American University Law Review

Volume 48 | Issue 1 Article 5

1998

Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement

R. Gregory Roberts

Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement

Keywords
Social Justice, Environment, Environmental Justice, Community Empowerment

ENVIRONMENTAL JUSTICE AND COMMUNITY EMPOWERMENT: LEARNING FROM THE CIVIL RIGHTS MOVEMENT

R. GREGORY ROBERTS*

TABLE OF CONTENTS

* Senior Note & Comment Editor, *American University Law Review*, Volume 48; J.D. Candidate, May 1999; *American University, Washington College of Law*; B.A. 1996, *University of Rochester*. I would like to thank my fiancée and best friend Gale Segarra for all of her support and encouragement. To quote R.E.M., "You are the Everything." I would also like to thank my parents for always being there.

INTRODUCTION

On April 2, 1997, the Tulane Environmental Law Clinic, on behalf of the community group St. James Citizens for Jobs and the Environment, filed an Environmental Justice Petition with the United States Environmental Protection Agency (the "EPA" or "Agency") requesting that the Agency revoke previously issued air permits for Shintech, Inc.'s proposed polyvinyl-chloride ("PVC") plant in St. James Parish, Louisiana.[1] Situated between Baton Rouge and New Orleans, St. James Parish is in the heart of what is known as "Cancer Alley."[2] St. James is a small community with a population that is over 80% black, where unemployment approaches 60%, and the average yearly income is less than $5,000.[3] Further exacerbating these depressed socioeconomic conditions, St. James ranks third in the state for highest industrial pollution levels with more than seventeen million pounds released or transferred yearly.[4]

Unfortunately, the situation in St. James is not unique. Empirical evidence shows that toxic-waste dumps, municipal landfills, garbage incinerators and similar noxious facilities are not randomly dispersed throughout the country, but tend to be located in poor, minority

1. *See* Environmental Justice Petition for the Denial of Shintech, Inc. Title V Air Permit (Apr. 2, 1997) [hereinafter Environmental Justice Petition] (on file with the *American University Law Review).*

2. "Cancer Alley" is an 85 mile stretch of the Mississippi River between Baton Rouge and New Orleans that is home to approximately 130 oil and chemical companies and waste dumps that annually release more than 900 million pounds of toxins into the air, ground, and water. *See Environmental Protection Agency Cabinet Elevation—Environmental Equity Issues: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 103d Cong. 21, 23 (1993) [hereinafter *Hearings*] (testimony of Rev. Benjamin F. Chavis, Jr.); *see also* Marcia Coyle, *Saying "No" to Cancer Alley*, NAT'L L.J., Sept. 21, 1992, at S5. In light of the exorbitant quantities of toxins released, the area has been described as a "massive human experiment" and a "sacrifice zone." *See* ROBERT D. BULLARD, DUMPING IN DIXIE 55-56 (1994) (citing MICHAEL H. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS 152-61 (1987)); David Maraniss & Michael Weiskopf, *Jobs and Illness in Petrochemical Corridor*, WASH. POST, Dec. 22, 1987, at A1. In the past several years, four towns along the river have literally disappeared—bought out by Dow Chemical, Georgia Gulf, and Placid Oil—and their inhabitants relocated. *See* Coyle, *supra*, at S5.

3. *See* Paul Hoversten, *EPA Puts Plant on Hold in Racism Case*, USA TODAY, Sept. 11, 1997, at A3 (referring to Convent, Louisiana, a town located within St. James Parish).

4. *See* Environmental Justice Petition, *supra* note 1, at 3-4 (citing 1994 Toxic Release Inventory ("TRI") data).

communities like St. James.[5] In fact, the United Church of Christ Commission for Racial Justice found race to be the single most important factor associated with the location of commercial hazardous waste facilities.[6]

Since 1982, communities like St. James have begun fighting back,[7] giving rise to the environmental justice movement.[8] As an extension of the Civil Rights Movement from the 1960s, the environmental justice movement is about more than hazardous waste dumps or any particular environmental issue.[9] It is about social injustice and

5. There have been numerous studies conducted on the incidence of race and pollution. Two major studies are the 1983 General Accounting Office ("GAO") study, *see* U.S. GENERAL ACCOUNTING OFFICE SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES [hereinafter GAO STUDY], and the 1987 United Church of Christ Commission for Racial Justice ("UCC") study, *see* COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter UCC STUDY], *discussed in* Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 801-02 (1993). The GAO study examined four off-site hazardous waste landfills in the eight southeastern states that comprise the EPA's Region IV. The study revealed that: (1) blacks comprised the majority of the population in three of the four communities where landfills were located and, (2) at least twenty-six percent of the population in all four communities, most of whom were black, had incomes below the poverty level. *See* GAO STUDY, *supra*, at 2.

The UCC study examined the location of controlled and uncontrolled hazardous waste sites across the United States. The study found that: (1) race proved more significant than socioeconomic status in the siting of hazardous waste facilities, (2) in communities with two or more operating hazardous waste facilities, the average minority population was three times that of communities without such facilities, (3) in communities with just one active hazardous waste facility the average minority population was twice that of communities without such facilities, and (4) three out of every five blacks and Hispanics lived in communities with uncontrolled hazardous waste sites. *See* UCC STUDY, *supra*, at 801-02.

6. *See* UCC STUDY, *supra* note 5, at 801-02.

7. In 1982, citizens in Warren County, North Carolina gained national attention for their protest of a proposed polychlorinated biphenyl ("PCB") landfill in their predominantly black community. This event is commonly viewed as the beginning of the environmental justice movement. *See* Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 296 (1995) (noting that the Warren County protest "gave credibility and momentum to [the] environmental justice movement").

8. In addition to "environmental justice," this issue is referred to as "environmental racism" and "environmental equity." Although the three terms are frequently used interchangeably, scholars and environmental justice advocates differentiate between them:

Environmental racism: The term was first used by the Reverend Benjamin F. Chavis, Jr. in 1987, and refers to "a policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals or communities on the basis of race or color." *See* Robert D. Bullard, *The Threat of Environmental Racism*, NAT. RESOURCES & ENV'T, Winter 1993, at 23.

Environmental equity: Environmental Equity refers to the equal enforcement and protection of environmental laws. *See* BUNYAN BRYANT, ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 5 (1995). This term was adopted by the Bush Administration. *See* Major Willie Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, 22 OHIO N.U. L. REV. 1227, 1234 (1996). Dr. Beverly Wright, Director of the Deep South Center for Environmental Equity, further defines the term as the right "of all people to benefit from the environment and to be equally protected from the effects of human use and abuse of it." *See id.*

Environmental justice: The term the Clinton Administration has adopted, and the term Professor Bunyan Bryant defines as "those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and productive." *See* BRYANT, *supra*, at 6.

9. *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 644 (1992) (suggesting that the environmental

patterns of institutional discrimination.[10] Accordingly, the goals of the movement parallel those of the Civil Rights Movement, representing an integration of civil rights and environmental laws[11] that may aptly be described as a quest for environmental civil rights.

This Comment discusses various means for achieving environmental justice and concludes that community empowerment strategies are the most effective. Part I places the environmental justice movement in the context of the struggle for social justice and examines the underlying causes of environmental injustice. Part I then focuses on proposed solutions and critiques those proposals. Part II examines the goals of community empowerment strategies and looks to St. James Parish, Louisiana as an example of what an empowered community can accomplish. Part III examines the effectiveness of community empowerment strategies and looks to the Civil Rights Movement as precedent for such strategies. Finally, in conclusion, this Comment argues that community empowerment strategies are the most effective means of achieving environmental justice because they attack the root-cause of the problem, the powerlessness of minority and poor communities.

I. THE STRUGGLE FOR SOCIAL JUSTICE IN THE ENVIRONMENTAL CONTEXT

As noted above, the environmental justice movement is more than an environmental movement.[12] In fact, environmentalism, as most Americans have come to describe it, is near the bottom of the environmental justice movement's priorities.[13] Representing a

justice movement addresses the process which results in pollution-generating facilities being placed in poor and minority communities in addition to the levels of pollution produced by those facilities).

10. Rev. Benjamin F. Chavis, Jr. observed: "Sometimes we get too single-issue to see how various social justice issues are interrelated. But in this movement, there is a perception at the grassroots level of how one manifestation of racial injustice is related to another." Marcia Coyle, *When Movements Coalesce*, NAT'L L.J., Sept. 21, 1992, at S10. Likewise, Charles Lee, a research director with the UCC believes that environmental racism is best viewed in its historical context:

> [T]he long history of oppression and exploitation of African-Americans, Hispanic-Americans, Asian-Americans and Pacific Islanders, and Native Americans . . . has taken the form of genocide, chattel slavery, indentured servitude, and racial discrimination in employment, housing and practically all aspects of life in the United States. We suffer today from the remnant of this sordid history, as well as from new institutionalized forms of racism.

ROBERT D. BULLARD, UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 286 (1994).

11. *See* Gunn, *supra* note 8, at 1227 ("[The] environmental justice movement attempts to bridge [the] traditional civil rights movement with [the] mainstream environmental movement.").

12. *See supra* note 9 and accompanying text.

13. This largely stems from a difference in perspective: environmental groups are concerned with leisure activities, wildlife, pollution abatement, and industrial regulation, whereas environmental justice groups are concerned with civil rights, social equity, and institutional discrimination. *See* BULLARD, *supra* note 2, at 9; *see also* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 266 (1998) (noting that the agenda of the mainstream environmental movement reflects the interests of its mostly white, well-educated, and middle-to-upper class members: nature

merging of the civil rights and environmental movements, the environmental justice movement symbolizes three of the world's greatest social dilemmas: "the struggle against racism and poverty; the effort to preserve and improve the environment; and the [] need to shift social institutions from class division and environmental depletion to social unity and sustainability."[14]

In its quest for social justice, the environmental justice movement must overcome the same fundamental obstacle faced by the Civil Rights Movement: powerlessness of poor and minority communities, both economic and political.[15] This powerlessness is the underlying cause of environmental injustice, manifesting itself in (1) the disproportionate siting of undesirable land uses[16] in poor and minority communities,[17] and (2) the inequitable enforcement of environmental laws in these communities.[18] As such, two "superficial" goals of the environmental justice movement are cleaning up existing hazardous sites and preventing similar sites from developing in the future. However, neither goal can ultimately and satisfactorily be accomplished without first remedying the underlying cause. For an environmental justice strategy to succeed, it must address and remedy the powerlessness that created the problem; anything less will be mere window dressing.

---

preservation, outdoor recreational activities, and ambient environmental conditions). In fact, some minority leaders have gone so far as to describe mainstream environmentalism as "'irrelevant' at best and, at worst, 'a deliberate attempt by bigoted and selfish white middle-class society to perpetuate its own values and protect its own life style at the expense of the poor and underprivileged.'" *See* Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 788 (1993) (quoting James N. Smith, *The Coming of Age in American Society, in* ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA 1 (James N. Smith ed. 1974)).

14. Gunn, *supra* note 8, at 1227.

15. Two types of political power are relevant to this problem. The first type is expressed in terms of a community's ability to influence decision-makers. The second type is represented by the ability of individuals in a community to hold significant positions of influence in the government. *See id.* at 1250. Overall, the poor and minorities lack both types. Robert Bullard notes that in spite of the progress made during the Civil Rights Movement in the 1960s, minorities still remain underrepresented in government positions. As a result, the interests of the predominately white industrial boards, zoning commissions, and governmental regulatory agencies will often run counter to those of minority communities. *See* BULLARD, *supra* note 2, at 26. The effect is the "Not In My Backyard" ("NIMBY") phenomenon, whereby wealthier communities, whose interests are typically represented within the relevant decision-making bodies, are able to influence the decision-making process and keep undesirable land uses out of their communities. As a result, such facilities are sited in disadvantaged communities. *See* discussion *infra* Part II.A.1 (addressing NIMBY and its effects on disadvantaged communities).

16. These undesirable land uses are typically termed "locally undesirable land uses" ("LULUs"), and refer to land uses such as prisons, homeless shelters, and waste disposal facilities that few people want in their community. *See generally* Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993) (explaining the goal of environmental justice and the importance of a fair siting program).

17. *See* GAO STUDY, *supra* note 5, at 2; UCC STUDY, *supra* note 5, at 801-02.

18. *See Unequal Protection: The Racial Divide in Environmental Protection*, NAT'L L.J., Sept. 21, 1992, at S2-S8 [hereinafter *Unequal Protection*] (citing studies indicating that white communities are more likely to receive preferred clean-up treatment than black communities); *infra* notes 123-29 and accompanying text (discussing the EPA's inequitable enforcement of environmental laws).

A. Pursuing Environmental Justice

To date, three primary means have been used to pursue environmental justice: litigation, legislation, and environmental justice strategies developed by executive branch agencies pursuant to Executive Order 12,898.[19] Each of these strategies will be discussed in turn.

1. Litigation strategies

Environmental justice litigation is "any litigation that seeks to prevent or remedy, directly or indirectly, the disproportionate burdens of environmental harm borne by people of color" and poor people.[20] To date, environmental justice litigation strategies have focused on the Equal Protection Clause of the Fourteenth Amendment and more recently, Title VI of the Civil Rights Act.

a. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment has traditionally been one of the primary means for remedying racial discrimination in this country.[21] As such, it is not surprising that equal protection claims form the basis of most environmental justice lawsuits brought to date.[22] However, the Equal Protection Clause has proven less effective in remedying perceived environmental injustices. This is primarily due to the Supreme Court's decision in *Washington v. Davis*[23] where the Court held that a showing of discriminatory intent was necessary to prevail on equal protection grounds.[24] Under *Washington* and subsequent cases, in order to prevail, plaintiffs must show that a "discriminatory purpose was a motivating factor" in the decision at issue.[25]

This burden has proven insurmountable for environmental justice plaintiffs.[26] To date, there have been several fully litigated cases in

---

19. *See* Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. I 1995) [hereinafter Executive Order] (outlining President Clinton's environmental justice policy).

20. *See* Gunn, *supra* note 8, at 1271-72.

21. The Fourteenth Amendment states, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see also* Gunn, *supra* note 8, at 1272 (noting that in addition to the Fourteenth Amendment, 42 U.S.C. § 1983 provides a means for remedying racial discrimination).

22. *See infra* note 27 (listing major equal protection cases brought in the environmental justice context); *see also* Gunn, *supra* note 8, at 1272 (noting that equal protection claims have been the legal hooks used in environmental justice lawsuits); Lazarus, *supra* note 13, at 829.

23. 426 U.S. 229 (1976).

24. *See id.* at 238-48.

25. *See, e.g.*, Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266-68 (1977). In *Arlington Heights*, the Court identified five factors that could be used to show intentional discrimination: (1) the impact of the action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) whether there were any substantive or procedural departures from the standard decision-making process, and (5) the legislative or administrative history of the challenged decision.

26. The Shintech controversy provides an excellent example of the difficulty of proving discriminatory intent in the environmental context. In refuting claims of environmental racism, the plant's Vice President of Manufacturing remarked that "Shintech's siting decision

which plaintiffs sought to use the Equal Protection Clause to block an environmental siting decision.[27] In each case, plaintiffs were able to show that a particular decision would adversely and disproportionately affect their community, but were unable to show that the decisions at issue constituted intentional discrimination.[28]

b. Title VI of the Civil Rights Act of 1964

The difficulties of proving discriminatory intent forced environmental justice advocates to seek alternative avenues for achieving their goals. One strategy that may hold some promise of success is Title VI of the Civil Rights Act. The principal advantage of Title VI is that individuals may pursue claims on the basis of disparate impact, without a showing of discriminatory intent.

In applying Title VI to the environmental justice context, two provisions are especially important, sections 601 and 602.[29] Section 601 is the principal part of Title VI and provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

---

has been based upon its assessment of basic economic factors such as availability of raw materials, direct access to deep water and access to rail transportation." Press Release, Shintech, Inc. 2 (Mar. 28, 1997) (on file with the *American University Law Review*).

This is not to say that equal protection claims will always fail. Occasionally, the proverbial "smoking-gun" is discovered, enabling plaintiffs to show the requisite intent. For example, in a case in Houston, Texas, plaintiffs brought suit alleging environmental racism by Gulf Oil for knowingly permitting residential development atop abandoned, contaminated oil pits. In that case, plaintiffs relied on, *inter alia*, a 1967 Gulf Oil document that outlined the firm's intention to sell the property for "negro residential and commercial development." *See Spotlight Story Environmental Justice: Latest Development Slows Down Key Trial*, GREENWIRE, Sept. 8, 1997, *available in* LEXIS, News Library, Grnwre File.

27. *See* R.I.S.E. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (finding no evidence that discriminatory intent motivated a government decision to build a solid waste facility in a predominately black neighborhood); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibbs County Planning and Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989) (finding no evidence that discriminatory intent motivated a government decision to build a solid waste facility in a predominately black community); NAACP v. Gorsuch, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982) (rejecting on similar grounds plaintiffs' challenge to a proposed PCB disposal facility); Bean v. Southwestern Waste Management Corp., 482 F. Supp 673 (S.D. Tex. 1979) (declining to enjoin the siting of a solid waste facility near a predominately black high school and residential area because plaintiffs failed to prove that the decision to grant a permit was attributable to an intent to discriminate on the basis of race), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986).

28. Illustrative of the problems faced in all three cases is that of *Bean*, the first environmental justice case to be filed. In *Bean*, the plaintiffs brought suit to enjoin the siting of a solid waste disposal facility within their Houston, Texas community. The plaintiffs' claim rested on two theories: (1) that the state agency's approval of the permit was part of a practice of discriminating in the siting of such facilities, and (2) given the historical siting of such facilities, that granting the permit constituted discrimination. *See Bean*, 482 F. Supp. at 673-74. Although the court found there was a disproportionate impact on minority communities, the data presented was not sufficient to show discriminatory intent. *See id.* at 677-80.

29. *See* Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 929 (3d Cir. 1997) (distinguishing between sections 601 and 602), *vacated as moot*, 119 S. Ct. 22 (1998). A plaintiff can challenge an action under Title VI in one of three ways: (1) sue the discriminatory recipient of federal funds, (2) sue the federal agency dispersing the funds, or (3) file a complaint through the funding agency's Title VI administrative process. *See* James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 156-71 (1994) (explaining how each method can be used).

receiving Federal financial assistance."[30] The Supreme Court has held, however, that section 601 only prohibits instances of intentional discrimination.[31]

Section 602, requires federal agencies to promulgate rules and regulations to implement section 601.[32] In developing these regulations, the Supreme Court has held that agencies may prohibit certain disparate impacts as a condition for receipt of federal assistance.[33] Importantly, the EPA has adopted a disparate impact standard in its Title VI regulations.[34] Under these regulations, facially-neutral policies or practices that result in discriminatory effects are a violation of Title VI unless it can be shown that the effects are justified and that there is no less discriminatory alternative.[35]

---

30. 42 U.S.C. § 2000d (1994).

31. *See* Alexander v. Choate, 469 U.S. 287, 293 (1985); *Chester*, 132 F.3d at 929.

32. Section 602 provides in relevant part:

> 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 [section 601] . . . 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. § 2000-1.

33. *See Alexander* , 469 U.S. at 293.

34. *See* 40 C.F.R. § 7.35(b) (1998). Section 7.35(b) provides:

> 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 accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

Id.

35. *See* OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS 3 (1998) [hereinafter INTERIM GUIDANCE].

EPA's Title VI implementing regulations enable individuals to bring suit under Title VI through an administrative procedure. *See* 40 C.F.R. § 7.120 (1998). To date, the EPA has received 49 complaints alleging violations of Title VI in the environmental context. *See* John Chambers, *The Supreme Court has Agreed to Take Up an Issue That has Stymied Regulators and Judges: Waste Disposal Facilities Planned for Construction in Minority Areas*, NAT'L L.J., June 22, 1998, at B6. Recently, the Agency has received numerous complaints alleging discrimination in the environmental permitting context. To facilitate the processing of such complaints, the Agency issued an Interim Guidance on February 4, 1998. *See* INTERIM GUIDANCE, *supra*; David Sive and Lemuel M. Srolovic, *Environmental Justice Issues Develop*, N.Y. L.J., Oct. 26, 1998, at S1, S12. The purpose of the Interim Guidance is to provide a framework for processing complaints alleging discriminatory effects resulting from the issuance of pollution control permits. *See* INTERIM GUIDANCE, *supra*, at 2.

The Interim Guidance sets forth the process that the EPA's Office of Civil Rights (the "OCR") will follow in processing complaints alleging discrimination in permitting. The OCR will first determine whether the complaint establishes a valid claim. Once the complaint is accepted, the OCR will conduct a factual investigation to determine whether the permits at issue create a disparate impact on a racial or ethnic population. *See* INTERIM GUIDANCE, *supra*, at 4. To determine whether a disparate impact exists, the OCR will conduct a five-step process: (1) identify the affected population, (2) determine the demographics of the affected area, (3) determine the universe of facilities and total affected populations, (4) conduct a disparate impact analysis that will likely include a comparison of the racial or ethnic class within the affected population and a comparison of the racial characteristics of the affected and non-affected populations, and (5) determine whether the disparity is significant under Title VI. *See id.* at 8-9.

If the OCR makes an initial finding of disparate impact, it will notify the recipient of federal financial assistance of its finding and provide the recipient with an opportunity to rebut the finding, submit a plan for mitigating the disparate effects of the permit, or demonstrate that it

There are, however, at least three limitations to Title VI. First, it applies only to actions receiving federal funds.[36] However, as federal financial assistance in environmental protection is extensive, establishing a sufficiently close federal financial nexus may prove relatively simple.[37] Second, in the absence of a showing of discriminatory intent, it may only be possible to obtain declaratory or injunctive relief.[38]

Third, and perhaps most important, is the issue of who may sue to enforce section 601 and the agency implementing regulations promulgated pursuant to section 602. While the Supreme Court has held that a private right of action exists under section 601,[39] in light of the Court's recent decision in *Seif v. Chester Residents Concerned for Quality Living*,[40] it is uncertain whether a private right of action exists under section 602 that will enable private citizens to enforce the EPA's discriminatory effects regulations.[41]

---

has a substantial, legitimate interest that justifies the decision to proceed with the permit. *See id.* at 4. If the recipient fails to make one of these showings, the OCR will issue a preliminary finding of noncompliance to the recipient that may include recommendations for the recipient to achieve voluntary compliance. *See id.* at 5. If the recipient fails to implement the OCR's recommendations or submit a response showing that the OCR's findings are incorrect or that voluntary compliance can be achieved through other means, the OCR will issue a formal determination of noncompliance. *See id.*

If the recipient fails to come into voluntary compliance within ten days of receiving the formal notice of noncompliance, the OCR may begin procedures to deny, annul, suspend, or terminate EPA assistance in accordance with 40 C.F.R. § 7.130(b) and may refer the matter to the Department of Justice for litigation. *See id.*

36. *See* 42 U.S.C. § 2000d (1994).

37. *See* Lazarus, *supra* note 13, at 835 (noting that federal environmental laws concerning hazardous waste, toxic substances, water pollution control, and clean air provide extensive federal assistance to state programs).

38. *See* Gunn, *supra* note 8 at 1284-85; Lazarus, *supra* note 13, at 836. Professor Richard Lazarus, however, argues that based on the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), a damages remedy may now be generally available under Title VI. *See* Lazarus, *supra* note 13, at 836. In *Franklin*, the Court unanimously held that a damages remedy is available in implied private rights of actions brought under Title IX of the Education Acts Amendment of 1972. *See Franklin*, 503 U.S. at 74. Lazarus argues that because the language of Title IX was modeled after Title VI of the Civil Rights Act, and because the Court has frequently relied on constructions of one in interpreting the other, that a damages remedy may now be available absent a showing of discriminatory intent. *See* Lazarus, *supra* note 13, at 836.

39. *See* Alexander v. Choate, 469 U.S. 287, 293 (1985); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Chester Residents for Concerned Quality Living v. Seif, 132 F.3d 925, 929 (3d Cir. 1997).

40. 119 S. Ct. 22 (1998).

41. *Chester* concerns the Pennsylvania Department of Environmental Protection's ("PaDEP") issuance of a permit to Soil Remediation Services ("SRS") to operate a waste facility in the predominantly black city of Chester, Pennsylvania. *See* 132 F.3d at 927. Plaintiffs, a non-profit corporation composed of residents of Chester, brought suit in federal court asserting that the PaDEP's issuance of the permit violated: (1) section 601 of Title VI, (2) the EPA's Title VI regulations implemented pursuant to section 602, and (3) PaDEP's assurance made pursuant to the EPA's Title VI regulations that it would not violate the regulations. *See id.* at 927-28.

The district court dismissed the case holding that the Plaintiffs failed to show intentional discrimination as required under section 601 and that there was no private right of action to enforce the EPA's Title VI regulations. *See id.* at 928. The Third Circuit, however, reversed and held that a private right of action did exist under section 602. *See id.* at 936. Under the Third Circuit's holding, a private citizen would be able to bring suit to enforce the EPA's Title VI discriminatory effects regulations.

On June 8, 1998, the Supreme Court granted the PaDEP's petition for certiorari. *See* Seif v. Chester Residents Concerned for Quality Living, 118 S. Ct. 2296 (1998). Shortly thereafter,

2. Proposed legislation

Although environmental justice issues were raised in the courts in the 1970s,[42] the issue was not debated by Congress until the 1990s, with the proposed Environmental Justice Act of 1992.[43] Despite a slow start, environmental justice proposals now appear regularly on the congressional agenda.[44] This increase in proposed legislation reflects the country's growing concern with environmental justice.[45] Unfortunately, Congress has not passed any environmental justice legislation.

The first proposed environmental justice legislation was the Environmental Justice Act of 1992 (the "1992 Act").[46] The 1992 Act sought to require the EPA Administrator to identify the 100 counties

---

however, the PaDEP revoked the SRS permit. *See Supremes Dismiss PA Waste Permit Case*, GREENWIRE, Aug. 18, 1998, *available in* LEXIS, News Library, Grnwre File. In a one sentence opinion, the Supreme Court subsequently held that the case was moot and vacated the Third Circuit's decision. *See Chester*, 119 S. Ct. 22 (1998). The Court's decision leaves standing the district court decision that no private right of action exists under section 602.

Although the Supreme Court's action reversed a holding that favored environmental justice groups, it may be wise not to read anything further into this case for two primary reasons. First, the Court was persuaded to change its mind about hearing the case because there was no longer a live controversy. *See* Mary Greczyn, *Supreme Court Calls Pa. Case "Moot"*, WASTE NEWS, Aug. 24, 1998, at 1. Second, at least nine other circuit courts of appeals have adopted reasoning similar to that of the Third Circuit in *Chester*. *See* Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996); Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996); New York Urban League v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Elston v. Talledega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993); David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1044-45 (7th Cir. 1987); Latinos Unidos de Chelsea v. HUD, 799 F.2d 774, 785 n.20 (1st Cir. 1986); Castaneda by Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986); Larry P. by Lucille v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984). Accordingly, the question of whether a private right of action exists to enforce the EPA's Title VI regulations remains unanswered.

Even if the courts largely remain closed to environmental justice litigants, however, President Clinton's Executive Order may have brightened the prospects of Title VI in the environmental justice context. In the memorandum accompanying the Executive Order, President Clinton directed federal agencies to ensure that entities receiving federal funds do not discriminate. *See* Memorandum from President William J. Clinton to Heads of all Departments & Agencies 30 WEEKLY COMP. PRES. DOC. 279 (Feb. 11, 1994) [hereinafter Memorandum on Environmental Justice]. The memorandum states:

> In accordance with Title VI of the Civil Rights Act of 1964, each Federal Agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.

Id. at 280. Major Willie Gunn argues that, given the Executive Order and the memorandum, the Clinton Administration may offer a favorable political climate for environmental justice plaintiffs to launch Title VI challenges through the administrative process. *See* Gunn, *supra* note 8, at 1285-86.

42. *See e.g.*, Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979).

43. *See* H.R. 5326, 102d Cong. (1992) (introduced by Rep. John Lewis of Georgia); *see also* S. 2806, 102d Cong. (1992) (introduced by Sen. Albert Gore, Jr. of Tennessee).

44. *See infra* notes 46-54 and accompanying text.

45. *See* ROBERT V. PERCIVAL, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY xxxi (2d ed. 1996) (explaining that public concern for the environment is a catalyst for profound changes in the law).

46. *See id.* Representative Lewis reintroduced the legislation under the same name in 1993. *See* H.R. 2105, 103d Cong. (1993). Both bills had the same underlying purpose: "To establish a program to assure nondiscriminatory compliance with all environmental, health and safety laws and to assure equal protection of the public health." *Id.*

containing the highest total weight of toxic chemicals[47] and mandate that the Secretary of Health and Human Services research the relative nature and extent of adverse health impacts in those areas.[48] In addition, the 1992 Act called for a moratorium on the siting of new hazardous waste facilities in these 100 "environmental high-impact areas."[49] Finally, the 1992 Act provided for "technical assistance" grants to individuals or groups in environmental high-impact areas.[50]

The second major environmental justice proposal was the Environmental Equal Rights Act of 1993 (the "1993 Act"),[51] an act which would have enabled citizens to petition against the construction of solid waste management facilities in "environmentally disadvantaged" communities.[52] Under the 1993 Act, an Administrator or state would have to grant a petition if petitioners established that: (1) the proposed facility would be located in an "environmentally disadvantaged" community; and (2) the proposed facility would adversely affect human health or the air, soil, water, or other elements within the community.[53] Once petitioners established these elements, an Administrator or state could only deny the petition if the facility's proponent demonstrated that: (1) there was no alternative that posed fewer risks; and (2) the proposed facility would not release contaminants or engage in activities likely to increase the cumulative impact of contaminants on residents.[54]

A third proposed environmental justice law is the Fair Environmental Protection Act ("FEPA").[55] While FEPA has never been incorporated into congressional legislation, a leading environmental justice advocate, Robert Bullard, argues that Congress should enact such a measure.[56] FEPA would prohibit environmental

47. *See* H.R. 5326, § 102(a).
48. *See id.* § 401.
49. *See id.* § 403.
50. *See id.* § 301. The primary purpose of the grants was to facilitate access by representatives of environmental high-impact areas to the public participation provisions of relevant statutes. *See id.* The Environmental Justice Act of 1993 contained the same provision. *See* H.R. 2105, § 301.
51. *See* H.R. 1924, 103d Cong. (1993) (introduced by Rep. Candice Collins of Illinois).
52. *See id.* § 3(a)(1).
53. *See id.* § 3(b)(2).
54. *See id.* § 3(b)(3).
55. *See* BULLARD, *supra* note 2, at 119, 126. Proposals like FEPA are part of an environmental justice framework developed by environmental justice advocates. The goal of the framework is to make environmental protection more democratic. More importantly, it attempts to bring to the forefront the ethical and political questions of "who gets what, why, and in what amount." *See id.* at 119. The framework consists of five general characteristics: (1) it follows the principle that all individuals have a right to be protected from environmental degradation (FEPA fits within this principle), (2) it prefers the strategy of prevention (or elimination of the threat before it occurs), (3) it shifts the burden of proof to polluters and dischargers who harm, discriminate, or do not provide equal protection to disadvantaged classes, (4) it allows disparate impact and statistical weight, as opposed to "intent," to infer discrimination, and (5) it redresses disproportionate impact through "targeted" action and resources (directing resources to areas with the greatest need). *See id.* at 119-21. The framework has three demands: (1) enforcement in a nondiscriminatory manner, (2) legislative initiatives generally, and (3) legislative initiatives directed at the states. *See id.* at 126.
56. See BULLARD, *supra* note 2, at 119, 126.

discrimination on the basis of race.[57] Modeled after various federal civil rights acts that promote nondiscrimination,[58] FEPA's goals include the elimination of unfair, unjust and inequitable decisions, the creation of a right to environmental protection, not merely a privilege, with the ultimate goal being the prohibition of environmental discrimination on the basis of race.[59]

3. Executive Order 12,898

After achieving only modest success in the courts and suffering repeated failures in Congress, the environmental justice movement received its biggest boost on February 11, 1994, when President Clinton issued Executive Order 12,898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations" (the "Executive Order").[60] The Executive Order requires each federal agency to develop strategies to achieve environmental justice by "identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations."[61] At a minimum, these strategies should: (1) encourage enforcement of federal and state health and environmental statutes in communities with high poor and minority populations; (2) increase public involvement; (3) conduct more accurate research and obtain more precise data regarding the health and environment of poor and minority communities; and (4) analyze disparities with respect to the use of natural resources by poor and minority populations.[62]

Most significantly, the Executive Order emphasizes grassroots community involvement.[63] Environmental human health research must include diverse segments of the population, including poor and minority communities which may be exposed to substantial environmental hazards.[64] The Executive Order encourages the public to submit recommendations to federal agencies relating to the incorporation of environmental justice principles into agency programs.[65] In addition, certain public documents relating to human health or the environment may be translated for minority

57. *See id.*

58. The precedents for FEPA are the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. *See id.* at 119.

59. *See id.* at 119, 126.

60. Executive Order, *supra* note 19.

61. *Id.* § 1-101, at 859.

62. *See id.* § 1-103, at 860. In developing and implementing their environmental justice strategies, each federal agency must ensure that their programs or policies "do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin." *Id.* § 2-2, at 861.

63. *See id.*

64. *See id.* § 3-301(a), at 861.

65. *See id.* § 5-5(a), at 862.

communities,[66] and each agency must ensure that important documents, notices, and hearings are concise, understandable, and readily available to the public.[67] A memorandum following the Executive Order directs each federal agency to provide opportunities for community input in the National Environmental Policy Act[68] ("NEPA") process, including consultation with affected communities and improving the accessibility of meetings, crucial documents, and notices.[69] Although the Executive Order represents a significant achievement for the environmental justice movement, its efficacy is still to be determined.[70] In fact, since none of its provisions allows for judicial review, it ultimately risks failure.[71]

4. The EPA's Environmental Justice Strategy

Pursuant to the President's Executive Order, the EPA developed an environmental justice strategy aimed at integrating environmental justice into the Agency's programs and policies.[72] The stated goal is to ensure that "[n]o segment of the population, regardless of race, color, national origin, or income, as a result of the EPA's policies,

66. *See id.* § 5-5(b), at 862.

67. *See id.* § 5-5(c), at 862.

68. 42 U.S.C §§ 4321-4370a (1994). NEPA was signed into law on January 1, 1970, by President Richard Nixon. NEPA set forth the nation's environmental policy and established as the "continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." *Id.* § 4331(a). NEPA requires all federal agencies to prepare an environmental impact statement addressing the likely effects of their activities. Specifically, the principal section, section 102, requires that all federal agencies:

> [I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(c).

69. *See* Memorandum on Environmental Justice, *supra* note 41, at 280.

70. This assertion is true for two reasons. First, the Executive Order was promulgated only five years ago. Second, many important aspects of the Executive Order remain undefined. The resulting ambiguity has proven to be especially difficult in the current Shintech controversy. *See infra* Part II.D (discussing the Shintech, Inc. controversy). Critics of the EPA's handling of the conflict decry the fact that "the EPA has no rules or regulations on environmental justice, yet insists on enforcing the idea." *Civil Rights Not the Role of EPA*, BATON ROUGE ADVOC., Sept. 23, 1997, at B6. This lack of definitions and regulations has made it extremely complicated to interpret and apply terms such as "disproportionately high and adverse."

71. *See* Executive Order, *supra* note 19, § 6-609, at 863 (stating explicitly that the Executive Order is only intended to improve internal management of the Executive Branch and does not create any right or benefit enforceable at law or equity). This lack of enforceability could have two effects. First, future administrations may be able to disregard it without having to take formal steps to repeal it. Second, the lack of independent enforceability leaves entrenched bureaucrats to implement the Executive Order. *See* Willie Hernandez, *Environmental Justice: Looking Beyond Executive Order 12,898*, 14 UCLA J. ENVTL. L. & POL'Y 181, 206 (1995/96). As poor and minority communities are underrepresented in such positions, they are not likely to see any drastic changes. *See id.* at 207.

72. OFFICE OF ENVTL. JUSTICE., U.S. EPA, ENVIRONMENTAL JUSTICE STRATEGY: EXECUTIVE ORDER 12,898, at 2 (1995) [hereinafter ENVIRONMENTAL JUSTICE STRATEGY].

programs, and activities, suffers disproportionately from adverse human health or environmental effects, and all people live in clean, healthy, and sustainable communities."[73]

In accordance with the Executive Order's emphasis on grassroots community involvement, the EPA based its strategy on three guiding principles: (1) environmental justice begins and ends in communities; (2) helping affected communities gain access to information will enable them to participate meaningfully in activities; and (3) effective leadership will advance environmental justice.[74] Following these principles, the EPA developed an approach focused on establishing common sense standards and procedures for conducting the Agency's programs.[75] This "Common Sense" Initiative[76] attempts to bring together communities, environmentalists, industry, states, tribes, and others to develop cleaner, cheaper, and smarter solutions to environmental problems.[77] Along with four other mission topics, the Common Sense Initiative focuses on "public participation, accountability, partnerships, and communication with stakeholders."[78] Based on the realization that effective environmental justice strategies require early involvement by affected communities and other stakeholders, the Agency will actively seek to incorporate the expertise of local, affected community members throughout this process.[79]

Foremost among the EPA's projects to address and remedy environmental injustice is its Brownfields program.[80] The program is designed to address the problems associated with abandoned commercial and industrial properties (known as "brownfields"), which are located overwhelmingly in minority and poor

73. *Id.* at 1.

74. *See id.* at 2.

75. *See id.* at 4.

76. In an introductory letter to the EPA's *Environmental Justice Strategy*, EPA Administrator Carol Browner explains that "[e]arly involvement and strong partnerships, founded on mutual respect and understanding, make good *common sense* and will result in sound public health and environmental policy." Carol Browner, *Introductory Letter*, ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 72. Accordingly, the EPA refers to its environmental justice strategy as "The Common Sense Initiative." *See id.* at 4.

77. *See id.*

78. *Id.* The other four mission topics are: (1) health and environmental research; (2) data collection, analysis, and stakeholder access to public information; (3) American Indian and indigenous environmental protection; and (4) enforcement, compliance assurance, and regulatory reviews. *See id.*

79. *See id.* at 6.

80. *See* NATIONAL ENVTL. JUSTICE ADVISORY COUNCIL, U.S. ENVTL. PROTECTION AGENCY, REPORT ON THE PUBLIC DIALOGUES ON URBAN REVITALIZATION AND BROWNFIELDS 2 (1995) [hereinafter NEJAC REPORT]. The findings in the National Environmental Justice Advisory Council Report ("NEJAC Report") are derived from a series of public hearings conducted by the EPA and the NEJAC entitled "Public Dialogues on Urban Revitalization and Brownfields: Envisioning Healthy and Sustainable Communities." *See id.* at 1. The report notes that the existence of such degraded and hazardous physical environments in disadvantaged communities has contributed to "human disease and illness, negative psycho-social impact, economic disincentive, infrastructure decay, and overall community disintegration." *See id.* at 2. The Brownfields program is designed to remedy these problems. *See id.*

communities.[81] The EPA hopes this program will: stem the environmentally damaging and racially divisive phenomenon of urban sprawl and Greenfields development; focus on problems that are inextricably linked with environmental justice; allow communities to offer their vision for redevelopment; apply environmental justice principles to the development of a new environmental policy; and provide greater awareness of and opportunities for partnership-building between the EPA and affected communities and other stakeholders.[82]

The Brownfields program clearly embodies the Executive Order's emphasis on grassroots community involvement.[83] By making a concerted effort to work with community groups, investors, lenders, developers, and other affected parties, the Brownfields program recognizes that communities directly affected by a problem or project are imminently qualified to participate in the decision-making process.[84] By providing services such as training and support for community groups and technical assistance grants, the Brownfields program seeks to establish mechanisms to ensure the full and meaningful participation of all affected parties.[85]

By actively seeking community input and involvement, the Brownfields program, in theory, enables poor and minority communities to influence the decision-making process; thus, addressing the problem of powerlessness by providing these disadvantaged communities with a modicum of political empowerment.[86]

B. Analyzing and Critiquing Proposed Strategies

1. The problems with litigation strategies

Although litigation has proven extremely successful in remedying past instances of racial discrimination,[87] there are two principal weaknesses to its potential effectiveness in the environmental justice

81. *See* NEJAC REPORT, *supra* note 80, at 2; *see also* GAO STUDY, *supra* note 5, at 2; UCC STUDY, *supra* note 5, at 801-02.

82. *See id.* at 1-2.

83. *See id.*

84. *See id.* at 3.

85. Public participation and community involvement are deemed essential to any effort in remedying environmental injustice. In its report, the NEJAC offered several recommendations, foremost among them was the need for informed and empowered community involvement. *See id.* at 3. The NEJAC stressed that "[e]arly, ongoing, and meaningful public participation is the hallmark of sound public policy and decision making." *Id.*

86. The Brownfields program has achieved several important successes. By March 1996, the EPA had awarded 40 grants to Brownfields pilot projects to encourage development of these contaminated properties. Additionally, the EPA has removed 27,000 sites from its inventory of potential Superfund sites (The Comprehensive Environmental Response, Compensation, and Liability Act). *See* PERCIVAL, *supra* note 45, at 300-01. The effectiveness of the initiative in the environmental justice context, however, remains suspect, as the discussion below will indicate. *See* discussion *infra* Part I.B.3.

87. *See, e.g, Brown v. Board of Educ.*, 347 U.S. 483 (1954) (banning segregation according to race in public schools).

context. The first weakness is that traditional means of remedying discrimination, such as the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, are not readily applicable in the environmental justice context. The high burden of proving discriminatory intent has, in effect, nullified the Equal Protection Clause.[88] Likewise, although Title VI holds some promise, it is still uncertain whether plaintiffs must show discriminatory intent when not bringing suit under a federal agency's Title VI implementing regulations[89] and whether plaintiffs can recover damages absent a showing of discriminatory intent.[90]

The second weakness is that taking environmental justice problems out of the streets and into court may actually be to a community's disadvantage.[91] Luke Cole, an attorney with the California legal Assistance Foundation, argues that in struggles between polluters and communities, "two types of power exist: the power of money and the power of people."[92] Typically, polluters have the money while communities have the people. By taking the struggle to the courtroom where polluters can bring in the best experts money can buy, the community is taking the struggle off the streets where it has the most power.[93]

Similarly, in bringing the struggle to court and away from community activists and the people, Cole argues the litigation strategy fails to alter the structure of power relations that created the problem in the first place.[94] As environmental laws are a product of a process that has traditionally excluded poor and minority peoples, working within the system will tend to strengthen, rather than challenge, institutions that work against these disadvantaged classes.[95]

---

88. *See supra* Part I.A.1.a (discussing the requirement that discriminatory intent be shown in equal protection claims and the difficulty of showing this intent in the environmental justice context).

89. *See supra* note 41 (discussing *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 119 S. Ct. 22 (1998)).

90. *See supra* note 38 and accompanying text (discussing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)). Despite the potential limitations, many argue that civil rights challenges should continue because environmental justice issues *are* inherently civil rights issues. Professor Lazarus observes: "The point is not just that environmental laws need to be enforced but that there is a civil rights problem in the environmental area." Marcia Coyle, *Lawyers Try to Devise New Strategy*, NAT'L L.J., Sept. 21, 1992, at S8. According to solo practitioner Michael Daniel, individuals and organizations can win environmental justice cases: "There are two or three stinking little cases that have people throwing up their hands and saying they can't do it," adding that civil rights advocates initially faced setbacks in the courts involving voting rights and housing and school desegregation. *See id.*

91. *See* Cole, *supra* note 9, at 650 (arguing that taking environmental problems to court plays to the community's "weakest suit").

92. *Id.*

93. *See id.* The cost of preparing and presenting an effective case may also prove prohibitive, thus decreasing the probability of a favorable verdict for the affected communities.

94. *See id.* at 648-49. Additionally, minorities and the poor have a profound skepticism of the law's potential because throughout the history of the United States the law has been used to oppress the poor and minorities by depriving them of their land, denying them the right to vote, and rejecting their status as full citizens. *See id.* at 647.

95. *See id.* at 652.

The siting of facilities is a political problem, not a legal one.[96] Thus, strategies that focus on remedying the political powerlessness of these communities are the preferred choice.[97]

2. The problems with legislation

Although environmental injustice is inherently a "political" problem, Congress is not the appropriate body to remedy the problem.[98] The difficulty in passing legislation goes to the central issue of environmental injustice--the political and economic powerlessness of minority and poor communities: Who will speak on behalf of the interests of the disadvantaged when environmental justice legislation comes before Congress? As the poor and minorities are underrepresented in virtually every sector of government,[99] no significant and meaningful support will come from such institutions.[100] The failure of the legislative initiatives bears witness to this.

Thus, in order to affect the political process, the environmental justice movement must develop strategies that empower local communities and enable them to exert pressure on the political decision-making process. The result will likely be similar to that of the Civil Rights Movement where communities, empowered by

96. *See id.* at 648 (explaining that siting is a political problem because the government must issue permits to polluters giving them the right to pollute).

97. In arguing against litigation strategies and for community involvement, Luke Cole suggests that a litigation strategy "teaches the community that the community is not smart enough to solve the problem itself." Coyle, *supra* note 90, at S8; *see also* Cole, *supra* note 9, at 648 ("Using a legal strategy, rather than a political one, would likely fail these [poor and minority] communities.").

98. In his testimony before the House Legislation and National Security Subcommittee, Robert Bullard remarked that "the solution to the types of problems discussed today is decidedly not more federal power, nor a new federal cause of action." *Hearings*, *supra* note 2, at 82 . He argues that "[t]o the extent that disparities occur among communities, those disparities will likely occur whenever the decisionmaker is removed from the community. What is called for is a return of these types of decisions to the community or at least to the closest level of government to the problem." *Id.*

99. For example, in 1995, the 104th Congress included 40 black Representatives (9%), 17 Hispanic Representatives (4%), and four Asian-Pacific Islander Representatives (.9%). In the Senate, there was one black Senator (1%), zero Hispanic Senators, and one Asian, Pacific Islander Senator (1%). *See* UNITED STATES BUREAU OF THE CENSUS, MEMBERS OF CONGRESS - SELECTED CHARACTERISTICS: 1981 TO 1995, *reprinted in* BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997 No. 448. The dearth of minority representation in government is perhaps best illustrated by the employee breakdown within the federal executive branch. In 1995, there were 1,960,577 total executive branch employees. Of these, 1,394,690 (71%) were white, 327,302 (17%) were black, and 115,964 (6%) were Hispanic. *See id.* at No. 538. Although the total Hispanic and black representations nearly mirror the composition of the country's population, when one examines the upper levels of the executive branch, a different picture emerges. For example, of the 327,302 blacks, only 24,448 (7%) were in payment Grades 13-15 ($48,878-$88,326) and only 942 (.2%) were in Senior pay levels. *See id.* Similarly, of the 115,964 Hispanics, 10,473 (9%) were in Grades 13-15 and only 382 (.3%) were in Senior pay levels. *See id.* Thus, although minorities as a whole are well-represented in the federal government, they are greatly underrepresented in upper-level positions where most of the decision-making takes place.

100. *See* Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 924 (1992) (noting that underrepresentation in governing bodies translates into limited contact with policy-makers as well as a lack of advocacy for minority interests).

grassroots organizations, enabled underrepresented interests to exert pressure on elected officials, resulting in the passage of the Civil Rights Act of 1964.[101] Although legislative solutions may eventually prove effective, without significant representation in the decision-making process, any legislation that is passed may prove too "watered-down" to be of any effect.[102]

3. The EPA's "Common Sense" Initiative

The EPA's "Common Sense" Initiative comes closest to addressing the underlying problem of powerlessness by actively soliciting input from in the decision-making process.[103] In theory, this strategy enables individuals and communities to have a voice and potentially influence the decision-making process.[104] Despite such an initiative, however, the EPA's history suggests that its commitment to environmental justice remains suspect.[105] This is perhaps best illustrated by the fact that the EPA does not regard Executive Order 12,898 as adding substantive environmental justice requirements to existing statutes and regulations.[106] When the principal agency in the environmental justice debate summarily dismisses such a significant accomplishment of the movement, the possible effectiveness of any strategy developed by that agency must be seriously questioned.

101. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a- 2000h (1994).

102. *See infra* note 191 and accompanying text (discussing two environmental justice laws adopted by the Louisiana State Legislature and how the second law was "watered down" to gain passage).

103. *See* ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 72, at 4.

104. *See id.*

105. *See generally Unequal Protection*, *supra* note 18, at S1-S8 (discussing the EPA's inequitable enforcement of environmental laws). As a result of such inequitable treatment, the EPA may have lost the support and trust of communities most in need of its assistance. In her testimony before the House Legislation and National Security Subcommittee, Dr. Beverly Wright, Director of the Deep South Center for Environmental Equity, observed that "ineffective responses to environmental problems by [the] government have resulted in serious distrust by communities of those agencies, the EPA included, responsible for the health and safety of the public." *Hearings*, *supra* note 2, at 124 (statement of Dr. Beverly Wright).

Additionally, minorities are not well represented within the EPA. Although accounting for 26.8% of the total workforce at the EPA, minorities are, again, grossly underrepresented in positions of authority. In fact, there is a direct correlation between Grade (government service pay level) and minority representation: at Grade 1, minorities account for 82.4% of employees compared with 17.6% for whites; at Grade 8, minorities account for 53.7% of employees compared with 46.3% for whites; at Grade 10, minorities account for 35.4% of employees compared with 64.6% for whites; at Grade 15, minorities account for 9.2% of employees compared with 90.8% for whites; and at Senior pay levels, minorities account for 7.9% of employees compared with 92.1% for whites. *See* OFFICE OF WORKFORCE INFORMATION, U.S. EPA, RACE/NATIONAL ORIGIN DISTRIBUTION OF FEDERAL CIVILIAN EMPLOYMENT tbl.2 (1996) (on file with the *American University Law Review*).

106. *See* Julie R. Domike & Arthur W. Ray, *EPA, Courts Focus on Title VI Issues in Locating Industrial Plants in Low-Income Areas*, NAT'L L.J., Dec. 1, 1997, at C1. In *In re Chemical Waste Management of Indiana, Inc.*, 1995 WL 395962 (EPA June 29, 1995), the EPA's Environmental Appeals Board ("EAB") held that "'the Executive Order does not purport to, and does not have the effect of, changing the substantive requirements for issuance of a permit under RCRA [Resource Conservation and Recovery Act] and its implementing regulations.'" *See Chemical Waste Management*, 1995 WL 395962, at *4. In short, if the applicant meets the requirements of the applicable statute, the EPA must issue the permit, regardless of the racial or socioeconomic composition of the surrounding community or the effect of the facility on the surrounding community. *See id.* EPA Administrator Carol Browner followed this reasoning in denying the environmental justice petition filed in the Shintech case. *See infra* note 174.

Instead, what is needed is a strategy that enables a community to take control of the struggle itself, without having to rely on the government's good faith to include it in the decision-making process.[107] A community empowerment strategy is just this type of strategy.[108] The remainder of this Comment examines community empowerment strategies and attempts to show why such strategies are the most effective means of achieving social justice.

II. THE IMPORTANCE OF COMMUNITY EMPOWERMENT STRATEGIES

A. The Path of Least Resistance

Community empowerment strategies must play a prominent role in any environmental justice strategy because they are the most effective means of addressing the root-cause of environmental injustice: economic and political powerlessness. As noted above, this powerlessness makes poor and minority communities the "path of least resistance," which has two principal effects: (1) a disproportionate number of "locally undesirable land uses" ("LULUs") are sited there;[109] and (2) once sited, enforcement of environmental laws at these facilities is lax, resulting in the creation of toxic "hot-spots" in these communities.[110]

1. The problem of siting: NIMBY

The most vivid manifestation of economic and political powerlessness is the NIMBY ("Not In My Backyard") syndrome.[111]

---

107. Stephen Wexler of the National Welfare Rights Organization observed: "'Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together.'" *See* Cole, *supra* note 9, at 649 (quoting Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970)). The analogy to the environmental justice context is clear: the problems of pollution will not be stopped by people who are not being polluted. Environmental degradation will only be stopped by its victims and only if they work together.

108. The term "community empowerment" is used to denote the organization of grassroots groups; it is a bottom-up approach that seeks to influence the decision-making process by organizing and empowering communities. The EPA's "Common Sense" Initiative uses the term empowerment, but this is essentially a top-down approach—the government allows communities to participate in the process. *See* ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 72, at 18 (discussing empowerment strategies within the Brownfields program).

109. *See* GAO STUDY, *supra* note 5, at 2 (observing that hazardous waste landfills were disproportionately located in poor and minority communities); UCC STUDY, *supra* note 5, at 801-02 (finding that race played a significant role in the location of commercial hazardous waste facilities).

110. *See generally Unequal Protection*, *supra* note 18, at S1-S12 (comparing the enforcement of environmental laws, response time, and penalties between poor and minority areas and wealthy areas).

111. Major Willie A. Gunn gives six explanations for environmental injustice: (1) relative lack of political power; (2) economics; (3) lack of participation in the environmental movement; (4) racism; (5) NIMBY; and (6) segregated housing and immobility. *See* Gunn, *supra* note 8, at 1247-51. It is this author's opinion that reason five, NIMBY, is a product of reasons one through four. Clearly, minority and poor communities lack economic and political power, thereby affecting their ability to influence decision-makers. Similarly, their lack of participation in the environmental movement further contributes to their inability to influence decisions on the siting of facilities. Finally, many interpret NIMBY as an embodiment of racism, an interpretation supported by the findings of the GAO and UCC studies. *See* BULLARD, *supra*

Traditionally, NIMBY has been used by affluent sectors of society to block the siting of LULUs in their communities.[112] These communities are effective at blocking LULUs primarily because: (1) they are able to expend the necessary resources;[113] and (2) politicians typically relate to these communities and are thus more sensitive to their needs and desires.[114]

When these communities say "Not In My Backyard," developers turn their attention to communities where opposition is less organized and less powerful—poor and minority communities.[115] In fact, some have labeled this response by developers and political officials the "PIBBY principle"—"Place in Black's Backyard."[116] Regardless of how it is characterized, the result is clear: because poor and minority communities are unable to muster sufficient resistance to the siting of LULUs, these undesirable facilities end up in their neighborhoods.[117]

---

note 2, at 83-84 ("[L]and use decisions are quite revealing of status hierarchies (race and class) favoring whites and the affluent over the poor and people of color."); GAO STUDY, *supra* note 5, at 2; UCC STUDY, *supra* note 5, at 801-02.

112. *See* Gunn, *supra* note 8, at 1249.

113. *See id.* (noting that poor communities will usually lack the financial resources to resist the siting of unwanted facilities); Mohai & Bryant, *supra* note 100, at 924 ("Communities where hazardous waste sites are located tend to be communities in which residents are unaware of the policy decisions affecting them, [and the] residents are unorganized and lack resources for taking political action."). For example, a consultant's report regarding the siting of three incinerators proposed by the City of Los Angeles contained the following advice:

> Certain types of people are likely to participate in politics, either by virtue of their issue awareness or their financial resources, or both. Members of middle or higher-socioeconomic strata . . . are more likely to organize into effective groups to express their political interests and views. All socioeconomic groupings tend to resent the nearby siting of major facilities, but the middle and upper-socioeconomic strata possess better resources to effectuate their opposition.
>
> . . . [A]lthough environmental concerns cut across all subgroups, people with a college education, young or middle-aged, and liberal in philosophy are most likely to organize opposition to the siting of a major facility.

Been, *supra* note 16, at 1002-03 n.6 (citing J. Stephen Powell, Cerrell Associates, Political Difficulties Facing Waste to Energy Conversion Plant Siting, Report to the California Waste Management Board 42-43 (1984)). The consultants then "recommended that 'communities that conform to some kind of economic need criteria should be given high priority' and that officials should look for 'lower socioeconomic neighborhoods' that were also in 'a heavy industrial area with little, if any, commercial activity.'" *Id.* (citing Dick Russell, *Environmental Racism*, 11 Amicus J. 22, 25-26 (1989) (quoting Cerell Associates)).

114. Robert Bullard argues that those communities capable of mobilizing political influence greatly improve their chances of "winning" the NIMBY war. Because minorities are underrepresented in political office, they must rely on officials who may not understand the nature and severity of the problems confronting the community. *See* BULLARD, *supra* note 2, at 131-32.

115. *See* Cole, *supra* note 9, at 646.

116. *See id.* at 647. The GAO and UCC studies support this assertion—if not PIBBY, then at least PIMBY ("Place in Minorities' Backyard"). *See* GAO STUDY, *supra* note 5; UCC STUDY, *supra* note 5.

Robert Bullard addresses another interesting problem that NIMBY poses for blacks. He asserts that it has been difficult for many blacks to say "Not-In-My-Back-Yard" because they do not have a backyard. He notes that nationally, only about 44% of blacks own their own homes, compared with 66% for society as a whole. As homeowners are the strongest advocates of NIMBY, blacks are clearly at a disadvantage. *See* BRYANT, *supra* note 8, at 80.

117. Another contributing factor to the disproportionate number of LULUs in poor and minority communities is "job blackmail." Because of their economic weaknesses, poor and minority communities are often willing to deal with the increased pollution in the hopes of obtaining economic benefits from the facility—the jobs vs. environment debate. *See* BULLARD,

NIMBY and the resultant problem of siting are harmful to poor and minority communities for reasons beyond that of pollution.[118] First, LULUs engender a sense of unfairness because they tend to gravitate toward disadvantaged communities, thereby making those communities worse places to live.[119] Second, NIMBY has operated to insulate non-minority and affluent communities from the adverse impacts of solid waste facilities while simultaneously providing them with benefits, such as garbage disposal.[120] This has led Robert Bullard to argue that NIMBY creates and perpetuates privileges for affluent communities at the expense of poor and minority communities.[121]

2. The problem of enforcement

The problems that lead to the siting of LULUs in poor and minority communities also contribute to the lax enforcement of environmental laws once the facilities are sited.[122] In 1992, the

supra note 10, at 55. To these communities, the prospect of jobs is something real and tangible, whereas potential environmental risks are something unknown. *See* BULLARD, *supra* note 2, at 27. An excellent example of this mentality is, again, the proposed Shintech plant in St. James Parish, Louisiana. A large percentage of the population (there is some debate as to whether the majority of the community is for or against the facility), including the state chapter of the NAACP, is pro-Shintech primarily for economic reasons. Among the reasons given by the Citizens of Freetown, a grassroots group in favor of the plant, is that the plant will bring job opportunities and residual economic benefits, as well as "provid[e] hope and financial security for many Freetown families." *See* Gladys Maddie, *Letter to the Editor*, NEWS-EXAMINER, Apr. 24, 1997, at 2. Given these possibilities, the group concluded that the potential economic infusion far outweighed any potential environmental effects. Letter from Carol A. Gaudin, Citizens of Freetown, to J. Dale Givens, Secretary, Louisiana Department of Environmental Quality 2 (Apr. 21, 1997) (on file with the *American University Law Review*).

118. Pollution, however, is obviously a major concern. More so than lax enforcement, NIMBY and the resulting problem of siting may have the most serious environmental ramifications. Even if all the facilities in the area are in perfect compliance with every environmental regulation, severe health hazards may still exist. In his statement to the House Subcommittee on Legislation and National Security, Rep. John Lewis of Georgia offered the following insight:

> [Y]ou can have a paper mill in a community that is in full compliance with all environmental laws, and then have an incinerator in that community that is in compliance, and a dry cleaning operation that is in compliance, and so forth and so on. But together, the paper mill, the incinerator, and the dry cleaning may be killing the community. People need to know that. They have a right to know.

Hearings, *supra* note 2, at 18 (statement of Rep. Lewis). Similarly, in his testimony, Bunyan Bryant summed up the problem as follows: "And in cancer alley you have all of the corporations each dumping hundreds and thousands of pounds of chemicals into the air and the water and the EPA and the State government issuing permits as if that is the only company that is doing it. There's no concern about the cumulative effect." *Id.* at 96 (statement of Bunyan Bryant).

119. *See* BULLARD, *supra* note 2, at 37.

120. *See id.* at 131.

121. *See id.*; *see also* Kaswan, *supra* note 13, at 272-73 (noting that the process "feeds on itself" in that zoning laws perpetuate these problems because when noxious facilities are already located in an area, additional similar facilities will be considered consistent with existing uses).

122. *See supra* note 105 and accompanying text (discussing the low minority representation in positions of authority within the EPA). Robert Bullard argues that this underrepresentation "has no doubt affected the outcomes of some important environmental decisions in at-risk communities." *See* BULLARD, *supra* note 2, at 101. The effects of this underrepresentation of minorities within the EPA are further exacerbated by their lack of representation in mainstream environmental groups. Thus, minorities are essentially denied a voice from the inside of the primary political process and from the outside. As they have no means of fighting for their interests, the resulting lax enforcement in minority communities should come as no surprise. *See id.* at 133.

National Law Journal conducted a study of the EPA's enforcement practices and found there to be a significant enforcement gap between predominately white communities and predominately minority communities.[123] Among other things, the study found that: (1) hazardous waste sites in minority communities took 20% longer to get placed on the EPA's National Priorities List than those in white communities;[124] (2) clean-up projects began approximately 42% later in minority communities than in white communities;[125] (3) penalties against polluters in low-income communities were 54% lower than for wealthier communities;[126] (4) a 500% disparity in fines levied under the Resource Conservation and Recovery Act existed between white and minority communities;[127] and (5) the Clean Air Act enforcement cases were overwhelmingly brought in white communities.[128] These findings strongly suggest that unequal environmental protection places minority communities at special risk.[129]

123. *See Unequal Protection*, *supra* note 18, at S1-S2 (concluding that "disparity under the toxic waste law occurs by race alone, not income").

124. *See id.* at S1, S4.

125. *See id.* at S4.

126. *See id.* at S2.

127. *See id.*

128. *See id.* at S12. This is true despite the fact that greater numbers of minorities are exposed to air pollution than are whites. Major Willie A. Gunn argues that this disparity may be explained by the relative political clout and activism of white communities as opposed to minority communities. *See* Gunn, *supra* note 8, at 1245 n.129.

129. Two examples are sufficient here. First, studies have shown that exposure to air pollutants increases the risk of respiratory illness in children. The State of Maryland conducted a study that examined the rates of hospitalization for asthma among children in relation to race and socioeconomic status. The study found that black children were three times more likely to be hospitalized for asthma than white children. *See Hearings*, *supra* note 2, at 109 (statement of Adolfo Correa-Villasenor, M.D., Ph.D.). Although white-black differentials in exposure to pollutants were not examined as possible explanations or contributory factors, given the disproportionate siting of facilities and lax enforcement in minority communities, this would seem a likely explanation. *See id.* The problems created by increased exposure to pollutants are further exacerbated by the difficulties poor and minorities face in obtaining adequate health care. *See* Cole, *supra* note 9, at 630 n.32 (noting that only 42% of people below the poverty level received Medicaid; that many doctors have not been trained to recognize environmental illness, and thus, those ill from pollution or other poisoning might not be properly diagnosed; and that doctors who treat poor, minority, and rural residents often have fewer resources at their disposal and therefore less care to offer their patients).

Second, numerous studies also indicate that minorities are disproportionately affected by lead poisoning. For example, the United States Centers for Disease Control has found that the percentage of lead poisoning victims was 30% higher among black children than among white children. *See Lead Poisoning: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong. 23-25 (1992) (statement of John H. Adams, Executive Director, Natural Resources Defense Council) (asserting that the effects of lead poisoning are serious). In his testimony before the House Subcommittee on Health and the Environment, Adams observed that:

> Lead poisoning strikes at the heart of the ability of children to improve their lot. . . . These children are at a greater risk of poor academic achievement and dropping out of school and some experts believe these kids ultimately are at greater risk of committing crimes because of neurologic and behavioral dysfunctions caused or exacerbated by lead poisoning.

Id. at 27.

B. The Public Choice Process

The public choice process provides an excellent illustration of why the interests of poor and minority communities are largely ignored on the institutional level. Debunking the myth that the public choice process is open to everyone, Professor Denis J. Brion argues that political experiences suggest that decisions can often be explained by a perceived hierarchy of power, where wealthy communities are not subjected to LULUs while poorer communities are.[130] The question then is: why does the public choice process produce such inequitable results? Brion provides two answers: (1) the operation of government precludes groups with fewer resources from fair consideration of their interests, and (2) the personal agendas of decision-makers often prevent objective decision-making.[131]

Addressing the first point, Brion argues that to participate adequately in the public choice process, two types of resources are required.[132] The first type includes resources that enable participation, such as time, negotiation and presentation skills, and a thorough understanding of the workings of and interplay among the various governmental entities involved.[133] In theory, anyone may acquire these resources. In practice, however, the cost of acquiring them frequently prevents participation—the classic collective action problem.[134]

The second type of resource is one that comprises the substance of participation.[135] This substance consists of both advocacy for a particular outcome and the information necessary to make an informed decision.[136] Brion contends that because decision-makers are frequently uninformed on a particular issue, they rely solely on people—such as industry representatives—who have the information readily available, thereby further prejudicing the decision-making process.[137]

Inequitable results also can be attributed to the personal agenda of politicians and bureaucrats. Due to the very nature of their

---

130. *See* Denis J. Brion, *An Essay On LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 440 (1988).

131. *See id.* at 443-44; Hernandez, *supra* note 71, at 192 (discussing Brion's answers as to why the public choice process produces inequitable results). The first reason represents both economic and political powerlessness while the second represents only the latter. In essence, the public choice process exacerbates and perpetuates the powerlessness of disadvantaged individuals, groups, and communities, rendering it virtually impossible for such groups to adequately raise their concerns and have their interests fairly represented. *See id.*

132. *See* Brion, *supra* note 130, at 444.

133. *See id.*

134. *See id.* On any given issue, the aggregate interest of the community may be significant, yet individuals in the community will not participate because the cost of participation is so high relative to their individual interests and because there is no mechanism in place to facilitate the organization of their interests. As a result, industry, for example, is frequently the only participant. Thus, the resulting participation does not accurately reflect the interests of those affected by the decision. *See id.* at 444-45.

135. *See id.* at 445.

136. *See id.*

137. *See id.*

profession, politicians do not begin to evaluate each issue from a neutral stance. Given their desire to remain in office, they are inclined to cater to the constituencies that elected them.[138] Bureaucrats, on the other hand, exhibit two strong biases: to avoid making controversial decisions and to expand their particular department.[139] Poor and minority communities lack economic and political clout; therefore, they enjoy little influence over government officials.[140] Conversely, wealthier communities are better able to influence and obtain favorable decisions from politicians since politicians can more closely relate to the wealthier communities.[141]

The public choice process illustrates why economic and political powerlessness is so detrimental to poor and minority communities. Lacking political representation and influence, the powerlessness of minority and poor communities creates and perpetuates the disparate siting of LULUs and unequal enforcement of environmental laws once a facility is sited. Given the nature of the public choice process, the only means of remedying this problem is by increasing the political and economic influence of poor and minority communities. Community empowerment strategies are aimed at accomplishing just this goal.

C. Transforming the Path of Least Resistance: Community Empowerment Strategies[142]

Community empowerment strategies are necessary because they are the only means to adequately address and remedy the underlying cause of environmental injustice—powerlessness. To be effective, however, these strategies must seek to accomplish three goals: improving education; building the movement; and addressing the

---

138. *See id.* at 443. The role of a politician has been characterized as "constituent service." *See id.* at 443 n.26 (citing Fred Barnes, *The Unbearable Lightness of Being a Congressman*, NEW REPUBLIC, Feb. 15, 1988, at 18 (noting that what a member of Congress does is "euphemistically" called "constituent service," which in reality is giving specific advantages to individuals in the member's district)).

139. *See id.*

140. *See supra* notes 111-15 and accompanying text (discussing the NIMBY syndrome and its consequences for poor and minority communities).

141. *See id.*

142. Although this Comment does not address public participation requirements in existing environmental laws, it is important to note that any successful empowerment strategy will involve the strategic use of public participation provisions. Luke Cole argues that "strategic use of public participation provisions in environmental laws can help relieve the environmental burden of environmental dangers on low-income communities and communities of color, while bringing those communities together to realize and exercise their collective power." Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 689 (1995). Cole then develops a participatory model consisting of the following phases: (1) the pre-application hearing, (2) the scoping meeting, (3) the public comment period on the environmental impact assessment, and (4) the public hearing held by the permitting agency to discuss public comments. *See id.* at 695-97. Each phase presents an opportunity for public participation that should be exploited by the community. *See id.* Utilizing public participation provisions is part and parcel of the educational process that is a key element in any successful community empowerment strategy. *See infra* notes 143-45 and accompanying text (discussing the importance of education in community empowerment strategies).

root-cause of the problem.[143] The first objective focuses on two types of education: educating the community about a proposed land use;[144] and educating the community that it must take power for itself.[145] The second objective mandates the creation of an active community group that will remain intact and active long after the problem at issue is resolved.[146] Finally, the third objective demands an effective strategy that will address the root-cause of environmental injustice and not merely a symptom of the problem.[147]

In short, community empowerment strategies seek to enable those who face the consequences of environmental decisions be the ones making the decisions.[148] By educating and mobilizing communities, these strategies attempt to remedy the inequitable results generated by NIMBY and the normal functioning of the public choice process.[149] The ultimate goal of community empowerment strategies is to create numerous empowered communities that will coalesce into a movement capable of exerting pressure on and affecting the personal

143. These three goals are extrapolated from Luke Cole's three models of environmental advocacy. The first model—the "professional model"—is attorney-centered and grounded in the belief that the attorney is an expert who can best represent the interests of the community. *See* Cole, *supra* note 142, at 693-94. The second model—the "participatory model"—seeks to maximize community involvement in the administrative permitting process. *See id.* at 694. The participatory model accepts the system as it is and encourages participation in it. *See id.* at 694-97. The third model—the "power model"—focuses on building power and is based on the conviction that no amount of participation will change the power relations giving rise to environmental degradation. *See id.* at 698-700. In evaluating the effectiveness of each model to the environmental justice movement, Cole asks three questions: (1) Will it educate?; (2) Will it build the movement?; and (3) Will it address the root of the problem or merely a symptom? *See id.* at 703.

144. There are two principal types of education concerning a proposed land use. First, a community can obtain a copy of the environmental impact assessment ("EIA"), assign chapters to each member, and meet to discuss what they learned from the EIA. As Luke Cole points out, a community's knowledge and experience will often diverge from the "knowledge" contained in the EIA. *See id.* at 695-96. Through these study groups, communities may be able to identify serious flaws in the project or indicate alternatives for the project. *See id.* Second, a community may simply begin researching the proposed facility to determine: the type of facility it will be, the nature of the pollutants it will discharge, and the harmfulness of those pollutants. This type of education is analogous to the education fostered in the Shintech case study discussed below. *See infra* notes 164-66 and accompanying text (discussing educational tactics used by the St. James Citizens for Jobs and Environment community group).

145. This type of community education centers on self-determination, the power to control one's destiny. *See* Cole, *supra* note 142, at 707.

146. *See id.* at 706 (arguing that merely mobilizing a number of community individuals is not sufficient if the group cannot be maintained).

147. *See id.* at 698-99. In other words, communities must identify and address the issues of political and economic powerlessness by focusing on what empowerment strategies call the "leverage point"—the decision. *See id.* at 698. Cole outlines the key questions that must be asked in order to influence the decision-making process effectively: (1) Who are the actual decision-makers? (2) Where do the individual decision-makers stand on the project? (3) How can the group neutralize or convert decisionmakers opposed to the group? (4) How can the group solidify the support of decision-makers who favor the group? and (5) Who are the group's potential allies, both locally and regionally? *See id.* at 699-700.

148. *See* Cole, *supra* note 9, at 661. Inherent within this concept is the sentiment that those who will be affected by the decision are imminently qualified to participate in the decision: the affected community's "beliefs and experiences are as valid, or more valid, than those of the traditional 'experts'—scientists, consultants, attorneys—fielded by industry, government, and environmental groups." *See id.* at 662.

149. Additionally, by mobilizing the community, these strategies decrease the prohibitive costs associated with becoming involved in the public choice process. *See* discussion *supra* Part II.B (discussing the public choice process and its associated costs).

agendas of key decision-makers.[150]

150. Because decision-makers typically discount individuals as insignificant, the formation of a community group that provides collective action is crucial to success: "[T]he atomistic individual could accomplish little in isolation, but could accomplish great things when organized into a group." Brion, *supra* note 130, at 452. Additionally, by improving the chances of successfully navigating the public choice process, community empowerment strategies provide individuals in the community with a sense of personal efficacy, a crucial element in political activism. *See* BULLARD, *supra* note 2, at 2. By its nature, community empowerment transforms personal efficacy into group efficacy, which enables communities to take charge of the struggle, and eventually take charge of their respective communities. This is precisely what happened in the Civil Rights Movement. Civil rights activists educated individuals about their rights and the law, which led to the education of entire communities, which in turn empowered individuals and communities to unite in a national movement that successfully exerted significant pressure on politicians nationwide. *See infra* Part III (discussing tactics used by the Civil Rights Movement during the 1960s and their effectiveness in exerting pressure on decision-makers).

D. Community Empowerment in Action: St. James Citizens for Jobs and the Environment—the Shintech, Inc. Controversy

The recent controversy in St. James Parish, Louisiana surrounding the proposal by the Japanese firm, Shintech, Inc., to build a $700 million PVC plant in the predominantly black community provides an excellent example of how and why community empowerment strategies are effective.[151] Controversy began virtually from the moment citizens heard of the proposal.[152] Despite protest, the Louisiana Department of Environmental Quality ("LDEQ") initially approved the requisite air permits for the plant.[153] Citizens groups subsequently filed petitions with the EPA requesting that the Agency rescind the permits on environmental justice and technical grounds.[154] The environmental justice issue centers on whether the siting of the plant in St. James Parish violates President Clinton's Executive Order. The controversy was widely viewed as the EPA's test case for implementing the Executive Order.[155]

1. Formation of the community group St. James Citizens for Jobs and the Environment

St. James Citizens for Jobs and the Environment (the "Group") was formed to provide a community voice in opposition to the siting of

---

151. *See generally* Peter Fairley, *Shintech Siting Dispute Awakens a Sleeping Giant*, CHEMICAL WK., Oct. 8, 1997, at 45 (providing a brief summary of controversy surrounding the proposed Shintech, Inc. plant).

152. There is significant disagreement, however, over whether the majority of the population supports the plant. In some door-to-door polls, surveyors report that as much as 73% of the black population is pro-Shintech. *See Environmentalists Seek to Make Shintech Delay More Permanent*, CHEMICAL MARKET REP., Sept. 22, 1997, at 5. This fact seems to raise questions about the application of environmental justice principles to the controversy: How can it be unjust if a majority of the population is pro-Shintech? Furthermore, this situation has led some to question the EPA's reasoning behind using this controversy as a test case for its environmental justice policies. *See, e.g.*, *Civil Rights Not the Role of EPA*, *supra* note 70, at B6 ("How can anyone claim the process has victimized black people when so many black people favor the project?"); *State NAACP Takes Pro-Shintech Stance*, ASSOCIATED PRESS POL. SERV., Sept. 22, 1997, *available in* 1997 WL 2551041 (noting that the majority of blacks favor the proposed plant and criticizing Jesse Jackson for his opposition).

For the purposes of this Comment, whether or not the community is for or against Shintech is irrelevant. This Comment is concerned only with using the controversy to show the effectiveness of community empowerment strategies. The existence of this controversy presents an excellent example of what an empowered community can accomplish.

153. *See In re Shintech, Inc.*, Petition on Permit Nos. 2466-VO, 2467-VO, 2468-VO, at 2 (EPA Sept. 10, 1997) (on file with the *American University Law Review*) [hereinafter *In re Shintech* Order].

154. *See infra* notes 170-71 and accompanying text (discussing the environmental justice petition and the petition for an adjudicatory hearing filed on behalf of St. James Citizens for Jobs and Environment).

155. Robert Bullard calls the Shintech controversy the "quintessential environmental justice struggle—a facility with 'staggering' permitted emissions proposed in a predominately black location, chock full of plants, where poverty and unemployment are endemic." Fairley, *supra* note 151, at 45 (quoting Robert Bullard); *see also* Vicki Ferstel, *Shintech Becomes Test Case: EPA Trying to Apply New, Vague Order*, BATON ROUGE ADVOC., Sept. 12, 1997, at A1; Hoversten, *supra* note 3, at A3; Carl Redman, *Shintech Controversy Will Revisit Legislature*, BATON ROUGE ADVOC., Sept. 23, 1997, at B7.

the proposed Shintech, Inc. PVC plant.[156] The Group is opposed to the plant for several reasons.[157] First, the Group believes the area is presently overburdened with three chloride processing plants, an oil refinery, a plastics plant, and other industries within a three-mile radius of the proposed plant.[158] Second, the plant would be located within a mile of the local elementary school, raising concerns about the condition of the school and whether it is adequate for "shelter-in-place" warnings.[159] Third, the Group believes that the promise of jobs at the plant is an empty promise.[160]

2. The Group's activities

The Group has been active in the community from the moment it heard of the proposal.[161] When news of the proposal first became public, the Group organized and funded two informational meetings.[162] The Group distributed fliers about the meetings, placed announcements in newspapers, and arranged transportation for those who would otherwise not have been able to attend.[163] The purpose of these meetings was to obtain information from a diverse

156. Letter from St. James Citizens for Jobs and the Environment ("SJC"), to Carol Browner, Administrator of the Environmental Protection Agency 1 (Apr. 29, 1997) [hereinafter SJC Letter] (on file with the *American University Law Review*).

157. *See id.*

158. *See id.* As a result, the area ranks third highest in the state for total toxic releases and transfers with more than 17 million pounds released or transferred yearly. *See* Environmental Justice Petition, *supra* note 1, at 9 (citing the 1994 TRI (Toxic Release Inventory) statistics). In addition, St. James ranks fourth in the state for toxic air releases, second for toxic water releases, and in the top four for "special interest" toxic chemicals (chemicals that are of the most concern because of their carcinogenic and/or teratogenic characteristics). *See id.* at 9-10.

159. *See* SJC Letter, *supra* note 156, at 1. "Shelter-in-place" warnings are alarms that warn of accidental toxic releases into the air. Residents are advised to stay in their homes during these warnings. *See id.*

160. The facts seem to support this argument. Shintech requires a high school education and technical skills. *See* SJC Letter, *supra* note 156, at 5. Pat Melancon, the Group's leader, claims that as much as 50% of the community has not completed high school and therefore would not qualify for employment at the plant. *See id.* In the Group's letter to the EPA Administrator Carol Browner, Melancon wrote: "[T]he jobs promise is a callous one that tells people who have been historically discriminated against, denied educational opportunities, and thought to be without political power, to sacrifice their health and environment and the health of their children for the promise of a job." *Id.* Additionally, members of the Group oppose the plant because they feel the creation of only 165 jobs does not justify further environmental degradation. *See, e.g.*, Editorial, *Are Shintech's Jobs Worth It?*, BATON ROUGE ADVOC., Oct. 10, 1997, at B10 (asking whether "165 permanent jobs are worth the tons of toxic poison and danger to our elderly and our children who can't protect themselves or escape").

In fairness to Shintech, the company said that it would work with a local technical college to help residents gain the skills necessary to compete for jobs at the plant. *See* Chris Gray, *Shintech Getting Good Reviews in Texas: Company Wants St. James Site*, NEW ORLEANS TIMES-PICAYUNE, Aug. 31, 1997, at A1. Pursuant to this offer, and as part of an agreement with the St. James chapter of the NAACP, Shintech pledged $500,000 to fund a nonprofit corporation for improving job training and creating small businesses in St. James, if and when it obtains the necessary permits for the plant. *See* Vicki Ferstel, *Shintech, Inc. Offered Help on Jobs, Businesses*, BATON ROUGE ADVOC., Dec. 16, 1997, at A1; Chris Gray, *Shintech Promises Training for Workers*, NEW ORLEANS TIMES-PICAYUNE, Dec. 17, 1997, at B3 [hereinafter Gray, *Training for Workers*]. The program does not guarantee jobs, but will focus on providing job training. *See* Gray, *Training for Workers*, *supra* at B3. In its agreement with the local NAACP, the company also resolved to implement an affirmative action plan in its hiring practices. *See* Hoversten, *supra* note 3, at A3.

161. *See* SJC Letter, *supra* note 156, at 4-5.

162. *See id.*

163. *See id.* at 1.

group of people[164] and to encourage "open and frank" discussion about the pros and cons of the proposal, including economic, health, and environmental impacts.[165] In addition to organizing informational meetings, the Group widely advertised the LDEQ's public hearing on the Shintech air permits.[166]

The Group also educated itself about the plant's operating procedures and the vinyl chloride, dioxin, and other hazardous materials that the plant would produce.[167] Likewise, in an effort to understand better their rights under existing law, the Group studied the permitting process and regulatory actions by the LDEQ and the EPA.[168] Through these efforts, the Group has sought to influence the decision-making process and ensure that the community's interests and concerns are fully considered in the permitting process.[169]

3. Results of the Group's efforts

In response to the Group's protests, the filing of an environmental justice petition with the EPA on April 2, 1997,[170] and a request for an adjudicatory hearing with the LDEQ on May 15, 1997,[171] the Group achieved several successes. First, on September 8, 1997, J. Dale

164. *See id.* (explaining that the Group invited the Vice-President of Shintech, the Parish President, and various environmental organizations).

165. *See id.*

166. *See id.* at 6. The Group mobilized 300 people to attend the meeting and gathered over 1000 signatures during the public comment period on the permit applications. *See id.* The flier the Group created for the public hearing included information about how the hearing would proceed, how citizens could voice their concerns, and a brief explanation about the amount of pollution the plant would release. *See* St. James Citizens for Jobs and the Environment Flier, Right To Know (copy on file with the *American University Law Review*).

167. *See* SJC Letter, *supra* note 156, at 5.

168. *See id.*

169. In the Group's letter to Carol Browner, Melancon writes:

> [W]e have taken the responsibility to fully participate in the Shintech permitting decision. At every opportunity made available to us, we have gathered information, researched issues, actively encouraged residents to participate in the decision-making process, and voiced our concerns about the types of pollution and associated health risks that Shintech [would] bring to our community.

SJC Letter, *supra* note 156, at 5.

170. The Tulane Environmental Law Clinic filed the petition on behalf of the Group and other local community-based organizations concerned with the proposed plant. The environmental justice petition states three reasons why the EPA should object to the Shintech permits. First, the plant would constitute a major new source that would increase the "disproportionately high health and environmental risks that are adverse to the predominately African-American and low-income community." *See* Environmental Justice Petition, *supra* note 1, at 2. Second, the permit fails to meet regulatory standards for minimizing the consequences of an accidental release. *See id.* Third, there has been no demonstration that the benefits of the proposed plant would outweigh the substantial environmental and social costs imposed on residents in and outside the community. *See id.*

171. The request for an adjudicatory hearing states three reasons why the LDEQ should reopen the permitting process and hold another public meeting. First, the LDEQ failed to address adequately environmental justice issues relating to the site selection and permitting process. *See* Letter from Tulane Environmental Law Clinic, to Dr. Clarice E. Gaylord, Director, Office of Environmental Justice, U.S. EPA 1 (May 15, 1997) (on file with the *American University Law Review*) (requesting an adjudicatory hearing regarding the Shintech air permit proceedings). Second, the LDEQ would have to grant Shintech an adjudicatory hearing if it requested one and it would be unfair to deny concerned citizens the same opportunity. *See id.* Third, the hearing is necessary to ensure the protection of citizens' rights to a fair public review and comment period and an impartial and unbiased decision. *See id.* at 2.

Givens, Secretary of the LDEQ, reopened the permitting process to enable further dialogue between the LDEQ and concerned citizens, and to address potential environmental justice issues.[172] Second, on September 10, 1997, EPA Administrator Carol Browner rejected Shintech's air permit on technical grounds—for its failure to regulate all potential sources of pollution.[173] The Agency, however, failed to act explicitly on the environmental justice issues,[174] instead leaving them to the LDEQ to address in the reopened permitting process.[175]

Third, on September 17, 1998 Shintech announced that it was suspending plans to build the PVC plant in St. James Parish.[176] Instead, it plans to build a smaller, $250 million plant near Plaquemine, Louisiana.[177] Perhaps most importantly, to avoid the

---

172. *See* Letter from J. Dale Givens, Secretary of the LDEQ, to Jerry Clifford, EPA Region VI Administrator 1 (Sept. 8, 1997) (on file with the *American University Law Review*). In the letter, Givens said the reopened process would enable the LDEQ to address issues that may involve environmental justice and provisions of Title VI of the Civil Rights Act concerning disparate impact on the surrounding community. *See id.*

On December 9, 1997, Louisiana became the first state to hold a public meeting on environmental justice issues. *See* Maria Giordano, *Shintech Forum to Focus on Racism: St. James Meeting First of its Kind*, NEW ORLEANS TIMES-PICAYUNE, Dec. 8, 1997, at A1. The LDEQ scheduled two such meetings to provide citizens an opportunity to discuss whether the Shintech, Inc. plant will disproportionately affect the predominantly minority communities near the proposed site. *See id.* Additionally, the meetings are an effort by the LDEQ and the EPA to more precisely define the term "environmental justice." *See id.*

173. *In re Shintech* Order, *supra* note 153, at 5-6.

174. In not acting explicitly on the environmental justice issues raised, Browner adopted the reasoning of the Environmental Appeals Board in *In re Chemical Waste Management of Indiana, Inc.* *See supra* note 106 and accompanying text. In rejecting the petition, Browner stated that "a petitioner must demonstrate that a permit is not in compliance with applicable requirements of the Act." *In re Shintech* Order, *supra* note 153, at 5. In essence, the petition was rejected on the ground that the Clean Air Act does not authorize petitioning the EPA to revoke a permit for environmental justice reasons. Instead, the Act mandates that petitioners show that a permit is not in compliance with a Clean Air Act requirement. *See id.* at 8 ("Petitioners have not shown how their particular environmental justice concerns demonstrate that the Shintech Permits [sic] do not comply with applicable requirements of the [Clean Air] Act."). Therefore, Browner was forced to find a "technical" violation of a Clean Air Act requirement in order to revoke the permits.

175. In a letter to J. Dale Givens explaining the EPA's decision, Browner made it clear that the Agency would step in if it was not satisfied with the LDEQ's handling of the environmental justice issue. *See* Letter from Carol Browner, EPA Administrator, to J. Dale Givens, Secretary of the LDEQ 1-2 (Sept. 10, 1997) [hereinafter Letter from Carol Browner] (on file with the *American University Law Review*). Additionally, the letter says that the EPA's Office of Civil Rights will continue looking into the Title VI claims raised. *See id.* at 2. The EPA's decision on the environmental justice issues may have been influenced by the LDEQ's decision on September 8, 1997, to reopen the permitting process to address, *inter alia*, environmental justice issues. In her letter, Browner stated that she is pleased with the LDEQ's decision to reopen the process and emphasized the EPA's belief that "it is essential that minority and low income communities not be disproportionately subjected to environmental hazards, and that the concerns of their residents be adequately addressed in the permitting process." *See id.* at 1.

176. *See* Vicki Ferstel & Chris Frink, *Shintech Withdraws Plan: EPA Official Praises Shintech Plan*, BATON ROUGE ADVOC., Sept. 18, 1998, at 1A.

177. *See Shintech Plans PVC Plant to Replace Vinyls Complex*, CHEMICAL MARKET REP., Sept. 28, 1998, at 5. Unlike St. James Parish, which has a predominately black population, the population of Iberville Parish, where Plaquemine is located, is almost evenly divided between whites and blacks and has higher relative income levels than St. James. Bob Kuehn, director of the Tulane Environmental Law Clinic, however, argues that this demographic difference may be traced to 1991 when Dow Chemicals relocated the predominately black community of Morrisonville. *See "Environmental Racism" Case Not Over; Company's Decision on Plant Site Doesn't End EPA Scrutiny*, DALLAS MORNING NEWS, Sept. 19, 1998, at 33A; *see also supra* note 2 (discussing the four towns that have "disappeared" along the Mississippi river over the past several years).

"firestorm" it encountered in St. James Parish, Shintech conducted a series of public meetings with residents in the parishes surrounding the newly proposed plant to identify issues that the company should address when it submits its new permit applications.[178]

These results are both discouraging and encouraging. They are discouraging because in its test case for environmental justice, the EPA ultimately left the decision to the LDEQ.[179] On the other hand, the results are encouraging because community involvement and pressure clearly influenced the decision-making process, as shown by the LDEQ's decision to reopen the permitting process, and Shintech's decision to relocate its plant and conduct public meetings at the new location before submitting its permit application.[180]

4. Assessing the effectiveness of the Group's tactics

To assess the Group's effectiveness, one must examine whether its actions accomplished the three goals of community empowerment strategies: increasing education; building the movement; and addressing the root-cause of environmental injustice.[181] Arguably, all three have been accomplished. First, the tactics clearly educated the community.[182] The Group researched relevant issues, identified their rights and how they could participate in the process, and also learned about the plant's production processes and the nature of the toxins that would be released.[183]

Second, the Group's efforts have helped build a movement.[184] By organizing meetings and posting notices about the LDEQ public hearings, the Group encouraged more people to attend and join the efforts to block the plant.[185] Additionally, the Group's efforts attracted national[186] and international attention[187] and the Group

178. *See* Mark Schleifstein, *Shintech Takes New Tack With Residents*, NEW ORLEANS TIMES-PICAYUNE, Oct. 7, 1998, at A2. The first meeting took place on September 23, 1998, and was attended by approximately 200 Iberville Parish residents. *See* Amy Reynolds, *People Talk of Fears with Shintech*, BATON ROUGE ADVOC., Sept. 24, 1998, at A4. At the third public meeting, October 7, 1998, Shintech officials presented residents with a 33-page report providing written answers to over 400 questions posed at the previous two meetings. *See* Chris Frink, *Report Offers Answers to Shintech Plant Questions*, BATON ROUGE ADVOC., Oct. 7, 1998, at B4. In addition, the report was sent to public libraries and people who requested copies. *See id.*

179. Luke Cole described the EPA's handling of the situation: "They punted pretty badly—spineless as usual from the Browner administration." Fairley, *supra* note 151, at 45.

180. *See infra* Part II.D.4.

181. *See supra* note 143 and accompanying text (presenting Cole's three goals of community empowerment strategies).

182. *See supra* notes 161-68 and accompanying text (discussing educational methods employed by Group).

183. *See id.*

184. Not only have the Group's efforts mobilized and empowered the local community, but they have become a rallying point for the environmental justice movement. Even the LDEQ Secretary J. Dale Givens recognizes that "Shintech is the pawn that's on the table now, but I think you'll see more of it across the country." *See* Fairley, *supra* note 151, at 45.

185. *See supra* notes 161-66 and accompanying text (discussing the Group's efforts to gain community support).

186. For example, U.S. Representative John Conyers of Michigan., vowed to campaign against the proposed Shintech plant so heavily that Louisiana voters "would think I was here running for Congress." *See* David Mastio, *Revolt Brews Against EPA*, DETROIT NEWS, Sept. 18,

gained the support of influential national public interest groups such as Greenpeace.[188]

Third, the Group's efforts have profoundly affected decision-makers. In her letter to the LDEQ Secretary J. Dale Givens, EPA Administrator Carol Browner stressed that the EPA felt it was essential that the concerns of the residents be adequately addressed in the permitting process.[189] Similarly, in her speech to the Congressional Black Caucus the day after rejecting the Shintech air permits, Browner explained that "I took this action, in part, because the local residents convinced us . . . that their concerns about being disproportionately subjected to environmental hazards were not being adequately addressed."[190]

At the local level, the Group's efforts spawned two environmental justice laws[191] and played a role in Shintech's decision to suspend plans for building its plant in St. James Parish and to hold public meetings prior to submitting its permit application for its newly proposed plant in Plaquemine.[192] By influencing the decision-making process, the Group's tactics addressed the root-cause of environmental injustice—the powerlessness of minority and poor communities.

III. COMMUNITY EMPOWERMENT STRATEGIES ARE THE ANSWER

The outcome of the Shintech controversy demonstrates the efficacy

---

1998, at B1.

187. *See, e.g.*, Hoversten, *supra* note 3, at A3; *U.S. Suspends Permit of Japanese Firm to Build Plastics Factory*, DAILY YOMIURI (Japan), Sept. 19, 1997, at B2.

188. Additionally, the Civil Justice Foundation, operated by the Association of Trial Lawyers of America, awarded a $10,000 grant to assist the Group. *See* Mike Dunne, *Lawyers' Grant Helps Shintech Foes*, MORNING ADVOC. (Baton Rouge, La.), Nov. 1, 1997, at B5 (discussing the Group as a "test case" for the success of environmental justice movement).

189. *See* Letter from Carol Browner, *supra* note 175, at 1.

190. EPA Administrator Carol Browner, Address at the Congressional Black Caucus Environmental Justice Forum (Sept. 11, 1997). This remark is interesting given that in her Order responding to the Group's petition, Browner simply said the permits were denied for technical reasons, namely, the failure to regulate all potential sources of pollution. *See supra* notes 173-74 (discussing Browner's ruling in *In re Shintech* Order). Nonetheless, the ruling demonstrates the political pressure exerted on the EPA by the Group's activities. Although the permits were rejected on "technical" grounds, the environmental justice issues clearly played a role in the final decision. The Group's efforts may explain why the Agency thoroughly researched the Clean Air Act's requirements and Shintech's permit application in order to find the "technical" grounds on which to reject the permit.

191. *See* Redman, *supra* note 155, at B7. These laws are especially significant because they were introduced by state Rep. Roy Quezaire, whose legislative district includes a large section of St. James Parish. *See id.* The first law mandates that people living or working near proposed industrial sites be given the first opportunity to voice their opinions at public meetings on permit applications. *See id.* The second law mandates that the LDEQ study the relationship between industrial pollution and the communities surrounding the polluters. *See id.* Significantly, however, the second bill was substantially watered-down from Rep. Quezaire's original proposal calling for a complete study of the environmental justice issue, specifically whether polluters tend to be located in poor or minority neighborhoods. *See id.* Nevertheless, the proposal and passage of two bills demonstrate the effectiveness of the Group's tactics in influencing the decision-making process.

192. *See* Mark Schleifstein, *Outcry Alone Didn't Alter Shintech Plan; Market Shifts Motivating Move to Plaquemine*, NEW ORLEANS TIMES-PICAYUNE, Sept. 19, 1998, at A1 (noting that community opposition was one factor in Shintech's decision to relocate).

of community empowerment strategies. The actions taken by the St. James Citizens for Jobs and the Environment accomplished the goals of community empowerment strategies, and as a result, the Group was able to influence the decision-making process. Although this outcome may have been the ideal, a less favorable outcome for the citizens of St. James would not mean that community empowerment strategies are ineffective. Empowerment strategies are effective because their ultimate goal is to win the war against social injustice. The outcome of any particular battle, while important for those involved, is not important in terms of the final goal, social justice.[193]

Empowerment strategies focus on building a movement ultimately capable of exerting pressure on decision-makers.[194] The building of a movement is a gradual process, likely replete with set-backs.[195] The Civil Rights Movement of the 1960s provides an excellent example of this gradual process. Efforts by individuals like Rosa Parks[196] and four

193. *See* Judith E. Koons, *Fair Housing and Community Empowerment: Where the Roof Meets Redemption*, 4 GEO. J. ON FIGHTING POVERTY 75, 80 (1996) (noting that the goal of empowerment may be accorded a long-term view that resists a win or lose approach). In fact, often a defeat in one community is ultimately beneficial for the movement as a whole. *See* BULLARD, *supra* note 2, at 45. An excellent example is the attempt by local residents in Warren County, North Carolina, in 1982, to block the siting of a PCB landfill in their economically depressed and overwhelmingly black community. *See id.* In what is widely hailed as the birth of the environmental justice movement, citizens of Warren County formed the Warren County Citizens Concerned About PCBs to protest the proposed landfill. *See id.* The group was joined by national civil rights leaders, black elected officials, environmental activists, and labor leaders. *See id.* Although the protests ultimately failed, they brought national attention to environmental justice issues and led to the 1983 GAO study of hazardous waste landfill siting and the 1987 UCC study on toxic wastes and race *See id.*; *see also supra* note 5 (describing the details of the 1983 GAO study and 1987 UCC study). The two studies are cited consistently to show the disproportionate impact of environmental laws on poor and minority communities. *See* BULLARD, *supra* note 2, at 33-36 (discussing the historical background of environmental problems facing black communities).

194. Community empowerment strategies utilize a three-part approach to achieve their ultimate goal. *See* BULLARD, *supra* note 2, at 2. The first part is individual empowerment. *See id.* This leads to the second part, community empowerment, which leads to the third part, the national movement. *See id.*

The basis for this evolution is the development of a sense of personal efficacy among individuals in the community. *See id.* Addressing the importance of personal efficacy, Robert Bullard discusses two types of "coping" strategies employed by blacks when confronted with a "stressor": problem-focused coping (efforts to address the problem directly); and emotion-focused coping (tolerating the stressor). *See id.* Bullard argues that the decision to take direct action or to tolerate a stressor often depends on how individuals perceive their ability to do something about the situation. *See id.* Through their emphasis on education and community involvement, community empowerment strategies are primarily designed to create this sense of personal efficacy that will encourage and enable disadvantaged individuals to take direct action as part of a community, and later, as a broad-based movement. The situations involving Rosa Parks and the Four North Carolina A&T students provide excellent examples of this progression. *See infra* notes 196-96.

195. *See, e.g.*, Coyle *supra* note 90, at S8 (noting that the Civil Rights Movement faced repeated failures in the areas of voting rights, housing, and school desegregation before passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965).

196. The incident involving Rosa Parks is an excellent illustration of the importance of personal efficacy in political activism. Just prior to the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Reverend Vernon Johns sat in the "white" section of a Montgomery, Alabama bus. *See* ROBERT WEISBROT, FREEDOM BOUND 14 (1990). When ordered off the bus, Johns stood and asked who would be leaving with him. *See id.* Nobody responded. *See id.* A few days later, Johns scolded a woman who had declined his request. *See id.* She responded: "You ought to knowed better." *See id.*

Roughly eighteen months after the *Brown* decision, on December 1, 1955, Rosa Parks refused

North Carolina A&T students[197] to change the prejudiced political system began with only a few supporters, but gradually spread from town to town across the South. As entire communities began taking part, a national movement was born that ultimately resulted in the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[198]

A. The Civil Rights Movement

The main goals of the Civil Rights Movement were to mobilize communities to bring about social justice, equal protection, and an end to institutional discrimination.[199] The environmental justice movement has the same goals.[200] As such, it is useful to examine the strategies employed by the Civil Rights Movement and evaluate them within the empowerment model.

1. Tactics employed by the Civil Rights Movement

Four principal tactics were employed by the Civil Rights Movement in its quest for social justice. The first tactic was litigation.[201] Black activists used the legal system to chip away gradually at school

---

to give up her seat on a bus in Montgomery, Alabama. *See id.* The bus driver called the police and Parks was arrested. *See id.* Unlike the situation with Reverend Johns, the people of Montgomery did not say "you should have known better" to Rosa Parks. *See id.* Instead, they began organizing against the bus company, the city government, and the Jim Crow laws. *See id.* (noting the rapid response to Parks' arrest within the black community).

The decision in *Brown* likely played a crucial role in the dramatically different responses to the actions of Reverend Johns and Rosa Parks. After *Brown*, the black community may have believed it could truly accomplish something and furthermore, it had a Supreme Court decision saying that segregation and separate but equal were no longer acceptable to back it up. The *Brown* decision may have given Rosa Parks and others the strength to defy racist laws and work towards their repeal.

197. The actions of the four North Carolina A & T students are especially illustrative of the gradual evolution of a movement. On February 1, 1960, four black students sought service at the local Woolworth's "white" lunch counter. *See* WEISBROT, *supra* note 196, at 3. Though they failed to receive service that first day, they returned to campus as heroes. *See id.* The next day, they were joined by twenty people; by the fourth day, white students were joining them, and within a week, the protests had spread across state lines. *See id.* at 18-19. Weisbrot recounts how these initial sit-ins led people to believe that they could also protest in their communities and effect change. *See id.* at 19. The thousands of people who began challenging the color line knew that the "the actions of these four freshman 'had something to do with [their] own li[ves].'" *See id.* This is an illustration of how empowered individuals who come together to form an empowered community can incite a national movement centered around promoting their interests.

198. *See generally* WEISBROT, *supra* note 196, at 1-18 (discussing how the Civil Rights Movement advanced gradually, securing small gains over decades).

199. *See* BULLARD, *supra* note 2, at 3 (presenting the overriding goals of the Civil Rights Movement).

200. *See, e.g.*, BRYANT, *supra* note 8, at 66 ("[T]he principles of the environmental justice movement include not only equal protection from environmental risks, or life and health issues, but also the right for people to live in communities that are environmentally safe, regardless of their race or income."); BULLARD, *supra* note 10, at 267 (contending that environmental issues for minority communities are reflective of environmental racism and often linked to other social justice issues relating to jobs, housing, and crime). Bullard asserts that the environmental issues "are viewed [by minorities] as part of the broader picture of race-based social inequity." *Id.*

201. *See* WEISBROT, *supra* note 196, at 10; *see also infra* note 203 (considering *Brown v. Board of Education*).

segregation and Jim Crow laws;[202] eventually achieving school desegregation in *Brown v. Board of Education*.[203]

The second principal tactic was the use of mass meetings.[204] These meetings usually convened in churches and were places where participants could express their emotions and formulate strategies.[205] The emotional expressions at these meetings became a way of channeling fear and rage into positive collective action.[206]

The third tactic took the form of mass protest actions such as marches or sit-ins.[207] Both were designed to rally community support and bring attention to the movement's cause.[208] Marches were especially effective at showing black solidarity and serving as a means for demanding reform and federal action.[209]

A fourth, and less well-known, tactic was the establishment of citizenship schools.[210] These schools focused on racial matters, holding interracial meetings and workshops that dealt with race

---

202. *See* WEISBROT, *supra* note 196, at 10.

203. 347 U.S. 483, 495 (1954) (holding that the doctrine of separate but equal has no place in the field of public education).

204. *See* RICHARD A. KING, CIVIL RIGHTS AND THE IDEA OF FREEEDOM 41 (1992) (analyzing the function of the mass meeting and its emotional effect on participants).

205. *See id.*

206. *See id.*

207. *See* WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS 138-39 (1980) (tracing the purpose and effect of sit-ins and their role in achieving black equality); WEISBROT, *supra* note 196, at 38-39.

208. William H. Chafe provides an excellent description of the effectiveness of the sit-in:

> [T]he fundamental contribution of the sit-ins was to provide a new form through which protest could be expressed. The very act of sitting-in circumvented those forms of fraudulent communication and self-deception through which whites had historically denied black self-assertion. The sit-ins represented a new language. Moreover, the language communicated a message different from that which had been heard before. . . . In an almost visceral way, the sit-ins expressed the dissatisfaction and anger of the black community . . . [the protest] was expressed in a manner that whites could not possibly ignore— the silence of people sitting with dignity at a lunch counter demanding their rights. . . . the message was different because for the first time, whites could not avoid hearing it.

CHAFE, *supra* note 207, at 138-39.

An excellent example of the effectiveness of mass protests in general occurred in the spring of 1960 in Nashville, Tennessee. In late April an explosion demolished the home of a black attorney who represented student protesters and knocked out the windows of a medical school across the street. *See* WEISBROT, *supra* note 196, at 38. After the bombing, two thousand people marched to the steps of City Hall. *See id.* at 39. The mayor quickly formed a bi-racial committee to help end the conflict. *See id.* The committee recommended the gradual desegregation of downtown stores and the mayor complied. *See id.* On May 10, 1960, four theaters and six lunch counters opened their doors to blacks. *See id.*

209. *See* WEISBROT, *supra* note 196, at 79 (asserting that the national protest movements were an effective means to influence the federal government). The most memorable and effective of these marches was the March on Washington for Jobs and Freedom held on August 28, 1963, when more than 200,000 blacks and whites gathered at the Lincoln Memorial in Washington, DC, and Dr. Martin Luther King, Jr. delivered his "I have a dream" speech. *See id.* at 82-83. The march had a profound impact on President Kennedy. *See id.* Prior to the march and rally, Kennedy had endorsed its objectives, but was wary of possible violence that could discredit the movement. *See id.* at 83. Afterward, however, Kennedy lauded the "fervor" and "dignity" of the participants and invited ten of the main organizers to the White House for a reception. *Id.*

210. Citizenship schools were originally established in Grundy County in East Tennessee as centers for training union organizers. *See* KING, *supra* note 204, at 42. In the 1950s, the schools changed their focus to racial matters. *See id.*

relations, political education, and leadership training.[211]

2. Evaluating these tactics within the empowerment model

The tactics employed by the Civil Rights Movement accomplished the three goals of empowerment strategies. First, they educated the community. Through institutions like citizenship schools, blacks learned to read, learned of their rights, and learned how the government operated.[212] Similarly, activities like marches and sit-ins enabled blacks to take control of the struggle.[213] Second, the tactics helped build a movement. Sit-ins and marches were extremely effective at building local support that spilled over into town after town.[214] Likewise, public meetings were an effective means of channeling individual feelings into collective action.[215] Third, the tactics sought to remedy the root-cause of social injustice.[216] Through unified action, blacks were able to place significant pressure on local and national politicians,[217] ultimately culminating in the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[218]

CONCLUSION: LEARNING FROM THE CIVIL RIGHTS MOVEMENT

The Civil Rights Movement demonstrates that community empowerment strategies are an effective means of overcoming powerlessness. The tactics employed by the Civil Rights Movement empowered individuals, communities, and ultimately, a national movement.[219] To succeed, the environmental justice movement must

211. *See id.* Between 1957 and 1970, 897 citizenship schools were established. *See id.* at 43.

212. *See id.* The typical procedure was to train teachers at citizenship schools so that they could return to their communities and educate others. *See id.*

213. As Richard King observes, the "forms of action . . . expressed a determination to seize the initiative in formulating goals and strategies away from local white and black elites." KING, *supra* note 204, at 40. Likewise, Myles Horton, founder of the citizenship schools, stressed that the "burden and the responsibility is on the whites, but the burden of change is on the blacks." *See id.* at 43.

214. *See supra* note 197 (discussing the effectiveness of the lunch-counter sit-in at Woolworth's in Greensboro, North Carolina).

215. *See* KING, *supra* note 204 at 41 (noting that the psychological function of mass meeting was not just cathartic, it also encouraged action).

216. *See* WEISBROT, *supra* note 196, at 314.

217. Weisbrot observes that during the height of the Civil Rights Movement, blacks "shook whole cities with mass demonstrations, demanded and secured sweeping changes in federal law, and reshaped the political agenda of two strong-minded chief executives (President Kennedy and President Johnson)." *See id.*

218. Gaining the right to vote meant that politicians would now have to court the black constituency in order to win elections. George Wallace's 1982 gubernatorial campaign is an excellent example of this "political calculation." *See id.* Weisbrot notes that Wallace, the "master of race baiting," was struck color-blind in the 1982 election. *See id.* Because his goal was to be elected governor, Wallace spent much of his campaign "kissing black babies" and assuring the black electorate of his new attitude on racial matters. *See id.* at 316.

219. *See supra* notes 212-18 and accompanying text (evaluating the tactics of the Civil Rights Movement within the empowerment model). Through such empowerment, the movement left an indelible mark on its participants. A newspaper editor in Albany, Georgia commented: "We won self-respect. It changed all my attitudes. This movement made me demand a semblance of first-class citizenship." KING, *supra* note 204, at 56. This self-respect was, in turn, often expressed in the rhetoric of freedom and empowerment. One participant recalls how she ceased to "respect boundaries that put me down . . . I was empowered by the civil rights movement." *See id.* In light of such changes, King observed that "a new sense of personhood

do the same. Although specific tactics may differ,[220] the underlying concept of empowering individuals to take control of the struggle for themselves should be at the core of any environmental justice strategy.[221]

In fact, any empowerment strategies adopted by the environmental justice movement stand a better chance of success than those embraced by the Civil Rights Movement. First, black communities have in place many of the institutions established during the Civil Rights Movement.[222] Second, because they have experience with collective action through various community groups and institutions, minority communities may be more responsive to organization efforts.[223] Third, through institutions such as the Congressional Black

---

emerged from the process of overcoming personal nullity and acting with others to create a political community." *Id.* at 57.

220. The greatest difference in tactics will likely be the use of litigation strategies. Although litigation strategies were extremely successful for the Civil Rights Movement, their efficacy in the environmental justice context remains questionable given the difficulties of proving discriminatory intent and the uncertain viability of Title VI of the Civil Rights Act. *See supra* notes 20-41, 88-97 and accompanying text (discussing the difficulties surrounding the use of litigation to remedy perceived environmental injustices and how litigation strategies may work to communities' disadvantage). Although the environmental justice movement may be unable to use the courts, it may still work within the system by utilizing the various public participation provisions in environmental statutes and by bringing administrative Title VI claims, a luxury the Civil Rights Movement did not enjoy.

The greatest similarity in tactics is the emphasis on education. The Civil Rights Movement educated its members through citizenship schools and mass-meetings. *See* WEISBROT, *supra* note 196, at 38. Similarly, St. James Citizens for Jobs and the Environment has devoted substantial resources to educating citizens about their rights and funding public meetings. *See supra* notes 161-68 and accompanying text.

221. A study conducted by Paul Mohai and Bunyan Bryant illustrates the importance of community empowerment strategies. In their study, Mohai and Bryant examined the awareness of Detroit area residents regarding environmental injustices. *See* Mohai & Bryant, *supra* note 100, at 930. One of the questions posed to residents was "[w]hether they felt politics rather than science played a more critical role in selecting a site for a new waste facility." *Id.* A majority of both blacks and whites (58% for each) believed that community opposition played a more significant role in siting decisions than scientific criteria. *See id.* at 931.

222. Robert Bullard observes that many blacks are affiliated with civic clubs, neighborhood associations, community improvement groups and other institutions that have track records of opposition to social injustice and racial discrimination. *See* BULLARD, *supra* note 2, at 18 (discussing these affiliations and the growing concern with environmental problems in black communities). As these institutions are experienced in fighting social injustices, they are readily transferable to the environmental justice movement. Additionally, much of the leadership in the Civil Rights Movement came from historically black colleges and universities ("HBCUs"). *See id.* at 3. Bullard notes that many of these HBCUs are located in some of the most polluted communities in the country. *See id.* As such, these institutions have a vested interest in improving their community's environmental safety. *Id.* at 4. Thus, HBCUs may once again play a central role in a movement for social justice. *Id.* Similarly, Aldon D. Morris, a black sociologist, argues that the black community possesses "(1) certain basic resources; (2) social activists with strong ties to mass-based indigenous institutions; (3) tactics and strategies that can be effectively employed against a system of domination." *Id.* at 16 (quoting ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 282 (1984)). This plethora of local minority social action groups, together with national organizations such as the NAACP and HBCUs, illustrates that the infrastructure for an environmental justice movement is already in place.

223. *See* BULLARD, *supra* note 10, at 62. Furthermore, Regina Austin and Michael Schill argue that "shared criticisms of racism, a distrust of corporate power, and little expectation that government will be responsive to their complaints are common sentiments in communities of color and support the call to action around environmental concerns." *See id.* Similarly, in describing the origins of the Civil Rights Movement, Aldon D. Morris wrote:

> The tradition of protest is transmitted across generations by older relatives, black

Caucus, environmental justice advocates are better able to attract the government's attention to the interests and concerns of minority communities.[224] Finally, the President has already involved himself in the environmental justice debate through Executive Order 12,898, thus providing the movement with a degree of national legitimacy.

The Shintech controversy is a solid foundation on which the environmental justice movement can build. Through their organization, education, and legal efforts, the citizens of St. James Parish were able to address the inequities of the public choice process. Their participation not only ensured that the community's concerns were heard but that decisions were made on the basis of complete information. Through these efforts, the citizens of St. James Parish gained a voice in the decision-making process. This is the goal of community empowerment strategies. Thus, the Shintech controversy demonstrates that the strategies employed by the Civil Rights Movement are just as effective today as they were almost forty years ago.

institutions, churches, and protest organizations. Blacks interested in social change inevitably gravitate to this "protest community," where they hope to find solutions to a complex problem.

The modern Civil Rights Movement fits solidly into this rich tradition of protest.

BULLARD, *supra* note 2, at 3. The present day environmental justice movement also fits "solidly within this rich tradition of protest." *See id.*

224. Perhaps most importantly, the Congressional Black Caucus gives blacks an increasingly powerful voice in the upper echelons of government. At a minimum, such organizations force governmental agencies to justify programs that affect minorities. Carol Browner's speech at the Congressional Black Caucus' Environmental Justice Forum the day after delivering her decision in the Shintech case demonstrates this. *See supra* note 190 (stating that EPA is committed to achieving environmental justice and that Shintech air permits were denied, in part, because of citizen petitions).