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## Highways and Bi-Ways for Environmental Justice

Richard J. Lazarus

*Georgetown University Law Center*, [lazarusr@law.georgetown.edu](mailto:lazarusr@law.georgetown.edu)

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## HIGHWAYS AND BI-WAYS FOR ENVIRONMENTAL JUSTICE

RICHARD J. LAZARUS\*

### INTRODUCTION

The highway between Selma and Montgomery in Alabama and the highway system surrounding the City of Atlanta in neighboring Georgia are quite different in many obvious respects. The former is U.S. Route 80 that travels along a mostly rural area of Alabama and is a mere 54 miles long. The latter surrounds a major metropolitan area in neighboring Georgia and consists of 1,016 miles of state roads and 218 miles of interstate highways, adding up to 5000 lane miles.<sup>1</sup> U.S. Route 80 is most famous for an historic civil rights march that occurred upon it in 1965, prompting Congress in 1996 to proclaim the highway a "national historic trail."<sup>2</sup> The Atlanta highway system, in contrast, is best known as the site of the highest average vehicular miles traveled (35 miles/day/person) of any place in the world.<sup>3</sup> The Georgia Department of Transportation boasts that 28 billion miles are driven each year in the Atlanta highway system, which is the equivalent of "58,000 round trips to the moon!"<sup>4</sup>

Each of these highways is significant, albeit in very different ways, to environmental justice. Each illustrates the reasons

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\* Professor of Law, Georgetown University Law Center. This essay is based on a talk presented at the "Civil Rights in the New Decade" symposium held at Cumberland School of Law on February 15, 2001. I am grateful to the students at Cumberland and the editors of the *Cumberland Law Review* for inviting me to participate in the symposium. I would also like to thank Rachel Entman, Georgetown University Law Center Class of 2001, for her excellent research in the preparation of both the talk and this essay.

<sup>1</sup> See State of Georgia Department of Transportation Website for District 7, <http://www.dot.state.ga.us/homeoffs/d7/dist7.htm> (last visited March 24, 2001) [hereinafter Georgia Transp. Dept. Website].

<sup>2</sup> Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, 110 Stat. 4093, § 501 (1996).

<sup>3</sup> *SprawlCities*, <http://www.islandpress.com/ecocompass/community/sprawl.html> (last visited March 24, 2001).

<sup>4</sup> Georgia Transp. Dept. Website, *supra* note 1.

why the environmental justice movement has risen to such national prominence during the past several decades. Both highways also provide an opportunity for more fully considering the obstacles that the environmental justice movement faces in its present effort to develop positive law consistent with the transformation in norms that the movement has already achieved. Finally, the two highways provide guidance on how some of those present obstacles may well best be surmounted in the future.

The purpose of this essay is to discuss the past, present, and future of the environmental justice movement as illustrated by these two highways. The essay is divided into three parts. The first part describes environmental justice, seeking both to place it in a broader historical perspective and to discuss how it relates to civil rights law and environmental law. The second part undertakes a closer examination of the challenges presented by efforts to fashion positive law to address environmental justice norms. This discussion considers why it has proven so difficult for both civil rights and environmental law to evolve in a responsive fashion. Particular attention is paid to Title VI of the Civil Rights Act of 1964,<sup>5</sup> which has been an area of emphasis for many in the environmental justice movement. Finally, the essay speculates on where progress is more likely to be made in the future in terms of securing legal bases for the promotion of environmental justice objectives. The essay concludes that the two highways that bookend the essay suggest possible bi-ways to environmental justice based on both environmental and civil rights laws.

### I. PLACING ENVIRONMENTAL JUSTICE IN HISTORICAL PERSPECTIVE

Fifty four miles may not seem very far to travel by car. But in March 1965, it was a very long walk. It was two weeks after "Bloody Sunday" in Selma—the confrontation between Alabama State Troopers and civil rights protestors on Edmund Pettus Bridge in Selma—when the Reverend Dr. Martin Luther King led marchers on U.S. Route 80 from Selma to Montgomery. U.S. Route 80 is a "national historic trail" today because of the historic role assigned to Reverend King's march in events leading to the passage of the Voting Rights Act of 1965 later

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<sup>5</sup> 42 U.S.C. § 2000d-d(7) (1994).

that same year.<sup>6</sup>

Walking from Selma to Montgomery along U.S. Route 80 today, one passes by the small community of Lowndesboro in Lowndes County. Just off the road is a 670 acre site for a proposed landfill. The landfill would receive 1,500 tons of solid waste a day. Nearby the proposed site are signs declaring "Don't Trash the Treasure!" in loud protest to the landfill's possible siting there.<sup>7</sup>

The resulting visual imagery is extraordinary in its potential symbolic significance and in its meaning for environmental justice. At the crossroads of U.S. Route 80 and the site of the proposed landfill is a temporal and spatial joining of two of the most successful movements for social change during the last century: the civil rights and environmental movements.

Each of these movements resulted in the passage of an incredible number of far-reaching laws. Both sets of laws challenged settled business practices in virtually every arena. But, even more than that, they challenged individual behavior. They questioned the morality of entrenched attitudes and made unlawful what had previously been common practices. They are, to that extent, subversive in their thrust.<sup>8</sup>

Many, if not most, laws simply codify existing norms. They reflect the current behavior of the vast majority. They are intended to denounce and rein in social outliers. The legal prescription is not itself controversial. It is those who break the law that are controversial.

Both civil rights law and environmental law are alike in that they reflect aspirational norms, not settled norms. They reject the past and present. And they seek a better future. They challenge current social, economic, and political forces that sometimes consciously and more often subconsciously promote means and ends in fundamental opposition to nondiscrimination and environmental protection objectives. As a result, both kinds of law are unavoidably controversial. They are tumultu-

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<sup>6</sup> See generally J. WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* 252-85 (1987).

<sup>7</sup> See Somini Sengupta, *At Odds in Alabama Over a Landfill on a Historic Trail*, N.Y. TIMES, Oct. 2, 2000, A16:1; *Critics Battle Landfill Plan Along Civil Rights Route*, AUGUSTA CHRON., July 10, 2000, A7. See generally Marlon Manuel, *Landfill May Settle Alongside History*, ATLANTA J. & CONST., July 23, 2000, A3.

<sup>8</sup> For a discussion of the inherently "subversive" quality of environmental law, see William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: The Who's*, 39 WASHBURN L. J. 1, 1 (1999); see also Cass Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 762 (1991) ("A principal purpose of civil rights law is to undo the historical wrong . . .").

ous in their implementation. And they are subject to constant attack and second guessing.

Environmental law also owes much in its own evolution to civil rights law. The pathbreaking environmental lawyers of the 1960s and 1970s borrowed the successful strategies and tactics of the civil rights lawyers that preceded them. They adopted their models in the creation of public interest organizations, their protests, their use of law reform litigation, and in their lobbying of lawmakers. Not surprisingly, those who participated in civil rights protests, like the 1965 march from Selma to Montgomery, include individuals who later became active in the environmental movements during the 1960s and 1970s.<sup>9</sup>

The image of a solid waste landfill alongside an historic civil rights highway is also telling because it reminds us of the potential overlap in goals of civil rights and environmental laws. They are not simply parallel tracts related by their aspirational character. They also overlap substantively. There exists within their respective spheres of concern much natural substantive harmony.

Civil rights is not just concerned with the right to vote, public accommodations, employment, and education. Its reach necessarily extends to environmental protection's core concerns: public health, quality of the air we breathe, the quality of the water we drink, and the natural beauty of the world within which we live. Indeed, the environmental movement in the United States has been closely aligned to this historic preservation movement, which naturally extends to U.S. Route 80.

However, the image of the landfill adjacent to U.S. Route 80 simultaneously serves as a reminder of the potential complexity of the relationship between civil rights and environmental protection law. That relationship is not always so simple. Not always so direct. And not necessarily so harmonious.

The civil rights and environmental protection pathways sometimes conflict. The first source of possible conflict derives from environmental protection law's potential to cause the very kinds of problems of discrimination that civil rights law seeks to eliminate. The second source stems from the manner in which the discrimination label masks nuances that blunt its rhetorical force. The moral force behind an accusation of discrimination can itself be undermined if, over time, it is not

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<sup>9</sup> Richard J. Lazarus, *Pursing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 789 & n.10 (1993).

carefully focused. Environmental protection has proven to be a difficult context for the necessary clear focus.<sup>10</sup>

As applied to the proposed landfill along U.S. Route 80, the first type of conflict is evident from the landfill itself. The landfill is, of course, a product of environmental protection laws and the physical location of such pollution treatment facilities has been a primary focus of many in the environmental justice movement. Environmentalists and government regulators long assumed that environmental protection laws were progressive. To the extent, therefore, that persons of color or low income communities were disproportionately subject to pollution in the first instance, environmental protection laws would correspondingly benefit those communities in a progressive manner. Environmental protection laws would, accordingly, naturally be part of the solution to redress the impacts of past discrimination and certainly not part of the problem.<sup>11</sup>

What the proposed landfill in Lowndes County reminds us is that environmental protection laws can also be part of the problem. In a desire to make society as a whole better off in the longer term, environmental protection laws may make some isolated areas worse off at least in the near term. In Lowndes County, by literally picking up everyone's garbage, much of the State of Alabama is benefitted from the elimination of numerous, uncontrolled garbage dumps that historically existed across the State. Yet, the upshot of these positive efforts towards environmental protection is nonetheless an aggregation of residual environmental risks somewhere else, typically in one location. No matter how well regulated that resulting facility, it is far from automatic that the community that houses that facility and, hence, the associated aggregation of residual environmental risks, is better off. Indeed, that community may well be worse off.

What environmental justice teaches is that, if left to default, that single location is likely disproportionately to be a community of color or low-income community.<sup>12</sup> That skewing may result from racist attitudes, either surficial or subsurficial, conscious or subconscious, but it need not be. It can also be pro-

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<sup>10</sup> See Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J. L. & COM. 597, 603-05 (1996).

<sup>11</sup> Lazarus, *supra* note 9, at 797-98 & n.38.

<sup>12</sup> See generally Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 273-78 (1997); Sheila Foster, *Race(ial) Matters: The Question for Environmental Justice*, 20 ECOLOGY L.Q. 721, 729-30 (1993).

duced by the so-called "normal" functioning of economic and political forces built upon a framework of discriminatory attitudes and practices long since formally and widely condemned. These are the same forces that result in the distribution of other kinds of societal benefits and burdens. We are constantly reminded how inequitable skewing of such benefits and burdens occur in a host of areas, including many unanticipated.<sup>13</sup> There is no reason to assume environmental protection is somehow immune from that same tendency.<sup>14</sup>

Environmental protection laws, therefore, may exacerbate civil rights concerns rather than redress them. Substantial natural harmony exists between the civil rights and environmental movements. But so too is there potential for substantial dischordance.

The second source of possible conflict arises out of ambiguity in applying the race discrimination label in many environmental protection contexts. The proposed landfill in Lowndes County here too is illustrative. At first, the controversy would seem to possess many of the trappings of a classic problem of environmental injustice. The proposed location would seem to threaten, symbolically or otherwise, a highway of enormous historical significance to the civil rights movement. The proposed landfill would also be in a county the population of which is mostly African American<sup>15</sup> and in a State that has frequently been the subject of complaints that its landfills have historically been sited in African American communities.<sup>16</sup>

The racial dimensions of the Lowndes County controversy, however, can become more clouded upon further examination. Supporters of the landfill stress that the closest town to the proposed site, Lowndesboro, is mostly white, as is much of the

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<sup>13</sup> The most recent example dominating headlines has been so-called "racial profiling," suggesting that police officers in certain communities target racial minorities for traffic stops in particular and criminal investigation in general. *See, e.g.,* Iver Peterson & David Halbfinger, *New Jersey Agrees to Pay \$13 Million in Profiling Suit*, N.Y. TIMES, Feb. 3, 2000, at A1:6.

<sup>14</sup> For a thoughtful recent annotation of studies describing and analyzing the disproportionate impact of environmental hazards by race and income, *see generally* LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP—ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 167-83* (N.Y.U. Press 2001).

<sup>15</sup> *See* Manuel, *supra* note 7, at A3.

<sup>16</sup> *See* Letter Complaint submitted by Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, with Carol Browner, Administrator USEPA (December 17, 1999) (complaint details alleged Title VI violations by Alabama Department of Environmental Management "by discriminating on the basis of race in issuing and modifying permits to operate municipal solid waste landfills . . .") (copy on file with author).

opposition.<sup>17</sup> A lawyer representing the landfill company further points out that the private school in that town where most of the families send their children includes the Confederate Flag as their symbol.<sup>18</sup> He suggests that the landfill opponents are therefore, perversely, using the “racism” label to further their own personal objectives, when civil rights is not their aim and actually something they otherwise oppose.<sup>19</sup> In further support, landfill supporters stress that the County Board that has approved the landfill is comprised of a majority of black members and that the Chairman of the Board is himself black.<sup>20</sup> The supporters also include at least some members of the African American community who argue that the landfill will be beneficial because it will provide economic revenue and other benefits to the county.<sup>21</sup>

The purpose of this essay is not to purport to determine whether, in fact, the landfill supporters are correct in their responsive characterization of the racial dimensions of the Lowndes landfill controversy. It is instead to raise the issue because such ambiguities are not unique to this landfill and they underscore the difficulties often created when the race discrimination label is invoked in the environmental context. The decisionmaking process surrounding a landfill siting determination is invariably quite complex, involving many multiple parties both public and private. It is for that reason inherently difficult to assign cause and effect and to assign a single motive for any one actor’s behavior. Because there are invariably going to be a multiplicity of motivations at play, it may quickly become “relatively fruitless [to] search for a wrongdoer, or in other words, the bad person with evil intent.”<sup>22</sup> There is also a tendency among those naturally sensitive to accusations of racism to believe, mistakenly, that the accusation necessarily lacks merit so long as there are at least some individuals of the minority race who support their position on the underlying controversy. As I have suggested elsewhere,<sup>23</sup> such

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<sup>17</sup> See Sengupta, *supra* note 7, at A16:1.

<sup>18</sup> C. Ellis Brazael III, Walston, Wells, Anderson & Bains, Remarks at the “Civil Rights in the New Decade” symposium held at the Cumberland School of Law of Samford University (Feb. 15, 2001).

<sup>19</sup> *Id.*

<sup>20</sup> Sengupta, *supra* note 7, at A16:1; Manuel, *supra* note 7, at A3.

<sup>21</sup> Sengupta, *supra* note 7, at A16:1.

<sup>22</sup> Torres, *supra* note 10, at 602.

<sup>23</sup> See, e.g., Richard J. Lazarus, “Environmental Racism! That’s What It Is”, 2000 U. ILL. L. REV. 255, 272-73.



a split within a community may instead suggest the early, yet incomplete successes of efforts to attain racial justice rather than the lack of any racial problem at all. No community or race need speak with one voice to have a voice.

As suggested by the underlying complexities of the racial dimensions of the Lowndes County landfill controversy, the historical relationship between the civil rights and environmental movements is not at all simple. It is quite nuanced. And it is marked by converging and diverging pathways.

The popular image of the relationship between the two movements has the advantage of simplicity, but the disadvantage of historical inaccuracy. The popular image portrays two movements parallel until the late 1980s and early 1990s when the environmental justice movement emerged nationally. The environmental justice movement, however, has much earlier roots. It can be easily traced to the sanitation and public health movements of the late nineteenth and early twentieth centuries. These movements responded to serious public health problems, especially in urban areas, caused by open sewers, uncontrolled garbage disposal on the streets, absence of distinct residential and industrial zoning classifications, and the unregulated processing and manufacturing of food. The cities suffered, accordingly, from extraordinary density, disease, and epidemics.<sup>24</sup>

The sanitation and public health movements responded by promoting programs of municipal sewage systems, street cleaning, and garbage collection. Cities promulgated zoning laws, smoke abatement codes, and noise ordinances. Then-emerging statutory schemes, such as the food, drug, and meat inspections' statutes passed by Congress in 1906 are clear precursors of modern environmental law. To the extent that these laws addressed the problems of the urban poor, they are likewise clearly precursors to the kinds of laws being promoted by the environmental justice movement today.<sup>25</sup> The extent to which, however, the benefits of those laws were distributed in an equitable and nondiscriminatory fashion is far less clear.

An early twentieth century example of the potential injus-

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<sup>24</sup> See generally ROBERT GOTTLIEB, *FORCING THE SPRING -- THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 7-8, 55-69 (1993); RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES -- A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 126-29 (1993); Robert J. Brulle, *Environmental Discourse and Social Movement Organizations: A Historical and Rhetorical Perspective on the Development of U.S. Environmental Organizations*, 66 *SOC. INQUIRY* No. 1, 58, 70 (Feb. 1996).

<sup>25</sup> ANDREWS, *supra* note 24, at 109-35.

tice in both the infliction of harm and the crafting of legal redress is supplied by the tragic events surrounding Union Carbide's construction during the 1930s of a tunnel at Gauley Bridge in West Virginia. Union Carbide sought to construct the tunnel as part of a larger plan to build a dam, hydroelectric facility, and tunnel near the town of Hawk's Nest. Union Carbide reportedly was aware at the outset of the serious public health hazards to workers associated with the construction project. The earth in the area to be excavated contained an exceedingly high percentage of silica (ninety percent or more) and the silica dust released by the construction would become absorbed in the workers lungs, leading to a variety of serious health problems, ranging from silicosis, pneumonia, and tuberculosis. Union Carbide sought out migratory workers for the project, mostly African Americans from Georgia, Alabama, Florida, and the Carolinas. The African American workers worked in the areas of the mine where the exposure was thought to be the highest. At least 581 of the 922 African American workers died. Because the hazards were greater than anticipated in areas thought to be less hazardous, 183 of the 291 white workers also died.<sup>26</sup>

Union Carbide paid relatively little in liability to those who were injured and died. The bodies of mostly African American workers were disposed of in a nearby field that, subsequently planted over, made it virtually impossible then to identify the workers and determine the cause of death. Union Carbide ultimately settled with 157 plaintiffs, agreeing to pay them \$157,000. At least half that sum was paid, however, to the plaintiffs' attorneys. In addition, the terms of the settlement for allocating the money were on strict racial lines. An unmarried African American received \$400 and a married African American received \$600; an unmarried white man received \$800 and a married white man received \$1000; and \$1600 was allocated to each family of deceased white men.<sup>27</sup>

The racial divisions revealed in the Union Carbide Settlement at Gauley Bridge are especially stark but not an isolated phenomenon. Charges of elitism have long been directed at the conservation movement, and with some justification. National

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<sup>26</sup> GOTTLIEB, *supra* note 24, at 236-39; see Grover Hankins, "Visiting the Iniquity (Sins) of the Fathers Upon the Children": Fashioning a National Template of Affirmative Relief for Workers of Color Presently Suffering the Chemical Effects of Past Discrimination, 2 RUTGERS RACE & L. REV. 161, 167-68 (2000).

<sup>27</sup> GOTTLIEB, *supra* note 24, at 239; Hankins, *supra* note 26, at 167-68.

parks were, by design, made less accessible to the poor.<sup>28</sup> When famed New Yorker Robert Moses opened up the Long Island beaches to the public, he also made sure that the poor and minorities of the City would be less able to reach those same "public" beaches, by building bridges over the roads too low for public transit buses to pass under.<sup>29</sup>

Charges of environmental elitism continued throughout the modern environmental era. Racial minorities frequently complained that wealthy white neighborhoods invoked environmental concerns as a pretense in support of exclusionary zoning practices designed to prevent racial segregation.<sup>30</sup> In 1970, the Mayor of Gary, Indiana, Richard Hatcher, responded to the successes of the environmental movement by stressing that movement's adverse impact on the cause of civil rights. Mayor Hatcher contended that "the nation's concern with the environment has done what George Wallace has been unable to do: distract the nation from the human problems of black and brown Americans."<sup>31</sup> During the 1972 Stockholm Conference on the Environment, Indian Prime Minister Indira Gandhi drew the connection differently, while emphasizing her own nation's priority. Gandhi declared that poverty is the worst kind of pollution.<sup>32</sup>

In certain respects, the divide deepened during the 1970s. A 1971 poll of members of the Sierra Club disclosed that forty-one percent of that organization's members strongly disagreed with the proposition that the Sierra Club should pay special heed to the pollution problems of the poor; only fifteen percent of those polled strongly agreed with the statement.<sup>33</sup> The Sierra

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<sup>28</sup> See GOTTlieb, *supra* note 24, at 31-32.

<sup>29</sup> Marc Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 744 n.63 (1996).

<sup>30</sup> See Joel Kosman, *Toward An Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 60 (1993); see also Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM 101 (Charles M. Haar & Jerold S. Kayden eds., 1990) (discussing practice of "expulsive zoning" in minority neighborhoods by allowing for nonresidential uses in those neighborhoods).

<sup>31</sup> Leonard G. Ritt & John M. Ostheimer, *Congressional Voting and Ecological Issues*, 3 ENVTL. AFF. 459, 465 & n.18 (1974) (quoting *The Rise of Anti-Ecology?*, TIME, Aug. 3, 1970, at 42).

<sup>32</sup> Karen Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353, 389 (1998) ("The rich countries may look upon development as the cause of environmental destruction, but to us it is one of the primary means of improving the environment of living, of providing food, water, sanitation and shelter, of making the deserts green and the mountains habitable.") (quoting Indian Prime Minister Indira Gandhi).

<sup>33</sup> GOTTlieb, *supra* note 24, at 253-54.

Club was also pursuing at this time population control and anti-immigration policies that many in the civil rights community considered racist in origin and effect.<sup>34</sup>

By the late 1980s, environmentalism seemed to exist on virtually two tracks.<sup>35</sup> There was, on the one hand, the national, so-called “mainstream” environmental public interest organizations such as the Sierra Club, National Wildlife Federation, World Wildlife Fund, Natural Resources Defense Council, and Environmental Defense Fund. These organizations were highly sophisticated, effective, and relatively well-funded. Their professional staff included teams of scientists, economists, and lawyers trained at many of the nation’s most prestigious academic institutions, who lobbied and litigated on behalf of environmental protection goals.<sup>36</sup>

The other, increasingly distinct track was that being developed by the rising grassroots environmental movement. This movement was marked by community based neighborhood associations rather than national organizations. Many of its leaders were themselves members of low-income communities and racial minorities. They lacked the formal training of the professional staff in the national groups, but possessed instead an expertise based on personal experience and passion. These grassroots organizations were often led by women.<sup>37</sup>

The inevitable collision between the two tracks occurred in the late 1980s and early 1990s with the grassroots organizations’ formally challenging the legitimacy and continuing relevancy of the national groups.<sup>38</sup> They demanded that the national groups pay attention to the concerns of the poor and to the complaints of racial minorities. They demanded that the national groups shift their priorities and reallocate their resources on behalf of environmental justice concerns. And they rejected any efforts to create a national environmental justice organization to speak on their behalf, opting instead for a more decentralized framework that retained the voices of the indi-

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<sup>34</sup> *Id.* at 256-59.

<sup>35</sup> Seth Zuckerman, *Environmentalism Turns 16*, THE NATION, Oct. 18, 1986, at 368-69; GOTTLIEB, *supra* note 24, at 170.

<sup>36</sup> GOTTLIEB, *supra* note 24, at 117-61; Robert Percival, *The Political Origins of Modern Environmental Law: Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL. F. 9, 13, 15-20 (1998).

<sup>37</sup> GOTTLIEB, *supra* note 24, at 162-204, 207-34; Marc R. Poirier, *Environmental Justice/Racism/Equity: Can We Talk?*, 96 W. VA. L. REV. 1083, 1095 (1994).

<sup>38</sup> GOTTLIEB, *supra* note 24, at 260.

vidual communities themselves.<sup>39</sup>

The impact on the environmental and civil rights movements during the past decade has been considerable. Virtually all of the national environmental organizations have environmental justice programs.<sup>40</sup> They also now perceive their agenda differently as a result of the environmental justice movement. The national groups are more apt to discern the environmental justice dimension of a controversy that before they would have dismissed as outside their ambit of concern. These groups are more likely to forge working relationships with affected community organizations. There has been a change in culture.<sup>41</sup>

Like many such cultural shifts, it is far from complete or satisfactory to those affected. There are basic cultural differences, both personal and professional. Differences in priorities are inevitable. And, early successes are just as likely to intensify rather than reduce those differences. Whether the settlement of a lawsuit or passage of a new law, the law and policy-making processes depends on the interested parties making hard choices between competing priorities.

There are some who argue that vagueness in goals and underlying conflicts in priorities will severely limit the ultimate effectiveness of the environmental justice movement.<sup>42</sup> My own view is that much has already been accomplished by the union of the civil rights and environmental movement and it is too speculative to say what the full potential of the union is for positive reform. The efforts to realize that potential are underway right now in communities throughout the nation, including the Lowndes County landfill controversy. Opponents of the landfill are relying on environmental laws to prevent the siting. Opponents of this landfill and others in the State of Alabama are also relying on civil rights remedies. Their lawyers now include those employed by organizations, such as the Center for Race, Poverty, and Environment, that are specifically concerned with addressing the environmental justice concerns of

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<sup>39</sup> The rejection of a national organization was something the author witnessed while attending the First National People of Color Environmental Leadership Conference in Washington, D.C., held in Washington, D.C. in October 1991.

<sup>40</sup> The websites of these organizations all stress these programs. *See, e.g.*, Sierra Club, <http://www.sierraclub.org/foundation/programs/environmental.asp>; Environmental Defense, <http://www.edf.org/programs/EJ>.

<sup>41</sup> Kaswan, *supra* note 12, at 264-65.

<sup>42</sup> *See, e.g.*, CHRISTOPHER FOREMAN, THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE (1998); Poirier, *supra* note 37, at 1099 ("Isn't this movement impossibly vague?") (quoting Dr. Michael Greve, Remarks at the St. John's Law School Environmental Justice Symposium (Apr. 8, 1994)).

communities.<sup>43</sup>

## II. LAWMAKING FOR ENVIRONMENTAL JUSTICE

During the past decade, a consensus has generally emerged that the environmental justice movement identifies real and substantial problems. Inequities exist based on race and income. These inequities relate to the burdens imposed by pollution in the first instance. And, even more unsettlingly, they may be exacerbated by governmental pollution control efforts. The siting of facilities is part of the problem, but not the exclusive source. The problems identified by environmental justice extend to the setting of environmental protection standards in the first instance, their implementation through permit requirements and conditions, and their administrative and judicial enforcement.<sup>44</sup> Environmental justice also concerns, throughout these legal contexts, the need for those in the community affected by the decisions to be provided a meaningful opportunity to be heard. The opportunity to participate in the decisionmaking process is independently valuable.<sup>45</sup>

The dramatic increase in public awareness and, in many quarters, the acceptance of the teachings of the environmental justice movement stand in sharp contrast to clear changes in positive law. There have been very few.<sup>46</sup> This is partly because of controversy concerning the cause of the problems identified by the environmental justice movement. While many are persuaded that race and racial discrimination is a major cause,<sup>47</sup> others insist that more “neutral” market and political forces are the cause.<sup>48</sup>

The controversies surrounding causation, however, are only part of the reason for the lack of formal changes in positive law. During the early 1990s, there was sound reason to believe that such changes were about to be made through federal

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<sup>43</sup> See *supra* note 16.

<sup>44</sup> Lazarus, *supra* note 23, at 265-68.

<sup>45</sup> See Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998); Kaswan, *supra* note 12, at 232-39.

<sup>46</sup> Those that have occurred have been primarily in state law. See Valerie P. Mahoney, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 CARDOZO L. REV. 361, 376-378 (1999); Recent Developments, *A Survey of Environmental Justice Legislation in the States*, 73 WASH. U. L.Q. 1459 (1995).

<sup>47</sup> See, e.g., ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990); Foster, *supra* note 12, at 731-38.

<sup>48</sup> See, e.g., Lynn Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996).

legislation. Federal lawmakers were then debating several proposals for "environmental justice" legislation.<sup>49</sup> The newly-elected Vice President, Al Gore, had been a co-sponsor of one of those proposals.<sup>50</sup> Members of the Democratic Party, which controlled both congressional chambers, included representatives who voiced support for the legislation's enactment. And, Benjamin Chavis, the newly-appointed head of the National Association for the Advancement of Colored People, was especially well known for his work on environmental justice issues.<sup>51</sup>

To a large extent, political events far broader than the environmental justice movement simply overwhelmed any possibility of securing federal legislation. With the congressional elections in 1994, the Republican Party became the majority party in both chambers, for the first time in decades. The resulting "divided government" led to a virtual standstill in new environmental legislation during the rest of the decade. Environmental law had, before the 1990s, been famous for its extraordinary dynamism.<sup>52</sup> The law was constantly changing. Since the beginning of the modern environmental era in the early 1970s, Congress had consistently revisited and revised in significant respects the federal environmental protection programs. But since 1990, Congress has failed to amend any of the major pollution control laws. It became virtually impossible to achieve the legislative compromises necessary for significant changes in environmental law. The proffered environmental justice legislation was a casualty of that congressional stalemate.

The challenge during most of the 1990s has, accordingly, been to forge redress for claims of environmental justice primarily from existing law. Not surprisingly, these efforts have addressed the problem from two distinct angles. There have been efforts to try to apply existing civil rights law to the environmental context. There have also been attempts to apply ex-

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<sup>49</sup> See Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. REV. 1, 45-46 (1998).

<sup>50</sup> See 138 CONG. REC. S7480-02, 7489 (1992) (statement of Sen. Albert Gore, Jr. introducing the Environmental Justice Act, S. 2806, 102d Cong. (1st Sess. 1992)); Linda D. Blank, *Seeking Solutions to Environmental Inequity: The Environmental Justice Act*, 24 ENVTL. L. 1109, 1116-1128 (1994).

<sup>51</sup> See Lazarus, *supra* note 9, at 857 n.324.

<sup>52</sup> See A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121 (1994); Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791 (1994).

isting environmental protection laws to the civil rights context.

Neither has proved to be a nice or easy fit. The civil rights law model seemed better designed for the fair, nondiscriminatory allocation of benefits, rather than the burdens of governmental regulation. The environmental protection model turned out to be not especially well designed for consideration of economic or socioeconomic concerns, or for an accounting to the subjective factors motivating particular decisionmakers.

Title VI of the Civil Rights Act of 1964 is illustrative of both the potential reach and limitations of civil rights law in the environmental context. Title VI imposes a nondiscrimination mandate on recipients of federal financial assistance: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>53</sup>

Title VI is relevant to environmental protection generally and environmental justice, in particular, because of the sheer number of activities affecting the quality of the human environment that receive some form of federal financial assistance. The federal government spends considerable sums on those that pollute and on those that regulate pollution, including state and local governments. All are potentially subject to Title VI's nondiscrimination mandate.<sup>54</sup>

Title VI is especially significant to environmental justice because existing judicial precedent supports the authority of a federal agency's promulgating regulations extending Title VI's nondiscrimination mandate to activities or programs with a discriminatory or disparate impact.<sup>55</sup> Proof of a violation, accordingly, does not require a showing of discriminatory intent. Such subjective motivation is always hard to prove, but has been an especially high hurdle in the environmental context given the sheer number of actors and possible motivations for relevant decisions. Indeed, every environmental justice plaintiff who has sought to prove an equal protection violation, which requires just such a showing of discriminatory intent, has failed.<sup>56</sup> Most federal agencies, including EPA, have Title VI

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<sup>53</sup> 42 U.S.C. § 2000d (1994).

<sup>54</sup> See generally James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L. J. 125 (1994).

<sup>55</sup> See, e.g., *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983).

<sup>56</sup> See, e.g., *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1150 (E.D. Va. 1991), *aff'd* 977 F.2d 573 (4th Cir. 1992); *Bean v. Southwest Mgmt. Corp.*, 482 F. Supp. 673, 674 (S.D.



regulations that extend to a prohibition on disparate impact.<sup>57</sup>

Another particularly attractive aspect of Title VI for environmental justice plaintiffs is current judicial precedent supporting the availability of a private right of action to enforce Title VI regulations.<sup>58</sup> Theoretically, therefore, the environmental justice organization is not wholly dependent for enforcement of Title VI on the willingness of the federal agency that has funded the activity that allegedly results in the forbidden disparate impact. The aggrieved individuals or community representatives may initiate their own enforcement action based on Title VI regulations against the recipient of federal aid.

The Clinton Administration early on indicated a willingness to develop an effective environmental justice program based on Title VI. The President issued an executive order on environmental justice in February 1994 that referred repeatedly to Title VI and instructed agencies to develop strategies to identify and address "disproportionately high and adverse human health or environmental effects [of its programs, policies, activities] on minority populations and low-income populations."<sup>59</sup> Pursuant to that executive order, EPA took the lead in the order's implementation both convening an interagency Federal Working Group on Environmental Justice and developing EPA's own environmental justice strategy.<sup>60</sup>

At least within EPA, the impact of this planning process has been the proliferation within the Agency of a series of decentralized changes in planning and decision making processes involving standard setting, public participation and enforcement.<sup>61</sup> The Agency has also sought to implement Title VI by developing comprehensive guidance regarding the investigations of allegations that an EPA-funded program or activity is resulting in a disparate impact in violation of Title VI.<sup>62</sup> As of

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Tex. 1979).

<sup>57</sup> See 40 C.F.R. § 7.35 (1999).

<sup>58</sup> See *infra* note 64 and accompanying text.

<sup>59</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (February 11, 1994).

<sup>60</sup> *Id.* § 1-102. The work of EPA's National Environmental Justice Advisory Committee, on which the author served for several years, reflects the extent of EPA's commitment to developing a meaningful environmental justice strategy for the Agency. See, e.g., *U.S. Environmental Protection Agency Office of Environmental Justice In the Matter of the Fifth Meeting of the National Environmental Justice Advisory Council*, 9 ADMIN. L.J. 623 (1995).

<sup>61</sup> Lazarus, *supra* note 23, at 265-69.

<sup>62</sup> See Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised

this past November, EPA had received more than 100 Title VI administrative complaints,<sup>63</sup> and there have been several private Title VI actions filed in court.<sup>64</sup> Many of these actions are directed against state and local governments. Some challenge permitting decisions; others challenge broader policy initiatives.

Notwithstanding good faith agency intention, the task of implementing Title VI has proven far more difficult than either EPA officials or environmental justice community representatives likely anticipated in the first instance. While EPA has dismissed a substantial number of the administrative complaints on procedural grounds (e.g., the alleged violator was not a recipient of EPA financial assistance),<sup>65</sup> the Agency has decided only one case on the merits, which it dismissed.<sup>66</sup> The reason is simultaneously simple and complex. It turns out to be exceedingly difficult to develop criteria for the assessment of disparate impact violations and remedies in the environmental regulatory context.

The root problem in undertaking a disparate inquiry in the environmental regulatory context appears to be causation in the first instance and redressability in the second. The causation problem derives from the multiplicity of both public and private decision makers connected to the amount of pollution occurring in any one area or areas. It is far from obvious how one should decide the relevant universe of either the regulator or the regulated in deciding whether a disparate impact has occurred. The redressability problem stems from the difficult policy issues presented in deciding whether there are mitigating actions that the recipient may take to make acceptable what is otherwise unacceptable and, alternatively, whether there are circumstances when a disparate impact may be justified under

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Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650-39,701 (June 27, 2000).

<sup>63</sup> An up-to-date listing of Title VI complaints filed with EPA can be found at the website of EPA's Office of Environmental Justice. See <http://www.epa.gov/ocrpage1/docs/t6csnov2000.pdf> (last visited March 24, 2001).

<sup>64</sup> See, e.g., *New York City Env'tl. Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000); *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996).

<sup>65</sup> See Bradford Mank, *The Draft Title VI Recipient and Revised Investigation Guidelines: Too Much Discretion for EPA and a More Difficult Standard for Complaints?*, 30 ENVTL. L. RPTR. 11,144, 11,147 (Dec. 2000).

<sup>66</sup> See Letter from Ann E. Goode, Director of EPA's Office of Civil Rights to Father Phil Schmitter and Sister Joanne Chiaverini, Co-Directors, St. Francis Prayer Center, and Russell Harding, Director, Mich. Dept. of Env'tl. Quality, regarding the Select Steel Complaint (Oct. 30, 1998) (on file with author); see Luke W. Cole, *Wrong on the Facts, Wrong on the Law*, 29 ENVTL. L. RPTR. 10,775 (Dec. 1999).

## Title VI.

EPA has, to date, only begun to answer these Title VI causation and redressability issues in a single context: permitting.<sup>67</sup> It has identified but not yet considered other contexts such as the Agency's setting of environmental standards and enforcement policies.<sup>68</sup> Permitting, however, has hardly proven to be an easy terrain for a first step, but a stumbling ground instead.

A straightforward example is illustrative. In Alabama, the Center for Race, Poverty, and the Environment has filed an administrative complaint with EPA alleging that the State's permitting of landfill facilities has resulted in a disparate impact unlawful under the federal agency's Title VI regulations.<sup>69</sup> In processing that complaint on the merits, EPA has to address at a minimum three questions:

- (1) Whether there is a disparate impact;
- (2) Whether the disparate impact is proscribed by the Agency's Title VI regulations;
- (3) Whether an otherwise unlawful disparate impact may, through mitigating measures, be rendered permissible.

Each of these inquiries eludes an obvious response.<sup>70</sup> The first itself breaks down into at least four further inquiries:

- (1) What kind of impacts are relevant to the disparate impact inquiry?
- (2) What are the relevant sources of those impacts?
- (3) What is the baseline in comparison for determining whether a disparity exists?
- (4) What degrees in difference constitute a "disparity" for disparate impact purposes?

The ambiguities associated with causation complicate these inquiries.

The "impact" inquiry has several possible scopes, with vastly different policy implications. The narrowest approach would be to take into account only proven adverse human health impacts. This would place outside the scope of relevant

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<sup>67</sup> 65 Fed. Reg. 39,650-39,651 (June 27, 2000).

<sup>68</sup> *See id.*

<sup>69</sup> *See supra* note 16.

<sup>70</sup> For a general discussion of the associated difficulties, *see* National Advisory Council for Environmental Policy and Technology, Report of the Title VI Implementation Advisory Committee, *Next Steps for EPA, State, and Local Environmental Justice Programs* (March 1, 1999). The author served as a member of the EPA's Title VI Implementation Advisory Committee.

impacts unrealized environmental risks, even though the environmental statutes are, by their nature, primarily focused on risks rather than impacts. Embedded within this threshold issue, accordingly, is the fundamental question concerning the extent to which the government should pursue a precautionary approach that guards against risk *qua* risk rather than certain, demonstrated adverse human health effects.

The full spectrum of possible approaches is further suggested by considering the broadest possible approach to the impact inquiry. The broadest approach would be to take into account all of the impacts proximately caused by the facility to be permitted, regardless of whether those impacts are those within the authority of the relevant permit authority to consider. For instance, when state authorities were considering granting a permit for the locating of a solid waste facility in Chester, Pennsylvania, one of the primary impacts of that facility was going to be the exceedingly high number of trucks using residential streets to travel to the facility.<sup>71</sup> The sheer number of trucks threatened to devastate the community, with noise and air pollution and by their physical disruption of the streets. Such an impact is only indirectly related to the hazards regulated by an agency charged with ensuring against risks generated by the solid wastes themselves.

A related issue is whether an impact can be deemed sufficiently “adverse” for the purpose of disparate impact analysis if the facility is in compliance with all applicable environmental permitting requirements. The more relaxed approach here would be to allow for such a defense, based on the theory that statutory requirements are intended to guard against unreasonably adverse risks; compliance therefore can fairly be equated with the absence of such effects. The opposing argument is that the statutes provide no such guarantee. Not all environmental requirements are health-based; many are instead based on technological or economic feasibility and fail, moreover, to take into account the possible aggregation of multiple sources of pollution. Such requirements do not, accordingly, provide a guarantee that permitted effects will not be adverse, let alone distributed without disparate effect. Were statutory compliance a defense, Title VI would arguably be meaningless, because it would add nothing to what is already

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<sup>71</sup> Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 780 (1998).

required by the environmental statutes.

Determining the relevant sources for the disparate impact inquiry likewise raises a host of controversial matters. In the unlikely event that there is only one relevant source of whatever impact is allegedly disparate, the natural question is whether there can ever be a disparate impact based on one single facility. The likelihood of that occurring naturally turns on how broadly or narrowly one defines the denominator for purposes of the disparate impact analysis. If a generic unit of environmental risk serves as the baseline, the single source phenomenon is unlikely to occur. The more precisely, however, one defines the particular risk involved, the greater the likelihood that every site will be seen as distinct and therefore the less likely a finding of disparate impact.

A closely related question arises in the more likely scenario where there are multiple sources of the relevant impact. The question concerns how one defines the universe of sources in deciding whether a disparate impact exists. In this context, the more relaxed approach would be to consider only sources of the impact regulated by the specific permitting agency, the decisions of which are being challenged under Title VI. Under that view, the permitting agency would be responsible only for its own decisions and not for disparate impacts for which it may have been a contributing, but not independent cause. The sources that would fall outside the scope of the determination whether a disparate impact exists would be sources regulated by other permitting agencies (for instance, those located in other jurisdictions) and, perhaps even more significantly, unregulated sources. For many types of pollutants, there are exemptions that, in aggregation, may add up to substantial amounts of pollution.

A far more demanding approach under Title VI would be to make the disparate impact inquiry without being limited to just those sources regulated by the specific permitting agency subject to the Title VI claim. The disparate impact determination would, accordingly, be made separate from a determination of the extent to which the permitting agency should be deemed legally responsible for the disparity. Such an approach could allow for a remedy proportionate to the permitting agency's contribution to the problem. Alternatively, under a theory of responsibility more analogous to joint and several liability, a more demanding approach might even support holding the permitting agency more broadly responsible for

guarding against the resulting disparity in environmental impact. At this endpoint of possible approaches, it could even be made a *per se* violation of Title VI disparate impact regulations to allow any additional environmental impact to a community already subject to a disparate impact.

A related, difficult issue concerns the proper treatment of an application for a permit renewal where, as might happen, there is reason to suspect that a disparate impact now exists that did not exist at the time of the original permit issuance years ago. The more lenient option would be to exempt the facility seeking a permit renewal from any scrutiny under Title VI regulations. The justification for such leniency would be that the facility is seeking merely to continue ongoing operations. So long as the facility is not increasing its emissions, it should not be considered legally responsible for any existing disparity in impact. The directly opposing view would be that the initial permit was, by its own terms, of limited duration and that a permit renewal application should be treated no differently than a new application. There should be no grand-fathering of existing disparities. Under that view, to the extent that the facility seeking a permit renewal has, based on existing investment-backed expectations, more compelling equitable circumstances than a truly new proposed facility, those kind of policy concerns should play a role in the allocation of responsibility between new and existing sources. They do not support an absolute defense to any legal responsibility.

The same point/counterpoint debates similarly emerge in answering the other questions posed by the disparate impact inquiry. In determining the relevant baseline for purposes of the necessary comparison, one has to select certain spatial and temporal dimensions. Their selection may dramatically affect the conclusion. The same may be said for deciding how big the difference must be for it to be "disparate." Any difference? A significant difference? A statistically significant difference based on standards of deviation analysis? There is likely to be great disagreement regarding the "correct" answers to each of these questions and, because of the significant practical and policy stakes of different answers, also tremendous controversy.

Finally, there are a host of redressability issues that are no less controversial in nature. These relate to the circumstances under which a disparate impact may be "justified" and, therefore, not proscribed by Title VI regulations. They also concern

the circumstances under which, if any, a permitting agency may require mitigation of the disparate impact by providing offsetting benefits. A justification defense, for example, could be as relaxed as "economic profitability" or as demanding as "public health emergency." A mitigation policy could be so flexible as to allow for the "trading off" of human health risks in favor of employment opportunities and other economic benefits; or it could strictly provide that the only legitimate mitigation are measures that address the very impact that is the source of the disparity and, in effect, eliminate the disparity. Each of these redressability issues implicates health/economic cost and benefit tradeoffs that have long eluded consensus in environmental law and that have persisted instead in generating substantial controversy.

EPA has recently been struggling to offer at least some tentative answers to some of these issues, first, in issuing interim guidance,<sup>72</sup> and more recently, in issuing revised interim guidance.<sup>73</sup> The Agency has, not surprisingly, received few accolades for its efforts. Nor is that likely to change in the near future. The ingredients for consensus are too absent in this setting. Most simply put, the policy implications of competing choices are simply too disparate and the law too unformed to allow for either easy compromise or clear answers.

The regulated community and many of the state agencies that would be directly subject to EPA's Title VI scrutiny also harbor a natural antipathy to the entire undertaking. The former has long complained about the rigors of environmental protection requirements. The latter instinctively rebels against further federal intrusions on state regulatory authority. For each, the specter of an additional layer of environmental requirements, based not on either human health, economic efficiency, or technological feasibility, but on EPA's ephemeral notions of equity is untenable. The equity touchstone is too uncertain in its meaning and application because of its enormous variability. What equity would additionally require could depend on the actions of other sources, other communities, and other permitting authorities. Neither the state regulators nor their respective regulated communities relish a legal regime so

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<sup>72</sup> See U.S. EPA, *Interim Guidance on Investigating Title VI Administrative Complaints Challenging Permits* (February 1998); June M. Lyle, *Reactions to EPA's Interim Guidance: The Growing Battle for Control over Environmental Justice Decisionmaking*, 75 *IND. L.J.* 687 (2000).

<sup>73</sup> See *supra* note 62.

uncertain in its scope and application.

Finally, there is a case currently pending before the United States Supreme Court (likely to be decided about the same time this article goes to press) that will likely affect the future significance of Title VI in the environmental protection context. In *Alexander v. Sandoval*,<sup>74</sup> the Court is currently considering whether private parties may initiate private rights of action to enforce a federal agency's Title VI disparate impact regulations. There is strong precedent in the Court's decisions that such an implied private right of action to enforce Title VI exists<sup>75</sup> and it would seem at least somewhat counterintuitive to suppose that a private right of action may exist to enforce a statutory proscription but not to enforce valid agency regulations promulgated pursuant to that same proscription.

There is nonetheless reason to anticipate that the Court may rule against the existence of an implied private of action to enforce a federal agency's disparate impact ban under Title VI. The primary basis for such speculation is that the current Court is likely to be skeptical of the legitimacy of the disparate impact ban itself.<sup>76</sup> It was a sharply splintered Court that created the judicial precedent in *Guardians Ass'n v. Civil Service Commission of the City of New York*,<sup>77</sup> that courts have since read as upholding the authority of federal agencies to promulgate regulations under Title VI that, extending beyond the statutory prohibition on intentional discrimination, forbid federally-funded activities and programs with a disparate impact.<sup>78</sup>

Short of revisiting the continuing validity of that aspect of *Guardians*, which does not seem to be a question fairly presented to the Court in *Alexander*, the Court might instead choose to split the difference by disallowing a private right of action for its enforcement. Indeed, that outcome might seem particularly attractive to the Court. It would be in keeping with the Court's recent rulings on implied private rights of action, which have been less expansive towards their creation than

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<sup>74</sup> U.S. S. Ct. No. 99-1908 (argued January 16, 2001).

<sup>75</sup> See *Lau v. Nichols*, 414 U.S. 563 (1974); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983); *Bazemore v. Friday*, 478 U.S. 385 (1986); see also *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

<sup>76</sup> See Thomas A. Lambert, *The Case Against Disparate Impact Suits*, 34 GA. L. REV. 1155 (2000).

<sup>77</sup> 463 U.S. 582 (1983).

<sup>78</sup> See Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 12-20 (1999); see e.g., *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), cert. granted, 121 S. Ct. 128 (2000).



earlier caselaw that supports its existence under Title VI in general.<sup>79</sup> In addition, because *Alexander* involves a suit against a State, such a disposition would be generally consistent with the Court's recent reluctance to suppose congressional intent or authority to allow private lawsuits against sovereign States.<sup>80</sup>

Were the Supreme Court in *Alexander* to limit the ability of private parties to enforce Title VI regulations in court, the effectiveness of any restrictions on disparate impact imposed by such regulations would be sharply limited, but not eliminated. Plaintiffs would lose the current leverage they possess to threaten recipients of federal funds, and those seeking permits from such recipients, with Title VI lawsuits based on disparate impact. That leverage has, even in the absence of any formal successful adjudication on the merits, been sufficient to generate a series of creative settlements advantageous to environmental justice communities.<sup>81</sup>

Enforcement of the disparate impact prohibition would instead be exclusively controlled by the federal agencies themselves, through administrative proceedings. Given the difficulty those agencies, including EPA, have had in deciding what the disparate impact requirement even means, one might fairly anticipate that administrative enforcement is likely to be less than extensive. Because, moreover, courts are traditionally reluctant to second guess agency decisions involving the exercise of their enforcement authority,<sup>82</sup> there is likely to be little, if any, meaningful judicial review of such agency determinations.

For all these reasons, Title VI may ultimately prove to be a far less effective basis for legal redress on behalf of environmental justice communities than many anticipated just a few years ago. While its epitaph need not be written, environmental justice communities would be prudent to continue to explore more fully other possible, untapped legal bases for redress, including the environmental protection laws themselves.<sup>83</sup>

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<sup>79</sup> See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975).

<sup>80</sup> See, e.g., *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000); *Bd. of Tru. of the Univ. of Ala. v. Garrett*, 121 S. Ct 955 (2001).

<sup>81</sup> See *Lazarus*, *supra* note 23, at 272.

<sup>82</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>83</sup> Professor Gerald Torres has even suggested that too closely tying environmental justice to racism and to a civil rights law framework may be "the wrong road to follow if real changes for the communities at risk are to be achieved." Torres, *supra* note 10, at 602. His suggestion is especially portentous because Professor Torres was one of the primary authors of the President's Executive Order on Environmental Justice. See generally Gerald Torres, *Changing the Way Government Views Environmental Justice*, 9 ST. JOHN'S J. LEGAL COMMENT. 543 (1994) (discussing the structure and pur-

## III. BI-WAYS FOR ENVIRONMENTAL JUSTICE

The future of environmental justice is more likely to lie at least as much outside civil rights law as within. It is also likely to be found in the fair and effective enforcement of existing laws rather than in their significant substantive amendment. As much as civil rights laws provide an essential pathway for environmental justice, especially because of the symbolic significance of their mere invocation, the existing environmental protection statutes provide an additional avenue for environmental justice advocates.

Like civil rights laws, the environmental statutes constitute one of the great successes of the second half of the twentieth century in the United States. Emissions of significant air pollutants, such as particulate matter and lead, dropped more than eighty and ninety-eight percent respectively, while the population, gross domestic product, and vehicular use increased by more than twenty-seven, ninety, and 111 percent. Emissions of carbon monoxide, volatile organic compounds, and sulfur similarly decreased significantly. With the exception of southern California, the pollution standard index in major U.S. urban areas improved by seventy-two percent from 1985-1994; many of the nation's waters are far cleaner than before; and hundreds of abandoned and inactive hazardous waste sites have been cleaned up.<sup>84</sup>

There are, to be sure, significant examples of lapses as well, either because of statutory exemptions, regulatory exclusions, limited administrative agency resources, or lack of political will.<sup>85</sup> The plight of environmental justice communities are, moreover, an example of such a lapse. In many instances, however, the source of the problem in existing environmental laws for these communities is not traceable to either a statutory exemption or regulatory exclusion. The statutes as written provide many legal bases for effectively addressing the problems of these communities. The problems have instead mostly resulted from the lack of creative and effective implementation and enforcement of existing law on behalf of the legitimate environmental protection concerns of many communities.<sup>86</sup>

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poses of President Clinton's Executive Order on environmental justice).

<sup>84</sup> ANDREWS, *supra* note 24, at 280-81.

<sup>85</sup> See, e.g., J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263 (2000).

<sup>86</sup> I have more fully explored elsewhere the extent to which provisions in exist-

This brings us back to the second highway described at the outset of this essay: the highways surrounding the City of Atlanta in neighboring Georgia. The image of Atlanta's highways is no doubt less visually striking than the proposed landfill adjacent to U.S. 80. It is, however, no less striking in its relevance to environmental justice. The Atlanta highway system also effectively illustrates environmental law's existing, largely untapped potential.

Atlanta's highway system has the highest vehicular miles travelled (VMTs) of any place in the world for a reason. The metropolitan area is marked by a low density development pattern dependent on an extensive system of highways. Although these highways are typically dubbed "freeways," they are free only in the sense that there is no direct user charge applied to those who decide to drive on them. They are certainly not free to the extent they cost hundreds of millions of tax dollars to construct and maintain. And, they are certainly not free in terms of the environmental harm that they proximately cause.<sup>87</sup>

The City of Atlanta suffers from at least a "serious" ozone pollution problem.<sup>88</sup> The area exceeds national ambient air quality standards designed to safeguard public health.<sup>89</sup> The metropolitan area's failure to meet the health standard for ozone threatens everyone, but especially those who live in the urban core, and who are disproportionately poor and the most susceptible to the pollutant's adverse impacts.

There are, of course, substantial benefits to such an extensive system of freeways. Among the direct beneficiaries are those wealthy enough to live in the suburbs surrounding Atlanta, who commute by automobile into the city. The highway system, in effect, subsidizes those who chose to live further away, both making it possible for them to do so and enhancing their residential property values. Seemingly not comparably subsidized, however, have been the mass transit options of those living in the poorer, often racial minority, neighborhoods

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ing federal environmental laws may authorize EPA to consider more fully environmental justice concerns in their implementation of those laws. See Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOLOGY L. Q.* 617 (1999).

<sup>87</sup> See Jill Jordan Seider, *Traffic Jam: In Atlanta, A Pitched Battle Over Roads Pollution, and Boundless Urban Sprawl*, U.S. NEWS & WORLD REP., Feb. 8, 1999, at 28 available.

<sup>88</sup> 40 C.F.R. § 81.311 (2001).

<sup>89</sup> *Id.*; see Barney Tumeay, *Environmental, Civil Rights Groups File Suit to Halt Highway Construction in Atlanta Area*, 32 *ENVIR. REP. (BNA)* 341 (February 23, 2001).

of Atlanta.<sup>90</sup>

Because Atlanta's highway system plainly involves federal funding, the possibility that federal transportation funds are being spent by the state in a manner that disproportionately disfavors minority residents necessarily raises a potential Title VI issue. Local community members have, in fact, already filed such a claim.<sup>91</sup> It is nonetheless environmental law, not civil rights law, that has the potential for more sweeping and effective legal redress.

Pursuant to the Clean Air Act, as amended in 1990, federal transportation funds cannot be spent in a manner not in "conformity" with federal environmental statutory air quality requirements.<sup>92</sup> To satisfy that standard, Georgia must prepare a "state implementation plan" (SIP) that satisfies the Air Act's strict requirements for geographic area, like the Atlanta metropolitan area in "nonattainment" for ozone.<sup>93</sup> It also means that the State must prepare a regional transportation plan that, also subject to federal approval, will not contribute to VMTs in a manner inconsistent with the Clean Air Act.<sup>94</sup> Because Georgia's SIP will pass muster under the Clean Air Act only if it is capable of significantly reducing VMTs or at least their growth, a regional transportation plan must likewise call for federal transportation monies to be spent in a manner that contributes to that reduction.

The Clean Air Act, in short, should require the State of Georgia to spend less federal money on expanding and maintaining a system of highways that increases VMTs and more federal money on promoting transportation options, such as mass transit, that can reduce VMTs over the long term. The reallocation of federal funds will simultaneously be potentially progressive in its distributional effect. The transportation options more important to the poorer communities in Atlanta will receive a larger share of the federal subsidies.

Federal and State governmental officials, environmental organizations, and environmental justice community groups were very close to a major settlement of the related legal issues

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<sup>90</sup> See generally ROBERT D. BULLARD ET AL., *SPRAWL CITY: RACE, POLITICS, AND PLANNING IN ATLANTA* (Island Press 2000).

<sup>91</sup> See Robert D. Bullard, *Race, Equity and Smart Growth*, 3 *TRANSP. EQUITY* No. 1 (Environmental Research Resource Center at Clark Atlanta University) (Fall/Winter 2000).

<sup>92</sup> 42 U.S.C. § 7506(c) (1994).

<sup>93</sup> See *id.* § 7410(a)(2)(I), 7511a(c).

<sup>94</sup> See *Environmental Defense Fund v. EPA*, 167 F.3d 641 (D.C. Cir. 1999).

this past December that would have accomplished just such a redistribution of federal transportation funding.<sup>95</sup> It would have been a landmark settlement for environmental justice. Unfortunately, the settlement negotiations broke down in the final hours.<sup>96</sup>

Whatever the cause of the settlement's collapse, a coalition of national environmental organizations, regional environmental organizations, and local environmental justice community representatives have now filed a series of lawsuits against EPA, the federal Department of Transportation, and the State of Georgia.<sup>97</sup> They are challenging the Department of Transportation's approval of the State's regional transportation plan, on the ground that it lacks the required conformity with the federal Clean Air Act. They are seeking a judicial order that EPA reclassify under that Act the Atlanta Air Quality District from "serious" to "severe" for nonattainment with ozone. And, they are asking the federal district court to compel EPA to disapprove Georgia's SIP on the ground that it will not achieve the "reasonable further progress" towards attainment of ozone standards mandated by the federal law.<sup>98</sup>

#### CONCLUSION

Environmental law has come a long way since the Reverend Dr. Martin Luther King marched along U.S. Route 80 from Selma to Montgomery over thirty-six years ago. Much has happened since his assassination thirty-three years ago in Memphis. Back then, there was no EPA. No Clean Air Act. No Clean Water Act. No Superfund law. No Resource Conservation and Recovery Act. And no Endangered Species Act. Nor were there the state analogues that today exist in every state.

Today, the vast legal infrastructure of environmental law is firmly in place, and well settled. The challenge is not so much the need for new laws. It is instead for effective and fair implementation and enforcement of existing laws.

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<sup>95</sup> Kelly Simmons, *Environmental Groups Conditionally Accept State Plan on Roads*, ATLANTA J. & CONST., Dec. 12, 2000, at D3.

<sup>96</sup> Kelly Simmons, *Agreement on Roads Broke Down in Details*, ATLANTA J. & CONST., Jan. 4, 2001, at 3B; Barney Tumey, *Atlanta Transportation Plan Settlement Falls Apart; Environmental Groups to Sue*, 32 ENVIR. REP. (BNA) 16 (January 5, 2001).

<sup>97</sup> See Kelly Simmons, *Environmental Groups Sue Over Road Building*, ATLANTA J. & CONST., Feb. 14, 2001, at 3C; Barney Tumey, *Environmental, Civil Rights Groups File Suit to Halt Highway Construction in Atlanta Area*, 32 ENVIR. REP. (BNA) 341 (February 23, 2001).

<sup>98</sup> See 42 U.S.C. § 7502(c)(2) (1994).

It sounds deceptively easy. But it is not. It will not be easy to change the transportation habits of a major metropolitan area like Atlanta. But it was not easy in 1965 to march across a bridge in Selma.

What was required then and now are risktakers: Public citizens with a passion. This includes law students and lawyers who are not complacent, but agitated. They are willing to master the complexity of environmental law. They are willing to overcome the high institutional hurdles impeding its effective enforcement. And they are willing to serve those communities who have too long suffered from environmental injustice.

