d 255, 263-64 (La. Ct. App. 2001) (quoting Downing, J., Trial Ct. No. 456, 658, 19th Judicial Dist. Ct., Parish of E. Baton Rouge).

In his concern that Exxon not suffer the consequences of the area's nonattainment, the judge demonstrates no real cognizance of health risks to the community. To plaintiff's claim of environmental racism, the following quotes his entire analysis:

> It is unfortunate that the original zoning placed this industrial complex next to [the community of] Alsen. . . . Exxon has used a plant facility that was already in existence. They're actually putting out less pollution than the plant that was there previously. Considering the other policy considerations, should Exxon locate this some place where there is an area where there is no pollution? That's not a particularly good idea. Should they locate in another industrial area? Well, that just moves the problem to somebody else's city. Overall, in the balance, I cannot find that DEQ abused its discretion in putting [the Exxon plant] in an industrial area at the site of a prior plant that actually probably produced more pollution than the system that's been proposed.

Id. at 263.

For thoughtful, relevant critiques of cost-benefit analysis, see Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913 (2000); Curtis Moore, *The Impracticality and Immorality of Cost-Benefit Analysis in Setting Health-Related Standards*, 11 TULANE ENVTL. L.J. 187 (1998); Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931 (2000); W. Kip Viscusi, *Risk Equity*, 29 J. LEGAL STUD. 843 (2000).

295. Corrosion Proof Fittings v. EPA, 947 F.2d at 1223.

296. *Id.* at 1222-23. Some have asserted that the non-delegation doctrine should be utilized by the courts more frequently to prevent Congress from shifting the duty to make difficult policy decisions onto the unelected officials within Executive Branch agencies. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980). Although the non-delegation doctrine is not a common ground for invalidating an agency action, the Supreme Court is alert to its application in the environmental law context. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472-73 (2001).

"reasonableness" of risk should be determined relative to costs is a substantial setback for environmental justice. The number of deaths to be expected from a given chemical may be few, but when we multiply such a judgment by thousands of toxic substances, knowing that these deaths will be clustered in economically disadvantaged minority communities, the result is, to say the very least, "unreasonable."[297] Cost-benefit analysis is not, as some might have it, "a static public purchase of an environmental improvement," and it is crucial to understand that the consequences of seemingly sensible decisions in the abstract do not in fact exist in isolation but are compounded by those that came before and will follow.[298]

Corrosion Proof Fittings has also been criticized for discouraging agencies from fulfilling their protective mandates because of the heavy evidentiary and analytic burden that cost-benefit analysis of regulatory alternatives for every action entails. Professor Thomas McGarity observes that the opinion "has caused EPA to abandon virtually all attempts to reduce the risks posed by existing chemicals under [TSCA]" in the face of the years of data gathering, analysis, hearings, complex proceedings, and potential litigation.[299] It is unclear just how much documentation is necessary to regulate toxic chemicals, and this lack of clarity, combined with the burden of scientific uncertainty, hardly empowers agencies charged with protecting the public to do their job.[300]

The proper role for risk assessment and cost-benefit analysis in environmental decision-making is the subject of ongoing, productive, cross-disciplinary debate. For purposes of this Comment, I take it for granted that government agencies will continue to employ these methodologies and assert that environmental justice requires agencies and courts alike to revise their notions of "acceptable" risk to reflect the distributional inequities we now know exist. It is *definitionally* unreason-

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297. *See* Michaelson, *supra* note 282, at 1908 (arguing that cost-benefit analysis is "not a neutral tool of reform," but an "ethical reorientation as well as a practical one, changing toxics regulation from a proxy liability rule where persons own the entitlement to their bodies to a proxy property rule where toxics producers own the entitlement to destroy it."). It should also be noted that, as Michaelson points out, the common numerical equivalency of "acceptable" risk at "the level of one cancer in a million is arbitrary on its face." *Id.* at 1899.

298. DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 22 (2003). Driesen provides the following useful summary of common objections to cost-benefit analysis (CBA) in the environmental policymaking:

> Critics have attacked the appropriateness and practicality of CBA because it requires one to compare two seemingly incomparable things, environmental and health effects on the one hand and pollution control costs on the other. First, because environmental and public health benefits are notoriously difficult to quantify, an administrative agency will tend to undervalue them in a CBA process that requires quantification. "Soft" variables tend to get lost in the equation. Second, the government cannot and ought not assign a dollar value to human life, animal life, health, and aesthetic considerations. Third, CBA tends to devalue the benefits to future generations that stringent environmental protection offers. Fourth, benefit data to assess benefits properly simply do not exist and cannot be obtained at reasonable cost. Fifth, CBA does not take equity into account. For example, decisions to balance costs and benefits may leave those living nearest polluting facilities, often minority groups, susceptible to very large pollution burdens.

Id. at 21-22.

299. McGarity, *supra* note 290, at 538.

300. *See* Cranor, *supra* note 262, at 340-41 (summarizing lessons to be taken from judicial review of risk assessments).

able for agencies to continue using assessment and analytic methodologies that we know routinely underestimate the risk to low-income communities and people of color. Courts must likewise approach questions of risk with the heightened sophistication and social awareness that environmental justice demands.

V. CONCLUSION

Environmental injustice is a social justice problem, a public health problem, and an environmental problem, and correcting it is a collective responsibility. This Comment has provided an overview of the major civil rights and environmental law theories that have been advanced in environmental justice cases, and why, to date, courts have not been receptive to the claims. We need courts to begin taking the documented inequality and harm seriously—to engage directly the genuine constitutional issues at stake and to recognize, fundamentally, that our environmental laws operate in an unjust world. This may require a reexamination of the intent requirement in equal protection jurisprudence, heightened scrutiny of economic discrimination claims, reinforcement of the fundamental right to bodily integrity, and recalibration of the concept of risk in light of the unequal distribution of environmental hazards. Even as policymakers strive for environmental justice in the political sphere, it is critical that environmental justice claimants have the day they deserve in our courts.

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