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

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

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INTRODUCTION: The Inferno

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

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

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

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

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

Mounting environmental challenges command an ever increasing prominence within American society. Unbeknownst to most Americans, decision makers at all levels of government have routinely formulated and implemented environmental decisions that affected local communities, the nation, and the globe. For some communities, those decisions increased pollution exposure, health risks, road hazards, odors, and blight while for other communities environmental policies maintained or created greenways, walking trails, convenient transportation options, and increased environmental quality. The difference between the decisions can often be explained by race, other times by income, and sometimes by a combination of the two. This article explores the unsuccessful attempts to use civil rights law as a means of addressing racial bias, perceived and otherwise, in environmental decision making. In five parts, the article examines the intersection of environmental decision making and federal civil rights law.

Part I of this article chronicles the experience of local activists in Genesee County Michigan and their efforts to prevent the "environmental injustices" caused by the Genesee Power Station pollution permit. These local residents filed one of the first administrative civil rights complaints to the Environmental Protection Agency complaining that pollution from the facility had a discriminatory impact on the black residents of Flint Michigan proximate to the plant. This part recounts their journey through the administrative and judicial systems of the state and federal governments in an effort to prevent pollution from the facility from harming the elementary school students and residential community next door.

Moving beyond Genesee County Michigan, Part II reviews federal cases across the South that involved challenges to the environmental decisions of state and local officials. The courts in these cases almost uniformly reject claims of racial discrimination under the Equal Protection Clause of the United States Constitution or Title VI of the Civil Rights Act of 1964 based on the plaintiffs' failure to prove discrimination based on race.

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

² DANTE ALIGHIERI, *INFERNO: THE DIVINE COMEDY* (Batnam Classics ed., Tandem Library 1999) (1314).

Part III of the article considers the development of equal protection and other antidiscrimination law since the 1960s in an effort to understand the failure of “environmental racism” claims in the courts. To that end, Sheila Foster’s discussion of Democratic Process and Motive Review theory, David Allen Freeman’s elaboration of the Victim’s and the Perpetrator’s Perspective of antidiscrimination law, and Matthew Lindsay’s model of ethnic competition are reviewed. Drawing on the insights gained from these discrete perspectives, this part shows the theoretical basis for federal courts’ resistance to claims of racial discrimination in environmental decision making.

To provide a historical complement to the legal perspectives offered, Part IV reflects on the concerns raised by Dr. Martin Luther King Jr. and the Kerner Commission in 1967 and 1968 that many forms of racial bias present in the nation’s cities remained unabated despite civil rights legislation. Four decades later, segregation in housing and education remain as fixed reminders that civil rights laws were embraced as a popular means to eliminate the overt *de jure* segregation of the South but not the covert *de facto* segregation of the North. Because environmental injustice claims typically correspond to the latter and not the former, the nation’s antidiscrimination law serves as an ineffective weapon to challenge the disparate racial effects of environmental decisions.

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

The article concludes with recommendations for Congressional action that addresses the challenges posed by the issue.

PART I

THROUGH THE GATES OF HELL: The Genesee Power Station Complaint

Complainants Journey

The priest and the sister (Complainants) running the Catholic Prayer Center in Genesee Township, in Flint Michigan began a long and difficult journey when they overheard a discussion about a new waste incineration facility moving into their community and decided to do something about it.³ They alleged that the Michigan Air Pollution Control Commission (MAPCC) engaged in environmental racism by issuing a Prevention of Significant Deterioration (PSD) permit for the Genesee Power Station (GPS), a wood waste incinerator.⁴ The grant of this permit authorized the construction of

³ As an attorney with the Environmental Protection Agency, the author participated in the agency’s efforts to address environmental justice from 1992 to 2000. From 1997 to 2000, the author led the EPA investigation of this complaint under Title VI of the Civil Rights Act. Although the prayer center sits in Genesee Township, the Father and Sister operating it routinely served the needs of Flint residents across the street.

⁴ The Father and Sister forwarded letters to three different EPA offices in 1992 concerning the Genesee Power Station permit.

the GPS in an otherwise vacant industrial park in the Genesee Township.⁵ The facility was proposed for a location roughly one third of a mile south from the predominately black Carpenter Road Elementary School⁶ with a student body of four hundred (400),⁷ consequently, the community residents were prepared to fight for the health of their children.⁸ The Complainants discussed disdain over the placement of the facility⁹ and its selection process which was seen as ruthless, insensitive, dangerous and driven purely by economic factors.¹⁰ Furthermore, the Complainants pointed out the dangers and risks posed by the expected use of trucks on the same residential streets that their children played in, and the odors from the facility and other pollution sources in the area.¹¹ They contacted community leaders and began an ill fated journey that has yet to end.¹²

Their first stop was a meeting of the MAPCC,¹³ made up of eight representatives appointed by the governor¹⁴ whose function was to control air pollution and air pollution sources in the state of Michigan.¹⁵ It held the exclusive authority to approve or deny applications for all air permits in accordance with Michigan law.¹⁶ Working in conjunction with the MAPCC,¹⁷ the MDNR was responsible for the technical review of

⁵ See author's investigative notes.

⁶ *Id.* Carpenter Road Elementary school houses grades K through 5.

⁷ *Id.* The majority of the students receive free or reduced lunch. The school is located in a neighborhood with primarily small houses, apartments, and a subsidized housing project.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* In interviews, both the President and the Spokesperson for Flint-Genesee United for Action, Justice, and Environmental Safety expressed concern over odors from the facility. *See also*, Supplemental Memorandum from the Sugar Law Center to the OCR (1995). The Sugar Law Center submitted information regarding over 257 pollution sites in Flint. *Id.*

¹² Complainants continued to raise concerns about the facility for many years as it frequently appeared on Michigan's list of the worse permit violators. *Id.*

¹³ *Id.*

¹⁴ Flint Watt was the Michigan Department of Occupational Health representative; Nicholas Kachman was an industry representative; Jacki Savage was an industry representative; Linda Berker was a public representative; Robert Craig represented the Michigan Department of Agriculture; Jan Wilson was a local government representative; Frank Russwick, Jr. was the Michigan Department of Natural Resources representative; and Dr. Robert Honicky was the public health representative. *Id.*

¹⁵ The MAPCC and the MDNR conducted the public hearing process that concluded in the December 2, 1992, issuance of the GPS PSD permit. *Id.* The MAPCC was made up of Dr. Richard Honicky, Mr. Flint Watt, Ms. Linda Berker, Mr. Edward Kachmann, Ms. Jacki Savage, Mr. Frank Russwick, Mr. Robert Craig, and Ms. Jan Wilson. One Commissioner, Dr. Richard Honicky, was not present at the December 1, 1992, hearing. All of the Commissioners at the GPS hearing were white. *Id.*

¹⁶ In September of 1993, the MAPCC was abolished and its authority was placed in the MDNR Air Quality Division. The Air Quality Division had sole responsibility for issuing air permits, enforcing air pollution laws and regulations, and conducting all public hearings on air permits until October 1995. On October 1, 1995, the responsibilities of the MDNR were divided between the MDNR and the newly created Michigan Department of Environmental Quality (MDEQ). By Executive Order 1995-18 Michigan Governor John Engler reorganized the MDNR. The executive order placed responsibilities for environmental permitting and enforcement in the MDEQ while making the MDNR responsible for natural resources protection. Since, October 1, 1995, the MDEQ Air Quality Division has held responsibility for air enforcement and air permitting decisions in Michigan.

¹⁷ *Id.*

all applications to ensure compliance with all applicable environmental law and regulations.¹⁸

Once a month, the MAPCC held a meeting to oversee permit hearings¹⁹ to discuss drafts produced by the MDNR in cooperation with the permit applicant.²⁰ Prior to the hearing, the MAPCC would be provided with a staff activity report for the upcoming hearing²¹ which contained background information for the proposed project, significant dates in chronological order and the specifics of the site as well as technical concerns.²² During the meetings, the public was allowed to speak²³ in the order in which their comment cards were received,²⁴ although the Commissioners could decide to limit the time for comments per speaker.²⁵

In accordance with their rules, the MAPCC gave notice to the public of the hearing on the draft GPS permit²⁶ held some sixty-five miles from the proposed location.²⁷ The MDNR made copies of a draft permit available to the public and published notice that a public hearing regarding the draft GPS permit would take place on October 27, 1992. The initial GPS hearing took place in Lansing, Michigan at the Michigan Department of Public Health hearing room during the late morning and early afternoon. Of the sixty or so people present during the hearing, six of the eighteen attendees²⁸ commenting on the proposed GPS facility were black.²⁹ Prior to the hearing, the MAPCC was required by state and federal regulations to review and respond to written public comments submitted on the proposed draft, however, because the MAPCC failed to comply with this requirement, the hearing was postponed,³⁰ and rescheduled for December 1, 1992, at 9:00am.

Many Flint residents did not have transportation to attend the hearing to participate, and others traveled with the Complainants on a charter bus. The residents were instructed to arrive at the meeting location at 9:00 am. The residents arrived on time as instructed, but the GPS public hearing did not begin until roughly ten hours later,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Although the MAPCC had no formal operating procedure for conducting its meetings, the Commission followed set routines in conducting their meetings. Hearings began with a presentation by an MDNR staff member regarding the proposed permit. After the staff presentation, the MAPCC would make inquiries regarding the permit and then invite the permit applicant to come forward to make a presentation. At the close of the permit applicant's presentation, the public was allowed to come forward to make their comments. *Id.*

²⁴ *Id.*

²⁵ The MAPCC Chairman had no written operating procedures, but instead exercised discretion in conducting meetings in accordance with a set of practices established over time. *Id.*

²⁶ *Id.*

²⁷ Other hearings held during the meeting involved permits proposed for communities in Marquette County, Michigan located over 300 miles away. An examination of other hearing records from 1991 and 1992, shows that permit hearings were held in Lansing for facilities in Oakland County and Ferndale roughly 44 miles and 73 miles from Lansing, respectively. *Id.*

²⁸ *Id.* The audience was made up of persons attending the GPS hearing and other MAPCC hearings held that day.

²⁹ *Id.*

³⁰ 40 C.F.R. § 124.17(a)(2) required that the MDNR describe and respond to all significant comments.

at 6:40pm. Routinely the MAPCC allowed elected representatives and others the opportunity to be heard in advance of a hearing due to scheduling conflicts. However, when a black state representative³¹ requested to offer his views on the proposed Genesee Power Station in advance of the hearing due to conflicting business at the Michigan House of Representatives he was told to “wait with everyone else.”³² Without explanation, an African American University of Michigan instructor was also denied a request to speak in advance of the hearing in order to proxy an exam that evening.³³ Notwithstanding eighty-four participants, a full agenda,³⁴ and four other meetings scheduled for that day,³⁵ the Commissioner did not exercise his discretion to place restrictions on comments for the hearings.³⁶

Because earlier hearings were unrestricted and so much time had passed time, the MAPCC discussed postponement of the GPS hearing. One representative from both the public and the permit applicant was asked to address the Commission.³⁷ The public representative requested the hearing be rescheduled out of concern for those who had waited all day, as well as to allow more residents to participate. The applicant representative requested the hearing continue for financial reasons. The Commission voted and decided to proceed with the hearing. The participants were then given less than five hours to review the limited number of copies of the revised twenty-five page draft permit that contained fifteen modifications and responses to comments; despite the MAPCC’s standard practice to give two weeks to a month’s notice of modifications to a proposed draft.³⁸ Despite the lengthy delay, twenty-four members testified late that night;³⁹ blacks represented the vast majority of participants.⁴⁰ At 12:40am, the GPS permit was approved by the MAPCC by a vote of six to one.⁴¹

Acting as a representative for the Complainants, the Sugar Law Center (SLC), raised concerns about the Michigan Air Pollution Control Commission’s (MAPCC)

³¹ The former representative subsequently became a Genesee County Commissioner. *Id.*

³² *Id.*

³³ In order to speak the instructor traveled 130 miles to Flint and back. *Id.*

³⁴ The December 1, 1992, meeting agenda included more scheduled hearings than any other meeting held that year. Four of the six MAPCC meetings held in 1992, had two or fewer public hearings scheduled. The October 27, 1992, MAPCC meeting agenda included three scheduled public hearings. *Id.*

³⁵ Sometime after 2:00 p.m. members of the public and the permit applicant requested that the MAPCC reschedule another scheduled hearing. The MAPCC granted their request. *Id.*

³⁶ In contrast with the December 1, 1992, meeting, only 60 persons had expressed interest in participating in the October 27, 1992, MAPCC meeting. The October 27, 1992, meeting still concluded at 9:50 p.m. *Id.*

³⁷ Commissioner Berker was the only public representative on the MAPCC. She was also the only Commissioner who voted against issuing the GPS permit. *Id.*

³⁸ *Id.* The November 30, revised draft permit removed restrictions on the wood waste fuel present in the earlier draft. Arguably, the MDNR should have reissued the revised draft permit for an additional public notice period before finalizing the permit. While the additional seventeen day comment period provided by the MAPCC provided the public more time to review the October 5, 1992, draft permit, it failed to provide meaningful notice that the permit conditions they were reviewing had been significantly modified. Most importantly, the public had no reason to expect that prohibitions present in the October 5, 1992, draft would be absent from the revised draft permit considered by the MAPCC.

³⁹ Residents also submitted a petition from the community of 1,646 persons who opposed the facility. *Id.*

⁴⁰ According to commissioners the large number of African Americans at the December 1, 1992, hearing was exceptional because African Americans rarely made up a majority of the audience at MAPCC hearings. *Id.*

⁴¹ *Id.*

issuance of the initial Genesee Power Station (GPS) permit through a series of submissions to the Environmental Protection Agency (EPA). The Michigan Department of Natural Resources (MDNR) succeeded the MAPCC as the state agency responsible for administering the states Clean Air program. In its February 10, 1997 submission to the EPA, the Complainants claimed that the MDNR's permit review process exacerbated environmental burdens in communities as a result of the MDNR failure to account for the racial or environmental impacts of the proposed new sites. They further argued that the concentration of numerous pollution facilities in predominately black communities was a result of the MDNR's "see no evil, hear no evil policy."

In an effort to prove disparate impact in its application of the MDNR/MAPCC's policy concerning the issuance of the GPS permit, Complainants presented numerous statistics. The Complainants noted that the GPS is located in a residential area comprised of more than fifty percent African Americans despite the county's African American population only amounting to nineteen percent and a state wide population of 13.9 percent African Americans.⁴² The Complainants also cited that African Americans will receive the bulk of the impact from the facility as cancer and other impacts attributable to the facility have a fifty-nine percent chance of affect non-whites.⁴³

In a Supplemental Memorandum from the SLC, the Complainants stated that the MDNR/MAPCC refused to consider the cumulative environmental or racial impacts of the permit on the affected community and alleged a disproportionate and adverse impact on African Americans with regard to pollution sources within Genesee County. The Complainants based their claim on a study of all major air permits in Genesee County and a report identifying two hundred thirty six potential and thirty-nine known environmental risks within a three mile radius of the GPS.⁴⁴ According to the Complainants, the surrounding area oaf the GPS "presents a substantial risk to human health from environmental conditions." To further support their claim of disparate impact, the Claimants submitted statistics to the Office of Civil Rights (OCR) stating that in Genesee County African Americans are fifty percent more likely than whites to live within a one mile radius of a permitted air facility.⁴⁵ Of the residents residing within a one mile radius of a facility, the Claimants submit that twenty-seven percent are African American while they account for only 19.6 percent of the County population.⁴⁶ In addition, 99.8 percent of African Americans in Genesee County live within one mile of a permitted source of air pollution in comparison to 49.3 percent of whites.⁴⁷ Of those affected by emissions from the top fifteen pollution emitters in Genesee County, 39.1 percent are African American.⁴⁸

According to the Claimants, one adverse effect of MDNR's permitting policy was the detrimental impact that would result from GPS' emission of 4800 pounds of lead per year in a predominately African American community with numerous documented cases of children with elevated blood levels. The Claimants supported their claims with evidence of the following: (1) An analysis of Emissions and Impacts for the Genesee

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Wood Waste Boiler; (2) A 1995 risk analysis of the GPS performed by Dr. Stuart Batterman, a professor at the University of Michigan School of Public Health – the report included air dispersion modeling based upon final permitted emissions and the Wood Waste Procurement and Monitoring Plan;⁴⁹ (3) The Impact of Lead In Michigan (A Science Report to Governor John Engler) prepared by the Michigan Environmental Sciences Board Lead Panel, March 1995;⁵⁰ (6) A letter from Dr. Robert Soderstrom of the Genesee County Medical Society expressing concern about children with elevated blood levels residing near the facility;⁵¹ (7) A map from the Genesee County Health Department showing elevated blood cases reported to the Health Department for the years 1988-1994;⁵² and (8) The deposition and trial testimony of Drs. Rebecca Bascomb and Stuart Batterman regarding the health risks for children associated with elevated blood levels.⁵³

On August 4, 1995, the Complainants alleged in a letter that four of Michigan's five municipal solid waste incinerators have been granted permits by the MDNR in areas that have substantially higher concentrations of African Americans than their respective county-wide populations. They contend that on average, forty-three percent of the surrounding population with a one mile radius is African American, while their statewide makeup is less than fourteen percent. Consequently, the complaints argue that African Americans are disproportionately subject to pollutants.

During interviews conducted in August 1997 and September 1998, witnesses alleged that race improperly influenced MDNR's decision to post armed guards at the October 20, 1994 Carpenter Road Elementary School hearing ("October 1994 hearing"), and that the hearing was ended improperly.⁵⁴ The residents claimed that the Carpenter Elementary School hearing was the only hearing that took place in a predominately African American neighborhood near the boarder of the facility.⁵⁵ According to witnesses, the residents were confronted with white armed guards posted at the doors of the elementary school.⁵⁶ The presence of the guards baffled and disturbed the residents because there was no apparent disturbance to necessitate their presence, and guards had not been present at any of the other hearings. One of the residents was told by one of the guards that they were there to protect the MDNR from the residents attending the meeting;⁵⁷ however, the residents contend that their presence created an offensive environment and ultimately led to the MDNR's premature adjournment of the meeting before everyone had an opportunity to be heard. Ultimately, the Complainants and residents expressed the concern that the presence of the armed guards was for the

⁴⁹ Exhibit 25, Appendix to Plaintiffs' Brief, NAACP v. Engler, Genesee County Circuit Court, 95-38228-CV.

⁵⁰ Exhibit 45, Appendix to Plaintiffs' Brief, NAACP v. Engler, Genesee County Circuit Court, 95-38228-CV. The Michigan Environmental Science Board charged by Governor John Engler to identify and rank the various routes of human lead exposure; prioritize targets for remediation through exposure reduction and evaluate the efficacy of lead remediation techniques.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

protection of the MDNR from the black residents of the community and the premature adjournment of the hearing was reflective of the MDNR's blatant disregard for the largely African American audience in attendance.⁵⁸

EPA's Office of Civil Rights decided to hear the administrative complaint⁵⁹ in January 1995 which had been filed two years lost previously.⁶⁰ This was a direct result of the Michigan Department of Natural Resources Air Quality Division decision to approve a supplemental permit and the authorization of the facility's operation.⁶¹

On July 11, 1995, the Flint Chapter of the NAACP and Neighborhoods United For Action brought an action in the United States District Court for the Eastern District of Michigan against the state of Michigan, Governor John Engler, MDEQ, and Genesee Township alleging a violation of Title VI of the Civil Rights Act of 1964, the Michigan Constitution, and the Michigan Environmental Protection Act. After The United State District Court denied the Claimants motion for preliminary injunction, they voluntarily dismissed their Title VI claim on October 12, 1995. As part of the agreement Plaintiffs promised not to bring the same claims back to the United States District Court.

The U.S. District Court for the Eastern District of Michigan remanded the state law claims to the Genesee County Circuit Court. The Genesee County Circuit Court ordered that GPS Limited Partnership (GPSLP) be joined in the action as a necessary party on October 24, 1995. Before initiation of a preliminary injunction hearing, the GPSLP and the Genesee Township entered into Consent Judgment with Plaintiffs resolving the case for those parties on February 2, 1996. The Consent Judgment provided that construction demolition wood would not exceed 20% of the wood delivered to the plant.⁶² The Consent Judgment also purported to resolve all claims between the parties and barred Plaintiffs from seeking additional obligations against GPS.

Subsequent to the Consent Judgment, discovery proceeded against the State and MDEQ. Prior to the commencement of the trial, the Plaintiffs withdrew their claim under the Michigan Environmental Protection Act with prejudice, and subsequently, the Genesee County Circuit Court dismissed the Plaintiffs claim under the Michigan Constitution.

In April of 1997, the Plaintiffs proceeded to trial on the sole claim of the Defendants violation of Michigan's Human Rights Statute – the Elliot-Larsen Act. The Court limited its evidentiary consideration to the jurisdictional boundaries of Genesee County, thereby ruling evidence of matters outside the county inadmissible.

The opinion of Judge Archie L. Hayman was issued on May 29, 1997, based on the following findings of fact. The residents in the northern section of Flint Michigan, where the GPS is located, accounted for roughly ninety percent of the individuals referred to the Genesee County Health Department due to elevated blood lead levels between 1998 and 1994.⁶³ Those residents faced the significant burden from the cumulative impact of multiple sources emitting multiple pollutants through multiple pathways of exposure.⁶⁴ Of the residents residing within three miles of the GPS, the majority are

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² The PSD permit allowed the use of 100% construction demolition wood. *Id.*

⁶³ *NAACP v. Engler*, Genesee County Circuit Court, 95-38228-CV at 14.

⁶⁴ *Id.*

African Americans who face a disproportionate impact of that burden;⁶⁵ although the African American population in Genesee County is only 19.6 percent and 13.9 percent in the entire state of Michigan.⁶⁶ However, most of the pollutants affecting African Americans were present prior to their matriculation into those communities.⁶⁷ Notwithstanding its prior existence, lead exposure in children causes significant health and mental risks which can affect brain development, academic performance, decreased IQs, increased dropout rates, reading disabilities, poorer vocabulary and eye/hand coordination, as well as mental retardation.⁶⁸

The Court stated that it adopted the comments of Doctor Stuart Batterman who opines that the general approach is to lower blood levels as a precautionary principle, and therefore applied that principle to this case in its risk analysis to the populations who have already been exposed to high levels of lead.⁶⁹ The Court also adopted the comment of William Cooper who opined that seventy seven percent of the African American children under five residing within approximately one mile of a wood waste incinerator site are poverty stricken.⁷⁰ The court also accepted William Cooper's opinion that since 1994, African Americans have been disproportionately impacted by air emissions in Genesee County.⁷¹ The court also took into account the comment of Russell Judge Harding, who stated that the D.E.Q. did not attempt to determine what the blood lead levels were in the people residing in the surrounding communities of the GPS prior to permitting the placement of the facility.⁷²

As a result of the aforementioned facts, the Court concluded that the Michigan Department of Environmental Quality had no authority to override the local zoning or determine the location of plants,⁷³ and its failure to consider the multiple pathways of lead exposure in its risk analysis was violative of its duty under the Constitution to protect the health, safety, and welfare of the citizens of Michigan.⁷⁴ The Court also found that the location of significant numbers of African Americans near pollution sources on the north side of Flint, Michigan, was not due to policies created by the Michigan Department of Environmental Quality.⁷⁵

According to the findings of fact and the conclusions of law, the Court ruled that the State violated its Constitutional duty to protect the health, safety and welfare of its citizens. The Genesee County Circuit Court issued an injunction against the MDEQ, barring it from approving new air permits for major pollution sources in Genesee County until certain criteria were met, including the requirement that a risk assessment be conducted for each major air permit in Genesee County. The Court also found that MDEQ had not violated the Elliot-Larsen Act. Both the Defendants and the Plaintiffs appealed the decision to the Michigan Court of Appeals.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 17.

⁶⁸ *Id.* at 18-19.

⁶⁹ *Id.* at 21.

⁷⁰ *Id.* at 22.

⁷¹ *Id.*

⁷² *Id.* at 26.

⁷³ *Id.* at 28.

⁷⁴ *See supra* note 67.

⁷⁵ *See supra* note 68.

The Court of Appeals overturned the Michigan County Circuit Court decision on November 24, 1998, when it held that the Circuit Court judge lacked authority to consider the state's compliance with the Michigan Constitution because it was neither plead in Plaintiffs' complaint nor requested at any time before or during trial; however, the court affirmed the decision regarding the Elliot-Larsen Act.

Environmental Justice Background

The environmental justice movement began as a continuation of civil rights movement concerned with the prevalence of racism in the environmental arena. Its national prominence can be traced to Warren County, North Carolina, under the leadership of Congressman Walter Fauntleroy mirrored the "campaigns" of the civil rights movement.⁷⁶ Organizers fighting against the placement of a hazardous waste landfill in the area protested and used civil disobedience to challenge what they understood was "environmental racism."⁷⁷ After a truck driver traversed the state from the northern to the southern border, and back again, discharging waste oils along the shoulders of Interstate Highway 85, state officials decided to place a toxic waste landfill in Warren County to hold the contaminated soils gathered from across the state.⁷⁸ Protestors challenged the action as racism because the site selected was in the county with the largest black population of the state near a black residential area.⁷⁹ Congressman Fauntleroy was arrested along with 500 others during the protest. Upon his return to Washington he requested a General Accounting Office (GAO) study examining the demographics of communities with hazardous waste sites in the southeast.⁸⁰

The 1985 GAO study found that three out of five hazardous waste landfills in the southeast region were located in predominantly black or Latino areas.⁸¹ It was soon followed by a 1987 report, entitled "Toxic Waste and Race" by the Commission for Racial Justice of the United Church of Christ.⁸² That report was more extensive than the GAO study.⁸³ It looked at the list of uncontrolled toxic waste sites contained in the Environmental Protection Agency Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) database and mapped them unto zip codes across the country.⁸⁴ Using census data, the study then correlated the zip

⁷⁶ Walter Fauntleroy the non-voting delegate to the United States House of Representatives for the District of Columbia was a former civil rights organizer and lieutenant of Dr. Martin Luther King, Jr.

⁷⁷ ROBERT BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 31 (2000).

⁷⁸ *Id.* at 30. Over 30,000 gallons of PCB-laced oil was dumped and left on the side of over 210 miles of road in North Carolina for four years before the state and the EPA began clean up efforts. *Id.*

⁷⁹ *Id.* Warren county was more than 84% black at the time. *Id.*

⁸⁰ U.S. General Accounting Office (GAO), *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (June 1, 1983), <http://archive.gao.gov/d48t13/121648.pdf> (last visited Mar. 19, 2007).

⁸¹ *Id.*

⁸² CHARLES LEE, *COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST (UCC), TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* (1987).

⁸³ *Id.*

⁸⁴ *Id.*

codes with waste sites and the demographic data for nearby residents.⁸⁵ Beyond analyzing the racial makeup of residents, the study also examined residential income to assess its relative significance in the location of waste sites.⁸⁶ Report author, Charles Lee, and others, reported in the study that regardless of their income African Americans disproportionately lived in zip codes with uncontrolled toxic waste sites.⁸⁷ Within a year, a book by sociologist Robert Bullard of the Clark Atlanta University in Atlanta, Georgia, entitled “Dumping in Dixie” provided an academic examination of a historic and continuing phenomenon that relegated many undesirable waste disposal and polluting facilities to predominantly black areas. With the GAO study, Commission for Racial Justice report, and Professor Bullard’s book bolstering their claims, local activists and more prominent civil rights leaders began to draw attention to racial disparities in the siting of pollution related facilities.⁸⁸ In response to growing awareness and pressure, in 1990, EPA Administrator William Reilly commissioned an agency task force to determine what relationship existed between race and pollution.⁸⁹ Rejecting the activists’ claims that EPA and others participated in environmental racism; the Administrator adopted the name “Environmental Equity” to describe the concerns raised by activists.⁹⁰

Because the southeast region represented a focal point of environmental racism claims, EPA’s Region Four office in Atlanta became a major battlefield in the controversy. When EPA’s Draft Environmental Equity report was issued in 1992, the author had been an attorney in the EPA Region Four Office of Regional Counsel for less than one year. Coinciding with the issuance of the report, regional personnel and local organizers convened a meeting of activists from across the region to come and discuss their concerns with EPA personnel.⁹¹ At the well-attended meeting, one of the concerns raised was EPA’s decision to study “environmental equity” instead of “environmental racism.”⁹²

Though couched in semantic terms, this disagreement reflected a fundamental difference in the understanding that they and EPA had over the issue. Activists felt that race affected the decisions of corporations and state officials in choosing sites for unwanted pollution. Though activists lacked direct evidence of racial animus, they believed that the disparity in siting shown by the preceding studies and their own experience confirmed the phenomenon. On the other hand, EPA’s position reflected the view that racism was a charged word and that the behavior of their grant recipients, personnel, and others should not be so described absent clear evidence to that effect. The disagreement seemed to be resolved when the director of the Commission for Racial

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Charles Lee currently serves as the deputy director of the EPA’s Office of Environmental Justice and chair of the EPA’s National Environmental Justice Advisory Council.

⁸⁸ Lee, *supra* note 9.

⁸⁹ Environmental Equity: Reducing Risks for all Communities, EPA, http://www.epa.gov/compliance/resources/publications/ej/reducing_risk_com_vol1.pdf (last visited Mar. 20, 2007).

⁹⁰ *Id.*

⁹¹ Press Release, EPA, Release of Environmental Equity Report (July 22, 1992),

<http://www.epa.gov/history/topics/justice/01.htm>, (last visited August 1, 2008)

⁹² *Id.*

Justice, Benjamin Chavis Jr., coined the phrase “environmental racism.”⁹³ However, in actuality the issue merely submerged and resurfaced in the following three new contexts: studies contesting racial disparity in siting, federal court cases brought under the equal protection clause of the fourteenth amendment and Title VI of the Civil Rights Act, and administrative complaints filed with EPA alleging Title VI violations by EPA grant recipients.⁹⁴ Nonetheless, both EPA and activists accepted “Environmental Justice” to describe their concern and the apparent disagreement faded.⁹⁵

EPA created an Office of Environmental Justice in the agency Administrator’s Office. It was tasked with investigating the issue and educating agency personnel on how to approach citizens concerns. The first director, Clarice Gaylord, had a Ph.D. in atmospheric science and brought a scientific perspective and background to the issue. She was assisted in the task with corresponding regional directors. In Region Four, where a substantial number of “environmental justice” hot spots existed, Vivian Malone Jones was hired to direct the office.⁹⁶ A love-hate relationship soon developed as William Clinton was elected President of the United States, and EPA announced that “environmental justice” was one of its top five priorities.⁹⁷ EPA soon became the agency that environmental justice activists loved to hate. Serving as a clearinghouse for activist to voice their concerns, EPA modified many of its policies and practices of community relations and took substantial strides to give voice to the concerns raised by “EJ communities.” The agency provided numerous grants, sponsored several conferences and created a National Environmental Justice Advisory Committee (NEJAC) to inform the agency on ways to achieve its environmental justice goals.⁹⁸

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

⁹³ Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 395 (1991) (Chavis using the term “environmental racism” to refer to both the intentional and the unintentional disproportionate imposition of environmental hazards on minorities). The EPA uses the term “environmental justice” to refer to the fair treatment of all people, no matter what their race, color, national origin, or income level, in the development, implementation, and enforcement of environmental laws, regulations, and policies. Tom Stephens, *An Overview of Environmental Justice*, 20 T.M. COOLEY L. REV. 229, 231 (2003).

⁹⁴ See *infra* Part III.

⁹⁵ Stephens, *supra* note 20, at 231.

⁹⁶ Unlike Dr. Gaylord, Ms. Jones’ background was in civil rights. Best known for integrating the University of Alabama despite George Wallace’s personal refusal to deny her entrance to the University, Ms. Jones provided the agency with a level of credibility in dealing with a new breed of environmental activists. Now deceased, Ms. Jones served as director from 1992 to 1996. During this time, the author served as the primary contact and support for the Regional Office of Environmental Justice and the lead attorney addressing “environmental justice” issues for the Region.

⁹⁷ Carol M. Browner, Administrator of the EPA, before the Committee on Finance, U.S. Senate (Jan. 28, 1999), transcript available at <http://www.epa.gov/history/topics/justice/01.htm>.

⁹⁸ See EILEEN P. GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION (2002) (describing the history of National Environmental Justice Advisory Committee).

disproportionately high and adverse human health effects affecting minority and low income populations.⁹⁹

Under this regime, environmental justice became an exercise in community relations for EPA, state agencies, and corporations.¹⁰⁰ Rather than the development of an environmental policy that attended to the alleged disparity in pollution exposure, the environmental justice movement raised the awareness of community members concerning their role in environmental decision making and forced agency officials to develop a more effective means of dealing with the concerns of “minority” and “low income” populations. This represented a genuine improvement over the status quo. In fact, at the local level the environmental justice movement has provided well organized communities with access to funds, education, resources and great deal more respect and consideration from public officials and corporations.¹⁰¹ Unfortunately, the fundamental discord remained and today represents the primary basis of federal courts all but unanimous rejection of environmental justice claims under both the Fourteenth Amendment and Title VI. Moreover, EPA’s failure to find a single Title VI violation by any of its grant recipients since its 1997 decision to dedicate staff and resources to investigating Title VI complaints flows from the same discord.

However, while environmental justice was gaining notoriety and recognition through the 1980s and early 1990s, a different movement was transpiring in the federal courts. President Reagan’s appointment of Justices Antonio Scalia and Sandra Day O’Connor to the bench, Clarence Thomas to head the Equal Employment and Opportunity Commission, and a slew of federal court judges who were openly hostile to

⁹⁹ Meredith J. Bowers, *The Executive’s Response to Environmental Injustice: Executive Order 12,898* 1 ENVTL. LAW 645 (1995).

¹⁰⁰ In the absence of either legislation or case law providing supporting reform in the legal and regulatory regime governing the vast majority of environmental decisions, Executive Order 12898 provided enough authority to raise public expectations but not to raise the level of environmental protection for minority communities. In fact, to date EPA has never implemented the primary directive of the Executive Order to “identify and address the disproportionately high and adverse human health effects of its programs and procedures on low income and minority populations.” A 2004 EPA IG report concludes that EPA “has not developed a clear vision or a comprehensive strategic plan, and has not established values, goals, expectations, and performance measurements” to meet the directive. EPA Office of Inspector General, Evaluation Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice, Report No. 2004-P-00007 (March 1, 2004), *available at* <http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf>.

A 2006 Report finds that the Agency has also failed to conduct Environmental Justice reviews of its programs as required by the Executive Order. EPA Office of Inspector General, Evaluation Report: EPA Needs to Conduct Environmental Justice Reviews of Its Programs, Policies, and Activities, Report No. 2006-P-00034 (Sept. 18, 2006), *available at* <http://www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf>.

¹⁰¹ The evacuation of residents located near the “Mount Dioxin” Superfund site in Pensacola, Florida, is a good example. Sandra L. Geiger, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. J.L. & SOC. PROBS. 201, 221 (1998). In 1991, the EPA began what would become a five year evaluation process to assess whether an abandoned wood-treating facility posed a significant enough hazard to relocate the predominantly black families living in the area. *Id.* In light of evidence linking the residents’ health problems to exposure to dioxin, arsenic and other chemicals from the facility, the EPA determined that it would be more cost effective to permanently relocate the residents. *Id.* The federal government gave each family cash for their home (calculated using the fair market value) and relocation costs. *Id.* This relocation program helped to expand the option for people who would normally not have the resources to leave. *Id.*

race based civil rights claims signaled the end of the expansion of civil rights coverage for racial minorities that began in the mid 1960s and the onset of a contraction of race based opportunities.¹⁰² During this period, the federal courts, under the leadership of the Supreme Court, consistently erected greater burdens on parties seeking to remedy racial discrimination. Moreover, the U.S. Department of Justice, under Attorney General Edwin Meese, had so changed its position on race based discrimination that it switched sides in prominent cases to oppose its former position.¹⁰³ Accordingly, the expansion of civil rights protection to racial minorities in the environmental context had little hope of finding succor in the federal courts.¹⁰⁴

PART II

DOWN INTO THE ABYSS: Civil Rights Cases and Environmental Decisions

The Fourteenth Amendment Equal Protection Clause Cases

Despite the ongoing contraction of race based civil rights claims and remedies in the federal courts during the 1980s, early activists and others brought suits claiming violations of the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁵ These suits alleged that state agencies sited waste facilities in predominantly black and Latino areas and that racial disparity and inequality were characteristic of environmental decision making.¹⁰⁶ These claims were uniformly unsuccessful; yet, some consideration of the handful of cases will help demonstrate the substance of my claim that federal courts will not recognize “environmental racism” claims under the Fourteenth Amendment absent a strong showing of the type of “racial animus” typically associated with the actions of Bull Connor and other white segregationists.¹⁰⁷

In *Bean v. Southwestern Waste Management Corporation*, plaintiffs alleged that the Texas Department of Health’s (TDH) issuance of a permit continued a historical pattern and practice of disproportionately siting waste facilities in and around African Americans.¹⁰⁸ As evidence, plaintiffs identified the racial makeup of the areas proximate

¹⁰² Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989).

¹⁰³ William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980-89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 673 (1995).

¹⁰⁴ See generally Suzanne Smith, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 BUFF. PUB. INT. L. J. 223 (2002).

¹⁰⁵ The Fourteenth Amendment states in relevant part that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

¹⁰⁶ Donna Gareis-Smith, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 65-70 (1994).

¹⁰⁷ See *infra* Part IV.

¹⁰⁸ *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 677-79 (Tex. 1979). This case launched the career of Robert Bullard, the leading scholar in the environmental justice field and the director of the Clark Atlanta University Environmental Justice Resource Center.

to both the proposed and the existing waste facilities.¹⁰⁹ The evidence provided by the plaintiffs included sites permitted by the Texas Department of Water Resources (TDWR) and the TDH.¹¹⁰ However, the plaintiff's concern accordingly stemmed from the data showing the disparity in facility locations affecting nearby African Americans.¹¹¹ Under the court's analysis, the relevant facilities only related to the actions of the TDH because they could only be responsible for their own actions.¹¹² After removing the TDWR sites from the data set, the court found that no statistically significant disparity existed in the location of waste sites.¹¹³ The court further broke down the plaintiffs' claim by rejecting their method of analyzing the alleged disparate impact.¹¹⁴ While the plaintiffs focused on the racial makeup of communities and parts of town, the court looked to census tracts to define the relevant statistical data.¹¹⁵ The court rejected the plaintiffs' request for a preliminary injunction to stop the location of the new landfill across from a predominantly black high school in the black residential area of Northwood Manor in Houston ruling plaintiffs were unlikely to succeed on the merits.¹¹⁶

This case and its outcome underscores one of the many problems faced by environmental justice litigants. Rather than examining how current and past governmental decisions collectively create adverse disparate impacts on minority populations, contemporary equal protection jurisprudence focuses on the motivation of a single entity to assess whether a constitutional violation took place.¹¹⁷ Following the racial discrimination analysis proffered by the Supreme Court in the *Village of Arlington Heights v. Metropolitan Development Corp.*, courts seek to uncover some hidden impermissible motive.¹¹⁸ Environmental justice claimants, however, focus on the results of government decisions that disproportionately burden them.¹¹⁹ As in the *Bean* case above, litigants' concerns flow from the outcome of numerous decisions that now adversely affect them.¹²⁰ In their views, race played an impermissible role in the outcome of numerous decisions that reflect a lower standard of care and protection afforded them.¹²¹ While courts may find these alleged injustices unfortunate, they do not view them as rising to the level of an impermissible government action.¹²² Accordingly,

¹⁰⁹ *Id.* at 677-79.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 679.

¹¹⁴ *Id.*

¹¹⁵ *Id.* See also *infra* Part III for a discussion of analytical methods.

¹¹⁶ ROBERT D. BULLARD, *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* 4 (1997).

¹¹⁷ *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. at 673.

¹¹⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252 (1977). Strangely, in the thirty years since its adoption the Court has rarely found racial discrimination using the analysis, including the case in which it was developed. In practice, the test legitimates suspect decision making by making disparity analysis a less significant part of the equal protection analysis. *Vill. of Arlington Heights.*, 429 U.S. at 266.

¹¹⁹ Consider the Warren County protests, and the studies by the GAO and the UCC Commission on Racial Justice pointing out disparities in the location of hazardous and toxic waste.

¹²⁰ *Bean*, 482 F. Supp. at 673, 677-79.

¹²¹ LUKE COLE & SHELIA FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 70-74 (2000).

¹²² *Bean*, 482 F. Supp. at 679.

claimants have little hope of prevailing under civil rights based laws. Novel interpretations of existing civil rights statutes provide no better chances for litigants because their legal theories represent fundamental disagreements about the purpose and function of civil rights law.¹²³

The foregoing decision demonstrates the way equal protection analysis has often been interpreted by the courts.¹²⁴ Unlike statutory interpretation equal protection analysis flows almost exclusively from the standards imposed by the federal courts. Accordingly, despite the provision injustices to blacks and other racial minorities passed legal scrutiny like in the form of prohibitions on interracial marriage, integrated schools, integrated railway cars, and other Jim Crow laws.¹²⁵ The Courts subsequent decisions to the contrary in the wake of *Brown v. Board of Education* flowed from the changed racial sensibility of the nation rather than any substantive legal necessity.¹²⁶ In this regard, blacks and other racial minorities have historically had to wait for white sensibilities to change in order for them to enjoy many legal protections today taken for granted.¹²⁷ In light of such a contingent jurisprudential history, claimants should not view equal protection Jurisprudence as fixed or preordained but as a reflection of the contemporary norms of the society.¹²⁸ Accordingly, environmental justice claimants should make note of the contemporary societal bias against race based antidiscrimination law when evidence of racial animus is absent.¹²⁹ The series of federal cases examined below each analyze environmental decisions for possible violations of the equal protection clause.

I next consider *East Bibb Twigg's Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*.¹³⁰ In this case, the court reviewed the actions of a local zoning commission that approved the placement of an additional waste facility in predominantly black community.¹³¹ Plaintiffs contended that a historic practice existed of placing unwanted land uses in black communities.¹³² Specifically, plaintiffs challenged the placement of a landfill in a majority black census tract.¹³³ Despite the disparate impact allegations of plaintiffs, the court's analysis reflected a primary concern with the intentions of the board in approving the most recent permit to ascertain if impermissible conduct took place.¹³⁴ As in *Bean*, the court in *East Bibb* followed the equal protection analysis established by the Supreme Court in *Arlington Heights v. Metropolitan Development Corp.*¹³⁵

Recognizing that the placement of the landfill in a predominantly black census tract would necessarily have a disparate impact, the court countered that the placement of

¹²³ See *infra* Part III.

¹²⁴ See *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. at 252 (1977).

¹²⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹²⁶ Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 521 (1980).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *infra* Part III.

¹³⁰ *E. Bibb Twigg's Neighborhood Ass'n. v. Macon-Bibb County Planning & Zoning Comm'n.*, 706 F. Supp. 880 (M.D. Ga 1989), *aff'd.*, 896 F.2d 1264 (11th Cir. 1989).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 881.

¹³⁴ *Id.* at 884.

¹³⁵ *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. at 252 (1977).

a previous landfill in a predominantly white census tract nearby mitigated claims of racial bias in the commission's decision.¹³⁶ The adjoining census tract was much smaller with a majority white population; however, both tracts were located in a 70% majority black voting district.¹³⁷ The court also kept its analysis limited to facilities approved by the commission, just as the district court had in *Bean*.¹³⁸ Looking at the specific census tract of the existing facility without regard for the census tracts relationship to the larger community and area around it, the court found that no racial bias was associated with the new facility despite its placement in the predominantly black voting district with other unwanted facilities.¹³⁹ If the *Bean* and *East Bibb* cases appear to turn on the plaintiff's failure to persuade the court that a significant enough disparity exists to constitute an equal protection violation under *Arlington Heights*, the following decision will show that the significance of the disparity is truly not determinative in equal protection analysis.¹⁴⁰

R.I.S.E. v. Kay, Inc., provides one of the best examples of the futile nature of environmental justice equal protection litigation.¹⁴¹ In that case, plaintiffs alleged that the proposed facility was the fourth placed in an almost exclusively black area, and that the sole facility placed in a predominantly white area was closed due to the lower property values and the negative environmental affects that the facility would cause.¹⁴² Although the court stipulated to the clear disparate impact of the decisions, it meticulously noted that the members of the Board of Supervisors making the decision about the current facility were not part of the Board when the first two facilities were located.¹⁴³ Although the court made no later reference to this fact, it did decide that the plaintiffs failed to provide the necessary evidence showing discriminatory purpose under *Arlington Heights*.¹⁴⁴ Instead, the court explained that the Board members based their decision on their concern for the economic plight of the entire county.¹⁴⁵ Moreover, the court made clear "[T]he Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race."¹⁴⁶

Although the court here seems to have given short shrift to *Arlington Heights* finding that the current disparity and historic discrimination were not enough to infer a discriminatory purpose and discounting evidence showing deviations from the standard decision-making process, this case best reflects environmental justice litigants chances to succeed under an equal protection based analysis.¹⁴⁷ Despite the Court's claim in *Arlington Heights* that direct evidence of racial animus need not be provided to show discriminatory purpose in the absence of racial classifications, the opposite has proven

¹³⁶ *E. Bibb Twiggs Neighborhood Ass'n.*, 706 F. Supp. at 880-84

¹³⁷ *Id.* at 885.

¹³⁸ *Id.* See also *Bean*, 482 F. Supp. at 673-79.

¹³⁹ *E. Bibb Twiggs Neighborhood Ass'n.*, 706 F. Supp. at 880-84.

¹⁴⁰ *R.I.S.E. v. Kay, Inc.*, 786 F. Supp. 1144 (E.D. Va. 1991).

¹⁴¹ *Id.*

¹⁴² *Id.* at 1148-49.

¹⁴³ The court found that two members of the current board participated in approving the third facility suggesting the limited significance of past board decisions in light of the changes in membership. *Id.* at 1148.

¹⁴⁴ *Id.* at 1149-50.

¹⁴⁵ *Id.* at 1150.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1149-50.

true.¹⁴⁸ Absent evidence of racial animus, contemporary federal courts will not invalidate government decisions based on the consideration of multiple factors as equal protection violations.¹⁴⁹ In fact, a string of decisions show the unstated but implicit contemporary presumption that in the absence of explicit racial classifications or a direct link to past *de jure* segregation patterns, governments act without discriminatory purpose when substantial evidence to the contrary is lacking.¹⁵⁰ This presumption creates and insurmountable hurdle for environmental justice litigants who routinely lack direct evidence of racial animus.¹⁵¹ Environmental justice and other litigants seeking to surmount the mount of joy will find themselves trapped in a legal hell occupied by the spirits of past litigants who hoped for racial justice.¹⁵²

Cases Under Title VI of the Civil Rights Act of 1964

In contrast to the cases above, the court in *Dowdell v. City of Apopka* considered whether the disparity in funding municipal services such as water distribution, sewerage facilities, and storm water drainage to black and white residents by the City of Apopka constituted a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.¹⁵³ Making much of the racial disparity in the level of services available to residents, the court connected the city's disparate funding decisions with the municipal ordinance mandating residential segregation prior to 1968.¹⁵⁴ The court went on to note that the city's awareness that its near exclusive use of

¹⁴⁸ Vill. of Arlington Heights, 429 U.S. at 266 See also Robert Nelson, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 341-42 (1986) (citing recent cases which have ignored the *Arlington Heights* rule, instead requiring a showing of discriminatory intent or direct evidence of racial animus as an absolute prerequisite to an equal protection claim).

¹⁴⁹ In *R.I.S.E.*, direct evidence of racial animus may not have been enough as plaintiff's appellate brief alleged that racially derogatory terms were used by both a board member and a county official regarding the matter. Robert Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 532 (1992). See also Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284-85 (1997).

¹⁵⁰ Such cases using the *Arlington Heights* analysis include the following: *Atkins v. Robinson*, 545 F. Supp. 852 (D.C. Va. 1982); *Lamore v. Ill. Sports Facilities Auth.*, No. 89 C 1067, 1996 WL 153672 (N.D. Ill. Apr. 1, 1996); *United States v. Charleston County*, 316 F. Supp. 2d 268 (S.C. 2003).

¹⁵¹ Luke W. Cole, *Civil Rights, Environmental Justice, and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309 (1994). Although litigants, *Wash. Park Lead Comm., Inc. v. U.S. E.P.A.*, No. 2:98CV421, 1998 WL 1053712 (E.D.Va. Dec. 1, 1998) were able to withstand a summary judgment motion when they alleged that a relocation decision perpetuated historic discrimination of a formerly segregated housing project, the claim was voluntarily dismissed on appeal. For a contrary decision consider, *In Broward Gardens Tenants Ass'n v. U.S. E.P.A.* 311 F.3d 1066 C.A.11 (Fla.2002), in which the court held that alleged violations of the equal protection clause of the Fourteenth Amendment did not circumvent the ban on pre-enforcement review under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).

¹⁵² For a contrary view, see Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COL. L. REV. 387, 456 (1999).

¹⁵³ *Dowdell v. City of Apopka*, 698 F.2d 1181, 1181-82 (Fla. 1983).

¹⁵⁴ *Id.* at 1184.

funding on services for white neighborhoods would result in the lack of services for black residents constituted relevant evidence of discriminatory purpose.¹⁵⁵

I begin my examination of Title VI with a brief survey of *Dowdell* as a case between the margins that included an equal protection analysis, as well. Unlike the previous cases concerning environmental permitting and siting, however, this case related to the provision of municipal services to plaintiffs.¹⁵⁶ Using the *Arlington Heights* analysis, the court in this case nonetheless found violations of the equal protection clause.¹⁵⁷ However, rather than a broad exception to rule against finding equal protection violations in the absence of direct evidence, this case represents a strand of cases finding equal protection violations when municipalities continue historic patterns of discriminatory service provision.¹⁵⁸ In these cases, courts connect the invidious purposes of historic *de jure* segregation with the contemporary denial of services, connecting current patterns to past discriminatory ordinances.¹⁵⁹ Because environmental decision making falls outside the arena of conduct historically associated with discriminatory behavior, cases alleging purposive discrimination in that process have failed to find traction in the federal courts.¹⁶⁰ In light of that difficulty, many claimants hoped to find relief under Title VI of the Civil Rights of 1964 using a discriminatory effects standard of proof found in the EPA's Title VI regulations.¹⁶¹ This hope led some claimants down what proved to be an equally futile judicial tract.

In *Chester v. Seif*, residents of Chester, Pennsylvania, complained that the Pennsylvania Department of Environmental Quality violated Title VI of the Civil Rights Act of 1964 through the process it used to grant a waste facility permit to Soil Remediation Services, Inc.¹⁶² At the time of trial, Delaware County, Pennsylvania had a population that was 86.5% white and 11.2% black.¹⁶³ Within Delaware County, plaintiffs noted that the Chester Township had a population of 5,399, of which 53.6% were black and 45% were white, and that the City of Chester, had a population of 41,856, 65.2% of whom were black and 33.5% of whom were white.¹⁶⁴ Residents and activists complained that defendants' issuance of five waste facility permits in less than ten years that increased the permitted waste capacity in Chester by over 2,000,000 tons per year had a

¹⁵⁵ *Id.* at 1185-86. EPA attorney, Steadman Southall participated in early efforts to resolve the dispute before the *Dowdell* decision. In discussions with the author held in 1997 in Region Four, he noted the city's use of EPA funding to develop its sewage treatment system and that upon receipt of the grant the city committed to use the funds in a non-discriminatory fashion. Nonetheless, he pointed out that the city's disparate funding practice took place despite his and others efforts to encourage them to fulfill their non-discrimination obligations as an EPA grant recipient.

¹⁵⁶ *Dowdell*, 698 F.2d. at 1181

¹⁵⁷ *Id.* at 1186.

¹⁵⁸ *Neighborhood Action Coal. V. City of Canton*, 882 F.2d 1012 (6th Cir. 1989); *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986); *Ammons v. Dade City, Fla.*, 783 F.2d 982 (11th 1986); *Tinsley v. Kemp*, 750 F. Supp. 1001 (W.D. Mo. 1990); *Midwest Comty. Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491 (N.D. Ill. 1983).

¹⁵⁹ *Dowdell*, 698 F.2d. at 1181 *See infra*, Part III below for consideration of why these cases of the 1970s and 1980s fit the definition of impermissible discrimination.

¹⁶⁰ *See supra* Part II.

¹⁶¹ *See* 40 C.F.R. § 7 (1998).

¹⁶² *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413, 414 (E.D. Pa. 1996).

¹⁶³ *Chester*, 944 F. Supp. at 414.

¹⁶⁴ *Id.* at 413, n.1.

discriminatory effect on the predominantly black residents of the city of Chester.¹⁶⁵ Plaintiffs noted that the increased waste capacity did not include the permit capacity of a sewage waste facility to treat 44,000,000 gallons of sewage and incinerate 17,500 tons per year of sewage sludge.¹⁶⁶ The plaintiffs contrasted this permitting pattern within Chester with the two waste facility permits granted outside of Chester during the same period.¹⁶⁷ These two permits were located in two predominately white census tracts with a capacity of 700 tons per year.¹⁶⁸ Plaintiffs claimed that, “only two Census Tracts in all of Delaware County contained more than one waste facility and both of these were located in areas with populations that were predominately African-American.”¹⁶⁹ In contrast, plaintiffs asserted that Delaware County had 112 census tracts where white residents made up more than 50% of the population; 8 of those had one facility and 104 had none.¹⁷⁰

Further the court acknowledged that the City of Chester has one of the highest concentrations of industrial facilities in the state; it holds numerous plants, it incinerates all the solid waste from Delaware County, and 85% of Delaware County’s raw sewage and sludge gets treated there.¹⁷¹ In Chester, many of the pollution sources are near minority residential neighborhoods.¹⁷² Within 100 feet of over 200 homes, a cluster of waste treatment facilities received permits for operation.¹⁷³

At the district court level, the judge considered the claimants evidence but granted a motion to dismiss because the complaint failed to allege intentional discrimination.¹⁷⁴ Citing the Supreme Court’s decisions in *Alexander v. Choate*¹⁷⁵ and *Guardians Ass’n v. Civ. Serv. Comm’n of City of N.Y.*,¹⁷⁶ the court maintained that private parties bringing suit under Title VI of the Civil Rights Act must prove intentional discrimination even though federal agencies retained the ability to find violations of Title VI based solely on the discriminatory effects caused by their grant recipients’ programs.¹⁷⁷ On appeal, the Court of Appeals for the Third Circuit reversed the District Court opinion, holding that a private right of action existed to bring an action under federal agencies’ discriminatory effects regulations.¹⁷⁸ This 1997 appeal remanded the case back to the District Court for disposition in light of the Appellate Court opinion.¹⁷⁹ Although Pennsylvania appealed the circuit court’s decision to the United States Supreme Court in 1998, the case ultimately resolved when the Pennsylvania Department of Environmental Protection

¹⁶⁵ *Id.* at 415.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 415-16.

¹⁶⁸ *Id.* at 415.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 415-16.

¹⁷¹ *Id.* at 415.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 417.

¹⁷⁵ *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

¹⁷⁶ *Guardians Ass’n v. Civ. Serv. Comm’n of City of N.Y.*, 463 U.S. 582 (1983).

¹⁷⁷ *Chester Residents Concerned for Quality Living*, 944 F. Supp. at 417, n.5.

¹⁷⁸ *Chester Residents Concerned For Quality Living v. Seif*, 132 F.3d 925 (3d Cir.1997).

¹⁷⁹ *Id.* at 927.

revoked the waste permit at issue.¹⁸⁰ DEP revoked the permit at the request of SRS after their initial time period to construct the facility under the original air quality plan approval expired.¹⁸¹ Under the Title V program of the Clean Air Act, the facility would have been required to submit a new air quality plan that met with the more stringent regulations that had gone into effect.¹⁸² In light of the permits revocation, the Supreme Court dismissed the state's appeal based on mootness and vacated the Appellate Court decision.¹⁸³

Nonetheless, the Supreme Court resolved the Title VI legal questions raised in *Chester* a few years later, in *Alexander v. Sandoval*.¹⁸⁴ Although the case took place outside of the environmental context, the court ruled that no private right of action existed for plaintiffs to bring Title VI suits based on the disparate impacts caused by a federal grant recipient's program.¹⁸⁵ In the case, a 5-4 majority decided that the plaintiff's class action suit against the Alabama Department of Public Safety for its policy of limiting the Alabama Driver's license exam to English as a violation of the U.S. Department of Transportation's Title VI regulations could not be sustained because no private right of action exists under the statute to enforce agency disparate impact regulations.¹⁸⁶

Despite the Court's decision in *Alexander v. Sandoval*, one glimmer of hope remained for environmental justice claimants seeking to bring a civil rights action that did not depend on intentional discrimination.¹⁸⁷ The residents of the Waterfront South neighborhood in Camden, New Jersey, tested that hope when they filed an action under U.S. Code § 1983 against the New Jersey Department of Environmental Protection.¹⁸⁸ The case, filed prior to the Supreme Court's ruling in *Sandoval*, attempted to use the private right of action that exists under § 1983 to enforce EPA's discriminatory effect regulations.¹⁸⁹ Claimant's initial complaint alleged that a proposed cement processing facility would cause a discriminatory impact on residents in violation of EPA's Title VI regulations.¹⁹⁰ The neighborhood hosted two Superfund sites, multiple abandoned and/or

¹⁸⁰ Pennsylvania Department of Environmental Protection, Environmental Hearing Board Dismisses SRS AIR Appeal, <http://www.dep.state.pa.us/dep/DEPUTATE/polycomm/update/05-29-98/052998u8.htm> (last visited Mar. 26, 2007).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. at 974.

¹⁸⁴ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 293.

¹⁸⁷ Bradford C. Mank, *Using Section 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001).

¹⁸⁸ *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 145 F. Supp.2d 446 (D.N.J. 2001)(Section 1983 providing in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." See 42 U.S.C. § 1983. Although Plaintiffs initially filed suit under Title VI of the Civil Rights Act of 1964 at 42 U.S.C. § 2000d to §2000d-7. The District Court provided them with leave to amend the complaint following the Court's ruling in *Alexander v. Sandoval*.

¹⁸⁹ *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 145 F. Supp.2d at 509-10.

¹⁹⁰ *Id.* at 450-51.

contaminated industrial sites, chemical companies, waste facilities, a petroleum coke transfer station and more permitted polluting facilities.¹⁹¹ The plaintiffs further contended that the New Jersey Department of Environmental Protection (NJDEP) granted additional permits for a regional sewage treatment facility, an incinerator, and a power plant in the neighborhood.¹⁹² Consequently, the claimants maintained that the Waterfront South community made up of 63% African-Americans, 28.3% Hispanics, and 9% white residents hosted 20% of the city's contaminated sites and had more than double the number of permitted air polluting operations than an area within a typical New Jersey zip code.¹⁹³ As relief, the South Camden Citizens in Action (SCCIA) sought to enjoin the issuance of the air permit for the cement processing facility due to NJDEP's failure to assess the disparate impact the facilities operation would cause.¹⁹⁴

The U.S. Court of Appeals for the Third Circuit reversed the District Court decision granting the injunction.¹⁹⁵ Specifically, the court held that the District Court erred in finding it likely that the plaintiffs' would succeed on the merits of the case.¹⁹⁶ To support its decision, the court looked to the reasoning of the majority in *Alexander v. Sandoval* writing:

Inasmuch as the [Supreme] Court found previously that the only right conferred by section 601 was to be free of intentional discrimination, it does not follow that the right to be free from disparate impact discrimination can be located in section 602. In fact, it cannot. In sum, the regulations, though assumedly valid, are not based on any federal right present in the statute.¹⁹⁷

Although the analysis of the enforceability of EPA's regulations under § 1983 was one of first impression, the court did its best to ground its opinion solidly in the analysis of the *Alexander v. Sandoval* majority opinion.¹⁹⁸ In doing so, the court required that a clear congressional intention to prohibit disparate racial impacts be present in the underlying statute that plaintiffs claim creates a right enforceable under § 1983.¹⁹⁹ Further, the court specifically rejected arguments that agency regulations could form the basis for establishing enforceable federal rights under statutes that already establish such rights.²⁰⁰ As a matter of policy, the court further supported its decision based on the concern that the right to bring private suits based on disparate racial impacts could

¹⁹¹ S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot., 274 F.3d 771, 775.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 776-77.

¹⁹⁵ *Id.* at 791.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 789-90.

¹⁹⁸ *Id.* at 789, n.12.

¹⁹⁹ *Id.* at 790. Because the majority in *Alexander v. Sandoval* had so recently decided that no congressional intent to provide a private right of action based on disparate racial impacts could be found in Title VI, the court used the same analysis to determine that congress also lacked the intent to create a federal right that persons be free from disparate racial impacts caused by the programs of federal grant recipients.

²⁰⁰ *Id.*

have sweeping ramifications, and therefore should be expressly provided by congressional action rather than an interpretation by the courts.²⁰¹

The District Court ultimately resolved the case in 2006, five years after the issuance of the original injunction.²⁰² In its decision it addressed the outstanding claim that the NJDEP intentionally discriminated against the residents of South Camden in issuing the permit.²⁰³ To make its determination, the court considered the lengthy process preceding the issuance of the permit and the role of the former NJDEP Commissioner in the permitting process before finally undertaking an intentional discrimination analysis under *Arlington Heights*.²⁰⁴ Under that analysis the court on remand rejected each of the plaintiffs' contentions that NJDEP purposefully granted the permit based on the race of the residents.²⁰⁵ The court went on to find the following:

When the Court grants all inferences in favor of Plaintiffs, including evidence of potentially discriminatory enforcement and of a foreseeable disparate impact, Plaintiffs still fail to establish that NJDEP issued permits to SLC because of, not merely in spite of, its adverse effects upon the minority community of Waterfront South.²⁰⁶

South Camden, like the Genesee Power Station in Flint Michigan and the other cases surveyed, represents the contemporary experience of many racial minorities today.²⁰⁷

PART III

FACING THE BROKEN BRIDGE: Equal Protection and Title VI Jurisprudence

A broad and deep literature has developed over the past three decades around antidiscrimination and equal protection jurisprudence.²⁰⁸ Most of the articles of the time

²⁰¹ The court writes, “[i]t is plain that in view of the pervasiveness of state and local licensing provisions and the likely applicability of Title VI to the agencies involved, the district court’s opinion has the potential, if followed elsewhere, to subject vast aspects of commercial activities to disparate impact analyses by the relevant agencies... [w]hile we do not express an opinion on whether that would be desirable, we do suggest that if it is to happen, then Congress and not a court should say so as a court’s authority is to interpret rather than to make the law.” *Id.* at 790.

²⁰² *S. Camden Citizens in Action v. N.J. Dep’t. of Env’tl. Prot.*, No. Civ.A. 01-702, 2006 W.L. 1097498 (Mar. 31, 2006).

²⁰³ *Id.* at 1.

²⁰⁴ *Id.* at 7-10. The court gave specific consideration to the Commissioner’s participation in EPA’s Federal Advisory Council on Title VI and his understanding of NJDEP’s obligations under Title VI in light of that experience.

²⁰⁵ *Id.* at 36.

²⁰⁶ *Id.* The court’s decision falls squarely within the vast majority of race based Equal Protection cases challenging race neutral policies decided over the past thirty years. As in those cases, the *Arlington Heights* factors serve to justify discriminatory racial impacts that result from facially neutral policies.

²⁰⁷ See *supra* Part II.

²⁰⁸ See Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 Am. J. Comp. L. 295 (2007); Stephen A. Plass, *Privatizing Antidiscrimination Law with Arbitration: The Title VII Proof Problem*, 68 Mont. L. Rev. 151 (2007); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1 (2006); Gregory Mitchell & Phillip E. Tetlock,

period attempt to make sense of the Supreme Court's antidiscrimination jurisprudence under the Equal Protection Clause of the United States Constitution, the civil rights legislation of the 1960s or both.²⁰⁹ The constant theme across the literature sounds in the reconciliation of the landmark *Brown v. Board of Education* and its progeny with the subsequent decisions of the Burger and Rehnquist Courts contracting the reach and warrants for race based antidiscrimination findings.²¹⁰ From these articles, I will consider three of the concepts raised by authors seeking to rationalize the Court's decisions.²¹¹ Process Theory and antisubordination represent the two approaches authors employ to address the process/results, intent/effects, wrongdoer/victim tensions so prevalent in the Court's antidiscrimination jurisprudence over the past half century considered in this article.

Understanding the Court's equal protection jurisprudence serves as the chief concern of this section. Through a considered synthesis of the aforementioned theories, this section seeks to relate the insights of seminal scholarship in the area to an important historical development of the 1960s unaddressed by these significant works. The result will offer civil rights theorists a more comprehensive description of the Court's equal protection jurisprudence.

Legal commentators' concern with the Supreme Court's increasingly restrictive exposition of the protections offered by the Equal Protection Clause of the United States Constitution has dominated journal articles on the subject for over thirty years.²¹² The articles cover a range of approaches. While some commentators decry the Court's turn away from the commitments of *Brown* and its progeny²¹³, others challenge the Court's

Antidiscrimination Law and the Perils of Mindreading, 67 Ohio St. L.J. 1023 (2006); Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 Hous. L. Rev. 1469 (2005); Viktor Winkler, *Dubious Heritage: The German Debate on the Antidiscrimination Law*, 14 Transnat'l L. & Contemp. Probs. 959 (2005); Ivan E. Bodensteiner, *Review of David E. Bernstein's You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws*, 31 J.C. & U.L. 437 (2005); P.K. Runkles-Pearson, *The Changing Relations of Family & the Workplace: Extending Antidiscrimination Laws to Parents and Nonparents Alike*, 77 N.Y.U. L. Rev. 833 (2002); Chetan Gulati, *Genetic Antidiscrimination Laws in Health Insurance: A Misguided Solution*, 4 Quinnipac Health L.J. 149 (2001).

²⁰⁹ Most antidiscrimination scholarship falls into the later category that would be expected in light of the shared historical development of the two areas.

²¹⁰ See sources cited *supra* note 208.

²¹¹ While these do not represent all of the mechanisms used to "make sense" of the Court's decisions, they account for a substantial share of the commentary.

²¹² See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284-85 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); George Rutherglen, *Symposium: The Jurisprudence of Justice Stevens: Panel VI: Equal Protection: Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313 (2006); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007); Stacy E. Seicshnaydre, *Is the road to Disparate Impact Paved With Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141 (2007); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Samuel Issacharoff, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982); Reva B. Siegel, *Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998), and Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

²¹³ See sources cited *supra* note 212.

reliance upon “colorblind constitutionalism.”²¹⁴ A much smaller group commends the court for their principled decisions²¹⁵ while others use psychological insights to critique the Court’s intentional discrimination standards.²¹⁶ This section will focus attention on an additional group of articles that endeavor to explain the Court’s decisions based on an internal logic woven through the cases and a broader jurisprudential analysis.²¹⁷

The first of these articles is a seminal work in Critical Race Theory by David Alan Freeman.²¹⁸ In *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, professor Freeman chronicles the twenty five year history of Supreme Court decisions on equal protection and racial discrimination.²¹⁹ Professor Freeman’s elaboration of two perspectives on discrimination—perpetrator and victim—available to the Courts serves as one of the articles central insights.²²⁰ The perpetrator perspective understands discrimination as discrete actions carried out by individual actors against particular victims.²²¹ From this perspective discrimination appears as ahistoric and isolated events.²²² America’s history of slavery and Jim Crow segregation constitute irrelevant background factors under this view unless directly linked to the alleged violation.²²³ In contrast, the victim perspective focuses on current social conditions and their relation to historic mistreatment.²²⁴ From the victim’s perspective, discrimination problems cannot be resolved until the conditions created by discrimination have been eliminated.²²⁵ This view clearly contradicts the perpetrator perspective that construes the neutralization of the proscribed behavior as a remedy of the established violation.²²⁶

²¹⁴ See sources cited *supra* note 212.

²¹⁵ See Richard McAdams, *Cooperation & Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995), for an example from an interesting economic perspective.

²¹⁶ See CHARLES R. LAWRENCE, THE ID, THE EGO, AND EQUAL PROTECTION: RECKONING WITH UNCONSCIOUS RACISM, reprinted in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (New Press 1996); Charles Lawrence III, *Unconscious Discrimination Twenty Years Later: Application & Evolution*, 40 CONN. L. REV. 931 (2008).

²¹⁷ While other important articles offer viable accounts their examination extends beyond the scope of this article. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 533 (1980); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Reva B. Siegel, *Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004); and Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998).

²¹⁸ KIMBERLEE WILLIAMS CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (New Press 1996).

²¹⁹ Although these articles and my analysis focus on the race cases under equal protection they may offer a helpful background story to the Court’s gender, disability, and age jurisprudence.

²²⁰ Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1057 (1978).

²²¹ *Id.* at 1053-54.

²²² *Id.* at 1053-55.

²²³ *Id.* at 1052-53.

²²⁴ *Id.* “This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.”

²²⁵ *Id.* at 1053.

²²⁶ *Id.* Affirmative action and reparations, both largely unpopular with the society’s racial majority grow out of this perspective.

Deleted: Kimberlee Williams Crenshaw, CRITICAL RACE THEORY: THE ESSENTIAL WRITINGS that Formed the Movement.

Deleted: 62 Minn L. Rev. 1049, 1057 (1978).

The twin concepts of fault and causation provide the strong structural artifice holding up the perpetrator perspective.²²⁷ Fault allows antidiscrimination law to single out bad actors traversing the society's norm of racial neutrality.²²⁸ Through it, a large class of "innocents" is constructed who lack legal and moral responsibility for the discriminatory results of their conduct because they act without a desire to do so.²²⁹ The social ramification of this perspective's dominance can be seen in the resentment expressed by otherwise "innocent" members of the racial majority when remedial measures for historic discrimination such as affirmative action and reparations are discussed.²³⁰ A vision of America as an equal opportunity meritocracy only occasionally sullied by aberrant discriminating actors emanates from this perspective.²³¹

Causation balances fault in the perpetrator perspective.²³² By requiring that a defendant's actions create a "discriminatory effect," causation places objective discriminatory conduct beyond the reach of legal protection when no unique harm befalls its victims.²³³ This explains why the Court could find no violation of the Equal Protection Clause when jurisdictions across the American South openly closed down public facilities and services rather than provide them to blacks on an equal basis.²³⁴

Professor Freeman's article skillfully traces the Court's formalistic adoption of the "perpetrator perspective" and the challenge it faced in crafting remedies that correlated to the violations it identified that did not overly embrace the "victim perspective."²³⁵ Professor Freeman accounts for dissonance in the Court's decisions in the twenty five year period following Brown as the Court's ongoing efforts to legitimize the continued material subordination of blacks in the country while at the same time proscribing formal discrimination by public officials.²³⁶ Freeman marks the creation of remedies that offer the mirage of resolution without endorsing the "victim perspective" as no mean feat rather skillfully accomplished by the Court.²³⁷

²²⁷ *Id.* at 1054.

²²⁸ *Id.*

²²⁹ *Id.* at 1055. See Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987) (examining the prevalence and importance of unconscious bias in American society and the impotence of current antidiscrimination law to address it).

²³⁰ See *id.* While reparations programs are overwhelmingly rejected by whites, affirmative action is disfavored by a majority of white Americans. See *id.* at note 83. See also *id.* at note 83; Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action*, GALLUP, August 23, 2005, available at <http://www.gallup.com/poll/18091/Race-Ideology-Support-Affirmative-Action.aspx>. ("Whites are much more divided [than blacks], with opponents outnumbering supporters [of affirmative action] by a 49% to 44% margin.")

²³¹ Freeman, *supra* note 220, at 1054.

²³² *Id.* at 1056-57.

²³³ *Id.* Freeman cites, as examples of this, the post-Brown cases upholding state actions of closing public schools, swimming pools, and other segregated public facilities, rather than complying with desegregation orders. *Palmer v. Thompson*, 403 U.S. 217 (1971); *Evans v. Abney*, 396 U.S. 435 (1970). A specific example in the environmental law context can be seen in *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880, 884-85 (M.D. Ga 1989), *aff'd.*, 896 F.2d 1264 (11th Cir. 1989).

²³⁴ Alan Freeman, see *supra* note 230, at 1057.

²³⁵ *Id.* at 1054-57.

²³⁶ *Id.* at 1050-51.

²³⁷ *Id.* at 1057.

Sheila Foster provides another explanation of the Court's equal protection jurisprudence.²³⁸ In *Intent and Incoherence*, Professor Foster provides a cogent analysis of the Court's equal protection decisions by applying "motive review theory" and its antecedent "democratic process theory" to explain the seeming dissonance of the Court's decisions.²³⁹ The article speaks directly to the divergent levels of consciousness required by the Court to satisfy the discriminatory intent standard applied to the Equal Protection Clause.²⁴⁰

Refining, extending, and critiquing the arguments advanced by Daniel Ortiz in the *Myth of Intent in Equal Protection*, Professor Foster posits the coherence of Supreme Court equal protection decisions when viewed in light of "institutional process and substantive concerns."²⁴¹ Under process theory, the Court self consciously exercises "judicial restraint" when examining executive and legislative actions.²⁴² This deference supports the Court's majoritarian preference for democratic policy decisions.²⁴³ By restricting its role to examining the legitimacy of the process followed by its fellow branches, the Court avoids "substituting its policy preferences for those of other, more representative and accountable actors."²⁴⁴ As a "counter majoritarian" institution²⁴⁵ under process theory, court decisions overturning the actions of other branches absent the violation of "clear and determinative constitutional provisions" represents the frustration rather than the furtherance of American democracy.²⁴⁶

Motive review theory envisions the Court as the "corrector of democratic process defects."²⁴⁷ Racial prejudice and bias represent improper legislative and administrative motives that corrupt an otherwise democratic process; when these are found present in the motivation of governmental actors courts properly withhold judicial deference and apply judicial scrutiny to remedy the defective process.²⁴⁸ Ortiz shows that the Court uses the intent requirement to distinguish the protection of "political, criminal, and educational rights" from the protection of "social and economic goods, like jobs and housing" as a way of facilitating liberalism's commitment to the protection of individual choice in a societal area relegated to "market control."²⁴⁹ Applying this reasoning, the

²³⁸ Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998).

²³⁹ *Id.* at 1070-71.

²⁴⁰ *Id.* at 1069. This consciousness can range from a specific desire to harm the affected group, to general knowledge that harm is substantially certain to occur, to an unconscious bias towards the affected group.

²⁴¹ *Id.* at 1121-25.

²⁴² *Id.* at 1100-01.

²⁴³ *Id.* at 1101-02.

²⁴⁴ *Id.* at 1102.

²⁴⁵ For a contrary view of the Courts counter-majoritarian nature in race cases, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 278-86 (1997) (examining the Supreme Court's role as a majoritarian institution in significant cases involving the rights of blacks and other minorities). *See also* Carlton Waterhouse, *Avoiding Another Step In A Series Of Unfortunate Legal Events: A Consideration Of Black Life Under American Law From 1619 To 1972 And A Challenge To Prevailing Notions Of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207 (2006) (exploring the role of law in the historic mistreatment of African Americans).

²⁴⁶ Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1101-1102 (1998).

²⁴⁷ *Id.* at 1102.

²⁴⁸ *Id.* at 1102-03.

²⁴⁹ Daniel R. Ortiz, *Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1141-42 (1989). ("In making this distinction, intent doctrine reflects our prevailing political ideology-liberalism-which is a system of values rooted in the belief that the state should allow every individual to pursue his own

Court's decision to distinguish the standard for establishing an equal protection violation from that used under Title VII in the case of *Washington v. Davis* falls into place.²⁵⁰

Unlike voting, school desegregation, and jury selection cases where the Court allows a finding of discriminatory intent with something less than a showing of motivation, housing and employment cases under equal protection require a higher evidentiary burden to limit judicial intervention in these otherwise market controlled areas.²⁵¹

Using Motive Review Theory, Foster extends Ortiz's work showing that the degree of consciousness required to cause an Equal Protection Clause violation varies within the areas identified by Ortiz as requiring a showing of discriminatory motivation.²⁵² She explains:

The degree of judicial restraint is linked, in turn, to the ability of disparate impact evidence to trigger the demand for a justification from the decisionmaker. In other words, as the reasons for judicial deference decline, the relevance of disparate impact to the intent inference escalates. This evidentiary variation, in turn, significantly determines the degree of consciousness—or level of intent that can violate the Equal Protection Clause. As a result, the intent doctrine can be conceptualized along a continuum, instead of a bright line, separating the decision's impact from the decisionmaker's intent.²⁵³

Democratic process concerns, institutional competence, and a decision's potential burden on a challenger's political or fundamental rights sway the Court's evidentiary requirements in equal protection cases.²⁵⁴ Democratic process concerns—Foster's “democratic validation concerns”—reflect the Court's respect for the superior policy making authority of the executive and legislative branches based on their electoral accountability through the democratic process.²⁵⁵ Institutional competence considerations involve the Court's deference to the executive and legislative branches but differ from democratic process concerns. Decisions involving an executive or legislative branch exercise of “core constitutional duties” along with those related to specific expertise of the decision maker represent judgments reflecting particular competencies of the decision makers and not the Court thereby justifying a higher evidentiary standard for plaintiffs to prove intent.²⁵⁶ Potential burdens on a challenger's political or fundamental rights can provide a basis for lowering the evidentiary burden of the challenger in light of

perception of the good. Since such an aim requires the state to remain neutral between competing conceptions of the good, the state can legitimately act only to allow individuals more fully to pursue their own private conceptions....Remaining social interaction is governed by free markets since that mechanism is thought best to allow persons to achieve their individually chosen objectives in free trade.”)

²⁵⁰ See *Washington v. Davis*, 426 U.S. 229 (1976). Likewise, *Village of Arlington Heights*, 429 U.S. 252 (1977), requires that plaintiffs meet the substantial evidentiary burden of showing the defendants discriminatory motivation.

²⁵¹ Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1098-99 (1998).

²⁵² *Id.* at 1098-99.

²⁵³ *Id.* at 1121. The level of judicial restraint depends on the right affected by the decision, the decision maker's relation to the democratic process, and the nature of the decision being made. *Id.*

²⁵⁴ *Id.* at 1121.

²⁵⁵ *Id.* at 1101-02.

²⁵⁶ *Id.* at 1124-25.

the substantive rights at issue.²⁵⁷ By weighing these three factors, the Court shifts the level of consciousness required to violate the Equal Protection Clause along the continuum.²⁵⁸

Legislative and executive policy decisions beyond the scope of fundamental or political rights make up one end of the continuum.²⁵⁹ The Court provides the highest level of judicial deference in these cases—“super restraint”—refusing to interject their judgment absent a showing of specific intent to harm.²⁶⁰ At the opposite extreme, the court applies “minimal restraint” as the lowest level of judicial deference.²⁶¹ In these cases, the Court will require a justification from a government decision maker after a showing of substantial administrative discretion and a disparate impact.²⁶² Between these extremes, the Court applies “intermediate restraint.”²⁶³ Under this analysis, the Court may supplement its review of the decision maker’s stated rationale with consideration of the social and historical context of the decision.²⁶⁴ If a finding of general intent is made then the Court will also find a decision presumptively unconstitutional absent a justificatory showing by the decision maker.²⁶⁵ Using this approach, the Court distinguishes the level of intentionality required for equal protection violations—placing a high burden on parties claiming violations resulting from legislative or executive decisions over economic and social issues that do not implicate substantive rights.²⁶⁶

Matthew J. Lindsay provides the final analytical model, examined in this section.²⁶⁷ In his recent article, *How Antidiscrimination Law Learned to Live with Racial Inequality*, Lindsay explores the Courts move from concern with racial disparity as indicia of discrimination in the Civil Rights Era to a doctrine of colorblind competition that explains economic, educational, and other racial disparities in society as a reflection of ethnic differences resulting from racially neutral market based meritocracy.²⁶⁸ Lindsay maintains that following passage of the Civil Rights Act of 1964²⁶⁹ antidiscrimination law in the federal courts can be divided into three periods: the Civil Rights Era; Colorblind Equality; and Colorblind Competition.²⁷⁰ This article considers each period

²⁵⁷ *Id.* at 1125-28.

²⁵⁸ *Id.* at 1121-22.

²⁵⁹ *Id.* at 1122.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 1132-34.

²⁶² *Id.* Jury cases based on peremptory challenges and the challenge to the key man system for grand jury selection used in Texas in make up these cases. *Castaneda v. Partida*, 430 U.S. 482 (1977). The lower standard for these cases results from the Court’s protection of the Sixth Amendment right of the defendant, the increased institutional competence of the Court to review the decision, and the decreased democratic process concerns in reviewing decisions of administrative bodies. Foster, *Intent and Incoherence*, *supra* note 251, at 1132-33. Unlike the actions of directly elected legislators and some executive branch personnel, administrative agency policy decisions warrant decreased democratic process concerns. *Id.* at 1128-31.

²⁶³ Foster, *Intent and Incoherence*, *supra* note 251, at 1127-28.

²⁶⁴ *Id.* at 1128.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1098-99.

²⁶⁷ Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U.CIN. L. REV. 87 (2006).

²⁶⁸ *Id.* at 88-90.

²⁶⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. (1964).

²⁷⁰ Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 88-92.

proposed by Lindsay for the luminary spotlight it casts on equal protection jurisprudence.²⁷¹

From 1965-1971, federal courts and the United States Department of Justice sought ways to put the new antidiscrimination laws fully into practice.²⁷² The justice department, the Equal Employment Opportunity Commission, and others looked to racial proportionality in employment as a means to evaluate compliance with Title VII's²⁷³ antidiscrimination requirements for the workplace.²⁷⁴ The underlying logic commonly employed by the courts and federal officials was that absent racial discrimination blacks and other racial groups would experience proportionate representation in the labor force.²⁷⁵

In response to concerns that more affirmative steps were required to facilitate a non discriminatory and hence representative workforce, President Lyndon Johnson began and President Richard Nixon continued city based initiatives in federal contracting.²⁷⁶ These programs required that the construction industry and its unions create hiring plans that would allow them to reach certain levels of minority representation.²⁷⁷ When challenged, the federal courts upheld these programs using the same logic that applied to the ongoing Title VII cases—absent discrimination blacks would have proportionate representation in desirable jobs.²⁷⁸ In *Griggs v. Duke Power* the Supreme Court weighed in and held that a racial disparity in the workforce based on facially neutral hiring criteria was sufficient to show discrimination and to establish a violation of Title VII unless the employer could connect the criteria with a business necessity.²⁷⁹ Reflecting the logic of the lower courts and federal officials of the time, the Court viewed the employer's lack of black employees in certain positions resulting from its facially neutral criteria as indicia of discrimination requiring a justification by the employer.²⁸⁰

The next period, in Lindsay's analysis reflects the federal courts turn away from racial discrimination as the cause of racial disparity in education, employment and other aspects of society.²⁸¹ Justice Powell's opinion in *Regents of the University of California v. Bakke* provides the quintessential expression of the reasoning behind the social and legal turn away from expectations of racial proportionality.²⁸² Powell's opinion stands out in the landmark plurality decision for crafting the diversity rationale for affirmative action recent upheld in *Grutter v. Bollinger*.²⁸³ Upon investigation, Powell's opinion also stands out for reformulating the Court's understanding of racial disparity in American

²⁷¹ See *infra* notes 272-306 and accompanying text.

²⁷² Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 93-95.

²⁷³ Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (1964).

²⁷⁴ Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 95-100.

²⁷⁵ *Id.*

²⁷⁶ *Id.* 98-100. See PHILLIP RUBIO, A HISTORY OF AFFIRMATIVE ACTION 149-156 (2001), for a discussion of these initiatives and other aspects of affirmative action's development during this period.

²⁷⁷ Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 99-100.

²⁷⁸ *Id.* at 100-04.

²⁷⁹ *Id.* at 104-07. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²⁸⁰ *Griggs*, 401 U.S. at 429-30.

²⁸¹ Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 109-15.

²⁸² *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978).

²⁸³ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

society and its relationship to discrimination.²⁸⁴ As Lindsay points out²⁸⁵, Powell leaves the original purpose and understanding of the Equal Protection Clause as providing freedom and protection to the slave race to the universalized purpose of providing protection to what had become “a nation of minorities.”²⁸⁶ In making this turn Powell, recast the preceding two hundred and forty four year history of legally proscribed subjugation and subordination of American blacks²⁸⁷ preceding the civil rights movement with the experience of discrimination against ethnic immigrants.²⁸⁸ By defining America as a “nation of minorities” and equating blacks experience with that of other more successfully assimilated immigrants²⁸⁹ Powell argues that the “white majority” consists of a range of ethnic immigrants who are equally threatened with discrimination from governmental actors seeking to remedy the effects of past discrimination by whites against other groups.²⁹⁰

Connecting Powell’s argument with the writings of colorblind advocates of the time, Lindsay illustrates the twofold effect of the argument.²⁹¹ He elaborates:

First, it suggests that African Americans will follow a path of ethnic progress comparable to that of their immigrant forebears--the Irish, eastern European Jews, Italians, Japanese, and the like. Second, it accounts for racial inequality as an expression of ethnically distinctive culture or taste. Racial inequality is thus tolerable because it is temporary and bound to be diminished with each generation; but even if it persists, it is merely a natural manifestation of black ethnic difference. Under this model, the goals of the civil rights movement have already been satisfied, notwithstanding apparent evidence to the contrary; all that remains for antidiscrimination law is to police against the isolated, exceptional acts of illicit discrimination perpetrated by a handful of racist throw-backs to the Jim Crow era.²⁹²

²⁸⁴ Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 110-12.

²⁸⁵ *Id.*

²⁸⁶ *Regents of Univ. of Ca.*, 438 U.S. at 291-93.

²⁸⁷ Not to mention the conquest of its Native Americans.

²⁸⁸ *Regents of Univ. of Ca.*, 438 U.S. at 292. He writes, “Each had to struggle -- and, to some extent, struggles still -- to overcome...prejudices. *Id.* at 292. A full examination of the validity of this claim is beyond the scope of this article. The experience of Jewish immigrants fleeing Nazi persecution, Vietnamese immigrants escaping the Killing Fields, and Cubans departing Castro’s Cuba to come to the United States, however, seems of a different type than that of Native Americans and blacks whose primary experience of persecution came from the colonial, state, federal governments as well as its diverse citizens pursuant to its laws. For these groups, America beckoned not for their “tired poor and huddled masses yearning to be free.” See Carlton Waterhouse, *Avoiding Another Step in A Series of Unfortunate Events*, 26 B.C. THIRD WORLD L.J. 207, 227-250 (2006), for an examination of the significant role of law in the historic mistreatment of African Americans.

²⁸⁹ In the opinion Powell notes, “Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin.” *Regents of Univ. of Ca.*, 438 U.S. at 293.

²⁹⁰ *Id.* at 294.

²⁹¹ Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U.CIN. L. REV. 87, 113-14 (2006).

²⁹² *Id.*

Each of these points corresponds to contemporary and popular views of racial discrimination.²⁹³ Overt discrimination’s substantial diminution and the continued disparity in the educational and economic achievement of black, Latino, and Native Americans find ready explanation in the “culture of poverty” arguments popularized in the 1980s and still very relevant today.²⁹⁴ The implicit irony of the second point Lindsay identifies above is that adherents both espouse “colorblindness” and the essentializing arguments of racial difference that ascribe positive and negative stereotypes to racial minorities and ethnic groups to explain their relative successes and failures in society.²⁹⁵ The first point, of course, reflects the huge paradox at the heart of the argument—blacks, whose arrival predated that of the immigrants they are compared to by one to two centuries will succeed just as their predecessors did.²⁹⁶

Lindsay tracks the second thesis through a series of Court decisions to show its prevalence in the Court’s Title VII and equal protection analysis.²⁹⁷ In the Title VII context, the courts in *Watson v. Fort Worth Bank and Trust*²⁹⁸ and *Wards Cove Packing v. Atonio*²⁹⁹ reject the reasoning used in *Griggs and its progeny* that the lack of racial proportionality in the work place could rise to the level of a Title VII violation. In these cases, the majority rejected the argument that racial disparity reflected racial discrimination that required an employer to show that it was precipitated by “business necessity” as established by *Griggs*.³⁰⁰ The Ward’s Cove case represented a particularly strong expression of the thesis as Justice O’Connor deemed the ultra segregated positions, dining, and living quarters between whites and Alaskan natives as reflections of racial difference and inclinations devoid of legal significance.³⁰¹

In its seminal equal protection cases, the Court even more keenly reflected the “racial difference” argument initiated in *Bakke*.³⁰² *City of Richmond v. Croson*,

²⁹³ *Id.* See also JOHN MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (The Free Press 2000), and THOMAS SOWELL, *BLACK REDNECKS & WHITE LIBERALS* (Encounter Books 2005).

²⁹⁴ The thesis maintains that the disparity in economic and educational achievement of blacks, Latinos, Native Americans, and other groups results from their failure to assimilate the positive norms of American society rather than discrimination. THOMAS SOWELL, *BLACK REDNECKS & WHITE LIBERALS* (Encounter Books 2005). A second extension of the argument is manifested in less popular genetic inferiority claims. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *BELL CURVE: INTELLIGENCE & CLASS STRUCTURE IN AMERICAN LIFE* (Free Press Paperbacks 1994).

²⁹⁵ Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 117-18. See ROSALIND S. CHOU & JOE R. FEAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* (Paradigm Publishers 2008). See also FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (Basic Books 2001) for an investigation of the pitfalls for Asians and other groups of accepting the label that they represent “model minorities” in American society who demonstrate the systems racial impartiality through their success.

²⁹⁶ Acceptance of this proposition while encouraging to some reflects a historical understanding of society that avoids the economic, educational, political, and psychological consequences of three centuries of collective experiences prior to the passage of the civil rights act of 1964. Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 267, at 123-24.

²⁹⁷ *Id.* at 124-34.

²⁹⁸ See *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).

²⁹⁹ See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

³⁰⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

³⁰¹ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 642 (1989).

³⁰² See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995).

Deleted: See Frank Wu, *The Myth of the Model Minority*, ____ ____ (

Deleted: *Id.* at 123-124.

represents the next step in the Court's break with its approach adopted in Griggs explicitly reasoning that gross racial disparity³⁰³ in the construction field in Richmond, Virginia did not suggest the presence of racial discrimination.³⁰⁴ In the plurality opinion Justice O'Connor, dismisses the uncontested statistical evidence, testimony of witnesses, and findings of the United States Congress relied upon by the city council that racial discrimination against blacks was characteristic of the construction industry.³⁰⁵ In this regard, O'Connor expresses the underlying view subsequently applied to the federal government in Adarand v. Pena that existing racial disparity in the market place can only be correlated with discrimination through specific and direct evidence of discriminatory acts.³⁰⁶

Equal Protection Jurisprudential Theory and Environmental Justice

Environmental justice cases fall typically within the level of what Foster identifies as intermediate restraint. These claims brought under the Equal Protection Clause seek to overturn state agency decisions regarding the adequacy of a party's pollution permit request on the grounds of racial discrimination.³⁰⁷ Rather than alleging that state actors selected facility locations with the specific intent to adversely affect a particular racial group, plaintiffs routinely allege that state actors granted permit requests without regard to the discriminatory effect of their decision.³⁰⁸ Although environmental permitting decisions are made by administrative entities rather than legislators or high level executive officers, they fall clearly within the realm of economic ordering governed by the market.³⁰⁹ They largely result from requests for permits from commercial entities engaged in business activities. As a matter of geography, state and federal permits rarely relate to local land use decisions beyond minimum technical standards of ecological suitability and compliance with local land use laws. Consideration of the racial makeup or identity of persons in near proximity to facilities is absent from the state and federal government permitting process. The identity of persons residing near facilities is simply a matter of the housing market divorced from governments' operating practices.

Based on the above perspectives on the Court's equal protection jurisprudence environmental justice claims, have little chance of success absent a specific showing of

³⁰³ In this case, it represented the near exclusion of blacks as prime contractors in the industry. The city council's study revealed that blacks made up less than one percent of 1% of the City's construction contracts and 50% of the city's population.. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 479-80 (1989).

³⁰⁴ O'Connor states, "the statistics comparing the minority population of Richmond to the percentage of prime contracts awarded to minority firms had little or no probative value in establishing prior discrimination." *Id.* at 503. O'Connor's opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 294 (1977), foreshadows the more elaborated view that she adopts in *Croson*.

³⁰⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 499 (majority opinion).

³⁰⁶ See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (requiring the "strictest judicial scrutiny" of racial classifications by Congress even when intended to remedy past discrimination.)

³⁰⁷ See *supra* text accompanying notes 108-52.

³⁰⁸ *Id.*

³⁰⁹ Environmental permit decisions routinely reflect the market forces driving local land use for both public and private entities.

racial discrimination³¹⁰ by the permitting agency in its past decisions and a level of intentionality in the current decision beyond awareness of disparate impacts.³¹¹

This foregoing theoretical analysis conforms to the decisions in the environmental justice cases brought under the Equal Protection Clause discussed above.³¹² In *Bean*, the court eviscerated the claimants' disparity claim by distinguishing the actions of the Texas Department of Health and the Texas Department of Water Resources.³¹³ While the claimant alleged that the TDH had continued the historic discriminatory pattern of the TDWR, the court maintained that as distinct agencies their actions should not be considered together.³¹⁴ This distinction plays out in similar ways in the other cases as well.³¹⁵ The Court in *East Bibb* began its analysis, like the court in *Bean*, removing the landfills placed in black communities by another body from the disparity analysis.³¹⁶ After doing so, the court found that no significant disparity existed.³¹⁷ In *R.I.S.E. v. Kaye*, the Court rejected evidence that all but one of the landfills placed in the county were located in black communities partially on the grounds that only two commissioners who approved only one of the three other landfills currently served on the commission.³¹⁸ This approach falls squarely within the "perpetrator's perspective."³¹⁹ Courts, when evaluating discriminatory effects, consider the actions of only one agency instead of the cumulative effect of multiple agencies.³²⁰

Environmental justice decisions can also be explained under democratic process and motive review theory.³²¹ Under those theories, courts will defer to the judgment of legislative bodies and high level executive officers to exercise judicial restraint to protect democratic values.³²² The environmental cases above reflect the decisions of state administrative officers or county commissioners.³²³ Motive review theory counsels distinct approaches under each of these two governmental bodies.³²⁴ For the administrative decision maker, the issuance of a permit follows a highly regulated technical review process.³²⁵ Generally, permitting authorities grant environmental permit

³¹⁰ In these contexts, historic discrimination requires more than past disparity. Covert or overt racial discrimination typically associated with segregation era racial bias will be required rather than facially neutral decisions that have a disparate racial impact. *See Dowdell v. City of Apopka*, 698 F.2d 1181 (Fla. 1983), *Fortson v. Dorsey*, 379 U.S. 433 (1965).

³¹¹ *See* sources cited *supra* note 206.

³¹² *See supra* text accompanying notes 108-52.

³¹³ *See* case cited *supra* note 108.

³¹⁴ *See supra* note 109.

³¹⁵ *E. Bibb Twiggs Neighborhood Ass'n. v. Macon-Bibb County Planning & Zoning Comm'n.*, 706 F. Supp. 880 (M.D. Ga 1989), *aff'd.*, 896 F.2d 1264 (11th Cir. 1989).

³¹⁶ *Id.* at 1266

³¹⁷ *Id.* at 1267.

³¹⁸ *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991).

³¹⁹ *See supra* note 221.

³²⁰ Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

³²¹ Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1100-02 (1998).

³²² *Id.*

³²³ *See supra* notes 108-207 and accompanying text.

³²⁴ *See supra* text accompanying notes 108-207.

³²⁵ ABA, *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES & PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 473-81 (Michael B. Gerrard, ed., NYU Press 2001).

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requests unless applicants fail to satisfy pre-established federal or state criteria.³²⁶ Unless these criteria include community input or “environmental justice” as considerations, agency decision makers typically express the view that they lack the authority to deny a permit if it otherwise complies with state and federal technical requirements.³²⁷

Courts reviewing these permitting decisions under an equal protection analysis will defer to the technical judgments of agency authorities absent evidence of a specific discriminatory intent.³²⁸ Under motive review theory, these decisions can warrant a high level of deference.³²⁹ The particular institutional competencies involved and the limited discretion of the decision makers, for some executive decisions, call for courts to use “super restraint” since neither political nor fundamental rights are involved.³³⁰ Exercising this high level of restraint, courts will not overturn the decisions of a high-level administrator unless presented with evidence of a specific intent to discriminate.³³¹ Administrative agencies’ decisions to grant permits, despite discriminatory effects rather than due to them accordingly fail to demonstrate the requisite intent.³³²

In *S. Camden Citizens in Action v. N.J. Dep’t. of Env’tl. Prot.*, the District Court denied plaintiffs’ claim that the NJDEP violated § 1983 by granting a pollution permit to a cement processing facility in a minority community already burdened with multiple polluting facilities without assessing the disparate racial impacts it would cause.³³³ The District Court held that plaintiffs failed to show that the agency granted the permit because of rather than in spite of the disparate racial effects.³³⁴ In essence, the court found no specific intention to discriminate by the department and absent such a finding saw no basis to hold that the agency violated § 1983.

Quasi legislative bodies with discretion to approve or deny local land use decisions lack the restrictions placed upon administrative agencies.³³⁵ These voting bodies can weigh a host of considerations in their decision making.³³⁶ Under Motive Review Theory, the increased discretion these bodies enjoy, warrants a decreased level of deference from courts in light of the increased opportunity for improper considerations to

³²⁶ See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 103-21 (New York University Press 2001), for a discussion of the role of the opportunities and limits of public participation within the environmental decision-making context.

³²⁷ *Id.* at 75-76. Consider the position adopted by the Michigan Department of Environmental Quality in *NAACP-Flint County Chapter v. Engler*, Genesee County Circuit Court, 95-38228-CV.

³²⁸ Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1132-34 (1998).

³²⁹ *Id.* at 1122-28.

³³⁰ *Id.*

³³¹ *Id.*

³³² *S. Camden Citizens in Action v. N.J. Dep’t. of Env’tl. Prot.*, 274 F.3d 771, 775. *See also supra* note 206.

³³³ *S. Camden*, 274 F.3d at 775.

³³⁴ *See supra* note 206.

³³⁵ LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT

³³⁶ *See R.I.S.E. v. Kay*, 768 F. Supp. 1144, 1150 (E.D. Va. 1991) (noting the number of factors considered by the Board including the economic environmental and cultural needs of the country), *E. Bibb Twiggs Neighborhood Ass’n. v. Macon-Bibb County Planning & Zoning Comm’n.*, 706 F. Supp. 880, 882-84 (M.D. Ga 1989) (outlining the broad range of considerations in the Board’s decision making process), and Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1102-05 (1998) (discussing the significance of legislative versus administrative decision making bodies under the democratic process theory).

affect members' judgment.³³⁷ However, those bodies making local land use decisions will likely receive greater deference from courts in light of democratic process concerns and courts' preference that local elected officials make decisions about local land use.³³⁸ Court decisions in these cases then will continue to reflect the "super restraint" shown to technical administrative agency decisions only finding racial discrimination when provided with evidence of "specific intent" by the decision making body.³³⁹

In *Rise v. Kaye*, the county commission's decision to grant a permit request for an additional landfill in a black neighborhood despite the exclusive location of the county's three other operating landfills in black communities received great deference from the court. Attributing little significance to the disparate impact of the decision, the court found that the commission motivation was the economic well being of the entire county and not the race of the community where the facility would be located.³⁴⁰ Consistent with motive review theory, the court looked to the decision of the commission with substantial deference to their stated rationale for the land use decision.³⁴¹ Without evidence that a specific intent to discriminate guided the commissioners, the court gave little consideration to claimant's allegations of racial bias.³⁴²

In each of the aforementioned court decisions plaintiffs alleged a disparate racial impact of the decision, specifically that one or more minority groups residing nearby suffered a disparate effect of the requested pollution permit.³⁴³ Matthew Lindsay's analytical model provides significant insight into contemporary views of the federal courts regarding racial disparities related to the social and economic market place.³⁴⁴ Absent evidence that government actors purposefully intended to discriminate against parties because of their race, the disproportionate effects of government decisions on particular racial groups that otherwise reflect market based choices and competition do not implicate a violation of the equal protection clause.³⁴⁵ This has broad ranging implications for environmental justice advocates, activists, and would be litigants.³⁴⁶ The fourteenth amendment of the United States Constitution, Title VI of the Civil Rights act of 1964, and section 1983 of the United States Code offer no protection against mere racial disparity in pollution exposure, facility siting, or the negative effects of federal or state pollution permits.³⁴⁷ Further, it is extremely unlikely that the EPA's regulations

³³⁷ Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1132-34 (1998).

³³⁸ *Id.* at 1102-03.

³³⁹ *Id.* at 1122.

³⁴⁰ *Id.* at 1150.

³⁴¹ *Id.*

³⁴² *Id.* at 1149-50.

³⁴³ See *supra* notes 322, 327.

³⁴⁴ Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U.CIN. L. REV. 87 (2006).

³⁴⁵ Certain decisions are relegated to the markets, not to the courts. See Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 344, at ----, and Sheila Foster, *Intent and Incoherence*, *supra* note 337, at ---.

³⁴⁶ See *supra* notes 387-412 and accompanying text.

³⁴⁷ See Sean-Patrick Wilson, *Fighting the Good Fight: The Role of Environmental Civil Rights Litigators Going Forward and the Need for a Continuance of the Litigation Tool in the Environmental Justice Movement*, 28 W. NEW ENG. L. REV. 293 (2006), Uma Outka, *Environmental Justice and the Problem of the Law*, 57 ME. L. REV. 209 (2005), and Kyle W. La Londe, *Who Wants to be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27 (2004).

proscribing such disparities will be used to invalidate a state permit decision absent overwhelming evidence that permitting officials acted in bad faith in making a permit decision.³⁴⁸ Racial disparity based on de facto residential segregation patterns will not lead to civil rights violations under the courts contemporary analysis that accepts racial disparity as an expression of the preferences, values, and abilities of the diverse racial and ethnic groups that make up American society.³⁴⁹ From this perspective, perceived environmental injustices reflect the function of the market place and not the racial biases of local, state, or federal officials responsible for making environmental decisions.³⁵⁰

Under the “perpetrator’s perspective,” disparities in pollution exposure that may exist constitute unfortunate circumstances, but responsibility should not be placed on the “innocent” government or commercial actors who will routinely act without racial animus or discriminatory intent.³⁵¹ Using motive review theory, it appears that environmental decisions will very rarely, if ever, violate the equal protection clause as the institutional competencies and the democratic process preferences call for deference by courts, thus leading to a high evidentiary burden for litigants to prove decision makers acted with racially discriminatory motives.³⁵²

The judge’s statement quoted above in South Camden Citizens in Action captures society’s current view toward racial minorities’ allegations of discrimination today— unless you can show that the challenged actions resulted from overt racial animus, the perceived infringement warrants neither moral nor legal sanction. Along with the jurisprudential analysis above, a historical analysis of the civil rights movement at its close clarifies the courts rejection of environmental justice claims based in civil rights legal theories.³⁵³

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PART IV

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CROSSING HELL’S BASEMENT: Racial Alienation without Racial Animus

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During the later part of the Civil Rights Movement, the Southern Christian Leadership Conference (SCLC) expanded their campaigns beyond the borders of the Jim Crow south into the north and the west.³⁵⁴ Chicago, Illinois stood as the focus of SCLC and Dr. King’s attention.³⁵⁵ In an effort to build on the successes gained against Jim Crow segregation in the South and by the passage of civil rights legislation proscribing discrimination in public accommodations, employment, and voting, civil rights workers hoped to end the discrimination in housing and educations faced by African Americans

³⁴⁸ To date, the EPA has never invalidated a state permitting decision based on its Title VI regulation.

³⁴⁹ Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, *supra* note 344, at 87.

³⁵⁰ See 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). See also Vicki Been & Francis Gupta, *Coming to the Nuisance or Moving to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997), for a discussion of the limitations of market-based decision making.

³⁵¹ Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049 (1978).

³⁵² See *supra* notes 336-38 and accompanying text.

³⁵³ See discussion *infra* notes 354-87 and accompanying text.

³⁵⁴ STEPHEN B. OATES, *LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR* 376-79 (HarperCollins Publishers, 1994) (1982).

³⁵⁵ *Id.* at 379-80.

living on the Westside of Chicago.³⁵⁶ At the end of the campaign, King and the civil rights workers left Chicago with a real sense of despair.³⁵⁷ Despite their significant investment of time and resources, African Americans living on Chicago's Westside still faced de facto segregation in their schools and in housing.³⁵⁸ Moreover, efforts by King and others to address these problems received little sympathy from whites.³⁵⁹ In fact, polls of the time showed that "85 percent of white Americans believed that Negroes were demanding too much, going to far..."³⁶⁰ In fact the *Village of Arlington Heights* case itself took place in one of the Chicago's suburban neighborhoods marked by de facto segregation.³⁶¹ The Court, however, like the power structure faced by King and others could find no fault with the North's "neutral" public policies that resulted in the adversity faced by blacks.³⁶² King recognized this toward the end of the Civil Rights Movement and expressed his frustration with the intractable de facto segregation experienced by the millions of blacks living outside of the South.³⁶³ He confessed that the successes of the first decade of the movement misled everyone about the depth of anger suppressed by northern blacks and "the amount of bigotry" that America's white majority disguised.³⁶⁴ "The white power structure is still seeking to keep the walls of segregation and inequality substantially intact" he explained in 1967, just a few short months before his death.³⁶⁵

Earlier the same year, President Lyndon B. Johnson had established a national Advisory Commission on Civil Disorders, popularly known as the Kerner Commission.³⁶⁶ In 1968, the Commission provided its findings; as a result of its study the eleven member group reached the conclusion that "Our nation is moving toward two societies, one black, one white—separate and unequal."³⁶⁷ Further, the report found the following:

Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully

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³⁵⁶ *Id.* at 387.

³⁵⁷ *Id.* at 417-18. A similar phenomenon had taken place a few years before in Albany, GA. This campaign, which took place immediately before the success of Birmingham, failed due to the courteous treatment and planning of the white Police Chief Laurie Pritchett. Despite, Pritchett's courteous treatment and the absence of overt venom by his men that characterized so much of the south, African Americans in Albany still suffered daily from the effects of racist policies and practices. Nonetheless, due to the lack of opprobrium and overt racial animus displayed toward King and other civil rights workers, the campaign failed to engender the same support from the justice department and the courts that SCLC gained in other campaigns. *Id.* 191-95.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 418

³⁶⁰ *Id.*

³⁶¹ *Id.* See also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 255 (1977) (During the 1960s, Arlington Heights experienced considerable growth, but the population of its racial minority groups remained low. In 1970, the population of the Village included 64,000 residents; however, only 27 of the residents were black).

³⁶² *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. at 270-71.

³⁶³ DAVID GARROW, *BEARING THE CROSS* 581 (Perennial Classics, 1986).

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 609 (Bantam Books 1968) available at <http://www.eisenhowerfoundation.org/docs/Kerner.pdf>;

³⁶⁷ *Id.*

understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.³⁶⁸

Like the commission, King believed that racism caused the urban unrest of the time.³⁶⁹ In light of those realities, King realized that the desegregation campaigns in the South and the legal victories that accompanied them were limited achievements in light of the problems facing millions of blacks in America's cities.³⁷⁰ Today, environmental justice activists and others face the same battle against apathy and facially neutral policies that relegate African Americans and other racial minorities to bear disproportionate pollution burdens with the acceptance of federal and state law officials.

In most respects, the de facto segregation in housing and public education experienced by African Americans today is no different than it was on Chicago's Westside in 1966 during SCLC's campaign.³⁷¹ More than any other racial group, blacks today experience the highest level racial segregation in housing and education.³⁷² In a follow up to the Kerner Report, the Eisenhower Foundation found that forty years after the original Kerner Report 63% of African Americans attended racially segregated schools compared with 67% in 1968.³⁷³ In housing, African Americans remain the most segregated members of American society despite modest gains over the past twenty years.³⁷⁴ Despite these and other factors reinforcing the tenuous condition of black communities across the United States from 1968 up to the present, concerns that racial bias influences environmental decision making have been consistently rejected.³⁷⁵

In the cases considered above, the predominantly African American communities in Flint, Houston, Macon, Danville, and South Camden were victims of significant residential segregation that resulted from a combination of private and public racially influenced decisions before and at the time the suits were brought.³⁷⁶ On top of the residential segregation they experienced, these communities also suffered the adversity

³⁶⁸ *Id.*

³⁶⁹ See *supra* note 217 at 600 and 609.

³⁷⁰ *Id.* at 581.

³⁷¹ At the close of the Chicago campaign the lead local organizer who had implored Dr. King to come and offer assistance was distressed by the fact that “there may never be an answer” for the type of discrimination that they faced. *Id.* at 418.

³⁷² See *infra* note 228; Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation, The Civil Rights Project at Harvard University* (2006), http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf.

³⁷³ Kerner Plus 40 Report, <http://www.ifajs.org/events/spring08/Kerner40/Report.pdf> (last visited July 13, 2008).

³⁷⁴ U.S. Census, Racial and Ethnic Residential Segregation in the United States: 1980-2000. August 2002. Available at <http://www.census.gov/prod/2002pubs/censr-3.pdf> (last visited abbreviated month day, year).

³⁷⁵ See 2 ROBERT D. BULLARD ET AL., *RESIDENTIAL APARTHEID: THE AMERICAN LEGACY* (CAAS Publications University of California Lo, 1994) exploring the contemporary dominance of de facto segregation in American residential patterns. Bullard describes and explains the phenomenon that segregates Latinos and hyper-segregates African Americans. See generally ROBERT D. BULLARD ET AL., *HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY* (South End Press 2004) (discussing publicly funded segregation); JOE R. FEAGIN & KARYN D. MCKINNEY, *THE MANY COSTS OF RACISM* (Rowman & Littlefield Publishers, Inc. 2005)

caused by multiple pollution sources near and in their communities.³⁷⁷ In an effort to gain relief, community members turned to the courts in the hopes of gaining the protection of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.³⁷⁸ Time after time and case after case, however, federal courts could find no racial animus or racial opprobrium and therefore no violation of the residents rights by public officials.³⁷⁹ This phenomenon reflects the long term failure of civil rights law to address a historic form of racial discrimination perpetuated through facially neutral policies. From the close of the SCLC's Chicago Campaign to the present, the de facto segregation of American cities remains substantially intact.³⁸⁰ Moreover, contrary to prevailing notions that blacks have moved into the middle class and rendered racial discrimination concerns irrelevant, research indicates the contrary. In education and economic advancement, most black "middle class" children attend racially segregated schools along with low income blacks.³⁸¹ In economic terms, sixty- nine percent (69%) of black children from the middle class fail to exceed their parents' income in contrast with sixty-eight percent of whites (68%) from the middle class who surpass their parents' income.³⁸² These statistics, along with many others, reflect the society's continued failure to respond meaningfully to the discrimination concerns raised by Dr. King before his death and the Kerner Commission in their decisive report.³⁸³ Despite the regular proof of continuing racial discrimination against blacks and other racial minorities in American society, in housing, employment, and other areas race based civil rights law remains at the fringes of political and legal action with the exception of reverse discrimination claims against parties seeking to remedy past discrimination.³⁸⁴ The society and the courts sanction of discrimination couched in facially neutral policies that hide ongoing conscious and unconscious racial biases and prejudices precludes civil rights based attacks on environmental injustices.³⁸⁵

³⁷⁷ CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE LAW, POLICY & REGULATION 334-349 (2002); Peter L. Reiche, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 291-95, 299, 301-02, 305, 311-2 (1992).

³⁷⁸ *Supra* note 231.

³⁷⁹ *Supra* note 231.

³⁸⁰ *See supra* text accompanying notes 205-208. *See also* MARY PATILLO-MCCOY, BLACK PICKET FENCES, (University of Chicago Press 1999) for consideration of the tenuous nature of black "middle class" life in northern cities.

³⁸¹ *See* sources cited *supra* note 380.

³⁸² Kerner Plus 40 Report, <http://www.ifaja.org/events/spring08/Kerner40/Report.pdf> (last visited July 13, 2008).

³⁸³ The Kerner Report was rejected by then President Lyndon B. Johnson.

³⁸⁴ Civil rights enforcement has continually declined over the past decades despite numerous studies showing continued racial discrimination and rather consistent complaint levels. Reverse discrimination claims in contrast have occupied increasing legislative, judicial, and executive attention over the last twenty years. Consider *Grutter v. Bollinger*, 309 F.3d 329 (6th Cir. 2001); *Gratz v. Bollinger*, 188 F.3d 394 (6th Cir. 1999); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, (2007). Also note that Florida, California, Michigan, and Washington have passed ballot initiatives proscribing affirmative action and Arizona, Colorado and Nebraska are poised to vote on this issue in 2008.

³⁸⁵ Consider Carpusor, Adrian G & Loges, William E, "Rental Discrimination and Ethnicity in Names," *Journal of Applied Psychology*, 36, 934-952 (2006), finding that housing owners provided a positive response to inquiries from rental applicants with names identified with African Americans at a 56% rate compared with a 89% rate for names identified with whites. *See also* Marianne

As the survey above indicates, civil rights laws have proven ineffective for communities claiming environmental injustice.³⁸⁶ This ineffectiveness reflects the stagnation of the society's interest in eliminating the type of racism that the Kerner Commission found caused urban riots in the middle to late 1960s.³⁸⁷ However, before abandoning hope altogether, environmental justice claimants may consider the Environmental Justice Act of 2007 currently under consideration in the United States Congress as a backdoor out of the inferno they have faced. Much like Dante's ultimate escape from Hell, environmental justice claimants may find that they have descended so low in their legal journey that the only direction left to go is up.

PART V

UP FROM THE INFERNO: Legislative Light in Dark Places

On February 15, 2007, Congressional representative Hilda Solis from California's 32nd Congressional District introduced H.R. 1103 – Environmental Justice Act of 2007.³⁸⁸ On the same day, United States Senator Richard Durbin introduced S.642 – identical companion legislation in the Senate.³⁸⁹ These bills attempt to enshrine the federal mandate penned by President William Jefferson Clinton in Executive Order 12898 on Environmental Justice into federal law.³⁹⁰ The core component of the Executive Order directs federal agencies to identify and address disproportionately high and adverse environmental or human health effects of its programs, policies, and activities on minority populations and low-income populations.³⁹¹ In addition, the Executive Order directs agencies to develop Environmental Justice strategies that list the “programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised” pursuant to the dictates of the order.³⁹² Further, the Order maintains the following:

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to

Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873>

³⁸⁶ See *supra* Part II.

³⁸⁷ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 609 (Bantam Books 1968) available at <http://www.eisenhowerfoundation.org/docs/Kerner.pdf>; Kerner Plus 40 Report, <http://www.ifajs.org/events/spring08/Kerner40/Report.pdf> (last visited July 13, 2008).

³⁸⁸ Environmental Justice Act of 2007, S. 642, 110th Cong. (2007-2008) (a bill to codify Exec. Order 12,898).

³⁸⁹ *Id.*

³⁹⁰ As officially titled “A bill to codify Exec. Order 12,898, relating to environmental justice, to require the Administrator of the Environmental Protection Agency to fully implement the recommendations of the Inspector General of the Agency and the Comptroller General of the United States, and for other purposes.”

Id.

³⁹¹ Exec. Order No. 12,898, 3 C.F.R. 859 (1994) *reprinted as amended* in 42 U.S.C. § 4321 (2001).

³⁹² *Id.*

discrimination under, such programs, policies, and activities, because of their race, color, or national origin.³⁹³

The preceding three provisions along with the requirement that agencies “collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income” form the bulk of the substantive obligations of the Order.³⁹⁴ As drafted, these four provisions held considerable potential for addressing long and short term concerns of environmental justice claimants and advocates. Independently, each of these provisions could have significantly changed the long or short term experience of environmental injustice faced by minority and low income communities. Together, these provisions should have radically transformed the way that both low income and minority communities understood, related to, and were impacted by local pollutions sources. From EPA’s far-reaching pollution permitting programs to the Department of Transportation’s ubiquitous projects, the primary pollution sources affecting African American and other communities fall under some federal program.³⁹⁵ Accordingly, after fourteen years agencies should be well on their way to the resolution of a great number of environmental injustices.

Sadly, agencies have achieved an uneven record, at best, toward the directives of the Order.³⁹⁶ The agency with the most significant environmental responsibility, EPA, has been sited repeatedly for its failure to follow the directives of the Order.³⁹⁷ Instead of the systematic program analysis approach outlined by the Order, EPA has conducted an inconsistent environmental justice program that readily raised public awareness, participated in crisis management, and improved community relations but failed to systematically implement the directives of the Order.³⁹⁸ While many of these failures reflect the limited support in the Congress and the White House for substantive changes to the agency’s approach to fulfilling its substantive statutory obligations, high level agency management had differing views about the role and standing of the program over the years.³⁹⁹ Some agencies have fared better in implementing the Order, and others have fared worse.⁴⁰⁰ As a general matter, the limited success of some agencies in

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ Steven A. Light, *Is Title VI A Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. JUDGE RACE & L. 1

³⁹⁶ Denis Binder, Colin Crawford, Eileen Gauna, et. al, *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12,898 on Environmental Justice*, 31 ENVTL. L. REP. 1133 (2001). *See also*, Meredith Judge Bowers, *The Executive’s Response to Environmental Injustice: Executive Order 12,898*, 1 ENVTL. LAW 645 (1995).

³⁹⁷ EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE REPORT No. 2004-P-00007, March 1, 2004 AND EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES, July 5, 2005.

³⁹⁸ Denis Binder, Colin Crawford, Eileen Gauna, et. al, *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12,898 on Environmental Justice*, 31 ENVTL. L. REP. 11133 (2001).

³⁹⁹ EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE REPORT No. 2004-P-00007, March 1, 2004 AND EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES, July 5, 2005.

⁴⁰⁰ *Supra* note 252

implementing the Order appears to flow from the relative unimportance that agency executive's assigned Order implementation.⁴⁰¹

The codification of the Order provides an affirmation from Congress that federal agency programs that spawn disproportionately high and adverse human health or environmental effects have a legal obligation to identify and address them.⁴⁰² This codification speaks directly to the past neglect of environmental injustices caused or perpetuated by agency programs by elevating the obligation above "agency management directives" to statutory responsibilities.⁴⁰³ As statutory dictates, the above-stated provisions warrant increased prioritization, funding, and implementation criteria. Rather than a secondary responsibility that regulators jettison or disregard when addressing primary commitments, environmental justice obligations command heightened emphasis and attention under the proposed legislation as legally enforceable responsibilities.⁴⁰⁴ However, the elevated status offered by the Order should be seen as a minimal and moderate step by Congress to address this issue. The proposed legislation introduces no new substantive obligations to federal agencies, instead requiring that agencies give more weight to the obligations contained in the existing Executive Order.⁴⁰⁵ Furthermore, the statute neither redefines nor restructures the requirements of the Order, allowing agencies to strengthen and expand existing programming as necessary to comply with the codified obligations rather than creating a brand new set of commitments.⁴⁰⁶

However, as drafted, the Act retains a significant ambiguity that was present in the Order; in the principle directive that requires agencies to "address" the environmental injustices they "identify" without specifying how they are to do so. Administrative law principles dictate that each of the federal agencies interpret this ambiguity through regulation and rule making.⁴⁰⁷ In light of the fourteen years of previous history with the Order and the limited regulatory action taken by agencies, Congresses' failure to direct more specific action under this provision raises an important question about the level of action necessary to implement the Act. Arguably, the elevation of the former Order's requirements to statutory obligations requires that agencies re-evaluate their performance in light of the legal elevation of the requirements. In conjunction with the Department of Justice, agency General Counsel's should perform an analysis of the legal authorities currently available to implement the Act along with the necessary regulatory changes required to fulfill the new Congressional mandate. The EPA Office of General Counsel orchestrated such an analysis following the issuance of the Executive Order. The analysis detailed agency legal authority to provide a robust implementation of the Order including regulatory and rulemaking changes. However, agency management subsequently decided that the all but complete analysis be scuttled, the process

⁴⁰¹ *Id.*

⁴⁰² Exec. Order No. 12,898, 3 C.F.R. 859 (1994) *reprinted as amended* in 42 U.S.C. § 4321 (2001).

⁴⁰³ *Id.* at §6-609.

⁴⁰⁴ Environmental Justice Act of 2007, S. 642, 110th Cong. (2007-2008) (a bill to codify Exec. Order 12,898).

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ RICHARD JUDGE PIERCE & KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE, Vol. 3 (Wolters Kluwer Law & Business 2002). *See also*, *Chevron USA v. Natural Resources Defense Council*, 467 US 837.

abandoned, and discussions ceased.⁴⁰⁸ The proposed legislation should engender a similar process across the covered agencies that would meaningfully integrate environmental justice into the legal framework of agencies' administrative regimes. Provision 6-608 in conjunction with the language of 1-101 seemingly contemplates no less in stating that agencies shall implement the mandate "to the extent permitted by existing law."⁴⁰⁹ As a minimal and moderate step, however, the Act may leave a vast expanse of claimed environmental injustices untouched unless agencies reinterpret their obligations in light of the heightened legal bona fides of the Order's provisions created by the Act.⁴¹⁰ If agencies move forward with regulatory development of the area, the administrative law process may resolve these issues, however, a business as usual approach will offer communities little hope of meaningful change.⁴¹¹

One critical part of EPA's reevaluation must be to its Title VI program. Because the proposed legislation fails to address the Supreme Court's denial of private rights of action under Title VI, claimants only recourse for redressing disparate racial impacts from federal grant recipient programs rest with EPA's Office of Civil Rights. Due to its small staff and limited budget, the thorough investigation of complaints often precedes at a glacial pace or as in the case of the Genesee Power Station investigation vanishes into thin air.⁴¹² Under the proposed legislation, EPA and other federal agencies will be required for the first time to fulfill their Title VI obligations in light of the agencies' detailed Environmental Justice Strategy and agency wide program evaluation. Rather than a stand alone obligation unrelated to their environmental justice responsibilities, the proposed legislation could prompt agencies to evaluate and consider Title VI as one of the means of implementing the proposed legislation "to the greatest extent practicable and permitted by law."⁴¹³

One glaring limitation of the legislation is its neglect of the judicial rejection of environmentally based discrimination cases. It neither recognizes nor acknowledges the United States Supreme Courts denial of private rights of action under Title VI in

⁴⁰⁸ As a member of an agency wide working group on environmental justice, the author worked along with other lawyers across the agency to ascertain the legal authorities available to implement the Order. The robust analysis identified scores of existing legal authorities and appropriate regulatory actions to implement the Order. The agencies decision to abandon this effort undercut the authority and status of the program despite attestations by EPA management that environmental justice was an agency priority.

⁴⁰⁹ 1-101 states "To the greatest extent practicable and permitted

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

⁴¹⁰ Some persons still debate the existence of environmental injustices as an actual phenomenon. However, their approach to the question suffers from a fundamental flaw. Instead of viewing environmental injustice claims as the discrete experiences of individuals that warrant consideration, they perceive the matter as a phenomenon that only exists if universally experienced by a statistical majority of the nation's minority and low income populations. While this broad based analysis has value and in my view evinces disturbing racial trends, it cannot determine the legitimacy of any single community's claims of environmental injustices. What may not be a pattern in the Midwest can certainly be a recurring phenomenon in the Southeast, and what may not be an ongoing phenomenon in the Northeast certainly can still take place.

⁴¹¹ RICHARD JUDGE PIERCE & KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE*, Vol. 3 (Wolters Kluwer Law & Business 2002).

⁴¹² See Luke W. Cole & Caroline Farrell, *Structural Racism, Pollution and the Need for a New Paradigm*, 20 WASH. U. J.L. & POL'Y 265 (2006).

⁴¹³ Exec. Order No. 12,898, 3 C.F.R. 859 (1994) *reprinted as amended in* 42 U.S.C. § 4321 (2001).

Alexander v. Sandoval; a matter easily resolved through a simple legislative expression of intent to allow private citizens to use the discriminatory effects standard found in agency regulations in their private discrimination suits brought against federal grant recipients.⁴¹⁴ Further, the proposed legislation offers no civil rights protection against racial discrimination in environmental decision making by private or public entities. Unlike the civil rights legislation passed by congress to address the panoply of discrimination issues in the society⁴¹⁵, the Environmental Justice Act of 2007 takes the modest step of codifying the fourteen year old executive order that requires federal agencies to identify and address their role in producing “disproportionately high and adverse” health and environmental effects on “low income” and “minority populations.”⁴¹⁶

CONCLUSION

After going through Hell, environmental justice claimants have little hope of actually ascending to a point of recognition of their injuries and relief through the use of civil rights tools represented by the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.⁴¹⁷ However, even Dante found a narrow exit at the base of the Inferno that lead the poet and his guide to the base of Mount Purgatory the next step in the traveler’ journey toward the mount of joy.⁴¹⁸ Environmental justice claimants may likewise find some glimpses of hope in the proposed Environmental Justice Act of 2008. Unlike the Courts’ current construction of relevant civil rights laws that only “purposeful” discrimination warrants judicial recognition and redress, the proposed legislation acknowledges the inadequacy of conducting federal programs in a way that adversely affects minority communities at disproportionately high levels.⁴¹⁹ If passed this legislation may provide those willing to continue the narrow and arduous path through the painful purgatory of agency interpretation and implementation a daunting but conceivable path upward.

To ensure that the concerns of communities overburdened by pollution receive attention, however, the congress needs to act more intently. As a first step, Title VI should be amended to allow citizen’s filing suit to use the disparate impact standard found in EPA’s administrative regulations. In so doing, congress will allow citizens to serve the important role of aiding EPA in both monitoring and maintaining compliance

⁴¹⁴ This standard, used regularly by many federal circuits, would allow private citizens to bring discrimination claims under Title VI against state agencies that receive federal funds and have methods of administering their environmental programs that have the effect of discriminating based on race. 40 CFR 7.35(b).

⁴¹⁵ Past civil rights legislation has proscribed race and sex discrimination in public accommodations, employment, housing, and the use of federal funds.

⁴¹⁶ *Supra* note 413 at §1-101.

⁴¹⁷ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

⁴¹⁸ DANTE ALIGHIERI, *INFERNO: THE DIVINE COMEDY* 232 (Bantam Classics ed., Tandem Library 1999) (1314).

⁴¹⁹ *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Washington v. Davis*, 423 U.S. 820 (1975); 348 F. Supp. 15 (D.C. Cir. 1972).

with the established agency regulations. Further legislative action is also required to set health based limits on the level of pollution discharged in residential communities. Because current EPA policies examine pollution permit requests on a discrete basis, multiple pollution sources can and do overwhelm some residential neighborhoods irrespective of the cumulative risk that may exist. Thoughtful congressional action will be required to protect communities irrespective of race from the potential health threats that can be created by this practice. Otherwise, communities will do well to resist the temptation to challenge environmental decisions on civil rights grounds without overwhelming evidence of racial animus or a keen interest in joining other communities in an exit less inferno.