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# Adding Insult to Injury: Regulatory and Litigant Slight to Environmental Injustice

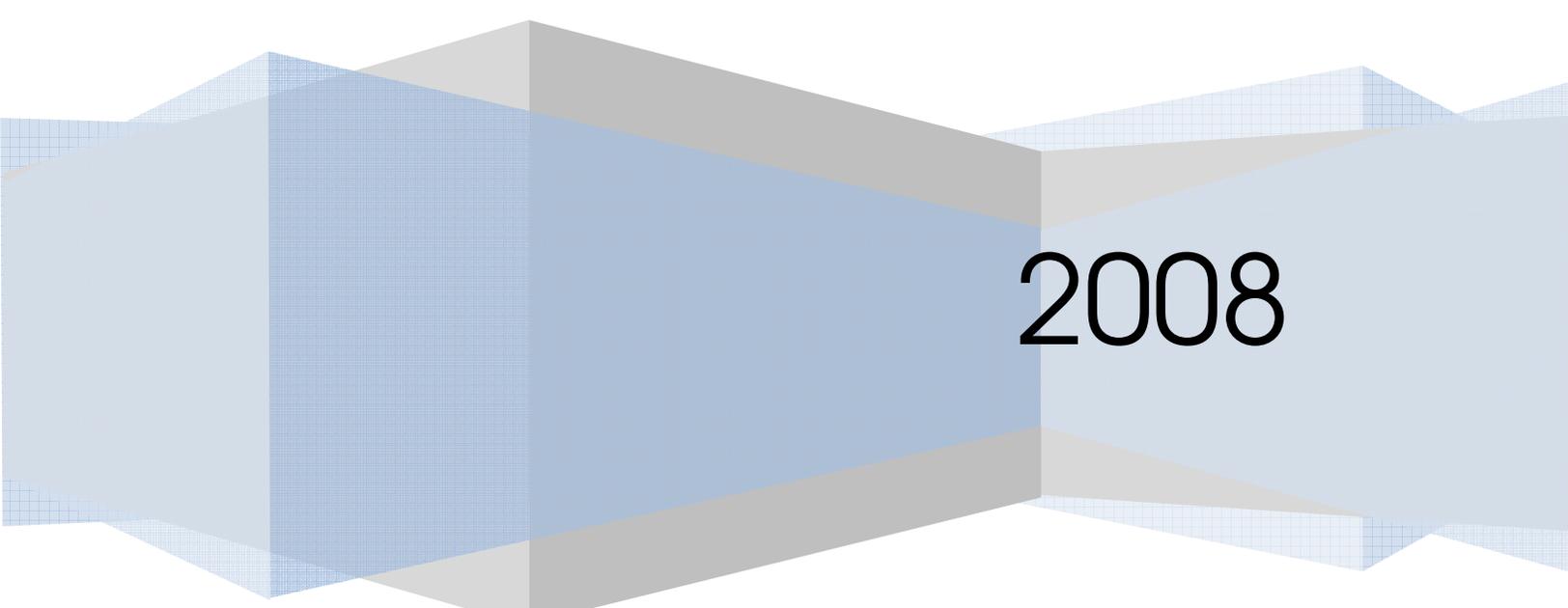
Claudia Wald, *University of Florida*

University of Florida

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Claudia Wald



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Claudia Wald  
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### Abstract

Likewise, cases asserting a community's environmental rights cannot succeed in conjunction with the system of environmental regulation... Likewise, the system of environmental regulation in place is both overly broad and underinclusive- thereby not amenable to a rights-based justification of environmental protection which indigent and people of color communities are raising... Likewise... many plaintiffs turned to Title VI of the Civil Rights Act of 1964 to pursue their claims in light of the difficulties of litigating under the Equal Protection Doctrine.... Likewise, the recent *Sandoval* decision ruled that no private cause of action existed under Title VI of the Civil Rights Act of 1964, eliminating just about all venues to enforce a private right of action by constitutional provisions...

### Introduction

The wealth of scholarly and community engagement in the area of environmental justice has produced a great degree of attention, reaction, and criticism. A diversity of opinions on whether and how environmental justice holds scientific validity,<sup>1</sup> legal standing and political power have emerged.<sup>2</sup> A relative consensus has also emerged that cases asserting a community's environmental rights cannot succeed in conjunction with the system of environmental regulation.<sup>3</sup> The environmental justice movement's ability to penetrate the mainstream has been a notable achievement. In general, the goal of environmental justice is to ensure that people of color and low income communities are not disproportionately burdened by environmental hazards solely because it is more politically convenient

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<sup>1</sup> This article analyses how scientific validity is integrated into regulation and procedure. However, the issue of scientific validity of environmental health disputes relating to equitable and unbiased environmental land uses is beyond the scope of this article.

<sup>2</sup> See, eg., Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 *Denv. U.L. Rev.* 1, 1-5 (1998) [hereinafter *Planning Milagros*].

<sup>3</sup> See, eg., Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 *Environmental Affairs* 143 (2002) [hereinafter *Form and Substance*].

and cheaper to locate polluting facilities in their neighborhoods.<sup>4</sup> Though the movement has predominantly focused on equity in siting decisions, there have been changes within the movement on a strategic level from an opposition model to proactive development and participation in policymaking in what has been termed a “land use planning model.”<sup>5</sup> Numerous shortfalls of the movement have been detrimental to its ability to garner wider attention than it already has since its inception. In exploring the saliency of environmental justice for the regulatory system and in the courtroom, this article studies citizen suits and the potential for and barriers to the effective adjudication of such cases. By attempting to combine civil rights and environmental regulatory approaches in a general fashion, considerable tensions arise between these areas of law.<sup>6</sup> In examining the failures and successes of environmental justice cases as a facet of the civil rights movement, significant questions may be presented regarding the state of race relations at present, and the persistence of inequality as a wider social schema.<sup>7</sup> Significantly, the inability of the regulatory system to integrate the principles of environmental justice into its working system can be attributed to the vastly different regulatory paradigms that regulators and activists bring to the understanding of the role of government intervention in solving environmental

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<sup>4</sup> See, Jacalyn R. Fleming, *Justifying the Incorporation of Environmental Justice into the SEQRA and Environmental Permitting Processes*, 6 Alb. L. Env't'l. Outlook 55 (2002) [hereinafter *Justifying Incorporation*]; Ora Fred Harris, Jr., *Environmental Justice: The Path to Remedy That Hits the Mark*, 21 U. Ark. Little Rock L. Rev. 799-803 (1999) (presenting a plausible approach to environmental justice concerns based on the distributional unfairness in siting decisions).

<sup>5</sup> *Planning Milagros*, *supra*, note 1 at 3.

<sup>6</sup> See, *Form and Substance*, *supra*, at 143; See generally, Veronica Eady, *Symposium Issue: 1982 Warren County Protests: Environmental Justice Twenty-Five Years Later: Outside Article: Warren County and the Birth of a Movement: The Troubled Marriage Between Environmentalism and Civil Rights*, 1 Golden Gate U. Env't'l. L.J. 41 (2007) (suggesting that, despite increases in hiring of people of color and women in the area of environmental justice, considerable challenges remain in addressing the privileged culture of environmental organizations) [hereinafter *Warren County*].

<sup>7</sup> See, Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 Ariz. L. Rev. 1219, 1261-1277 (1998) (supporting that African Americans continue to hold a subordinate position to the present day, such that the manifestation of racism has morphed from a dominant and overtly oppressive form to an underlying belief in white supremacy. As minorities continue to bear discrimination in essentially all social and economic political processes, it is no surprise that racism should carry over to the environmental realm. The inequities in siting of environmental hazards are reflective of the long-standing mode of discrimination towards people of color).

justice problems.<sup>8</sup> In the same vein, the problems that plaintiffs face in environmental justice battles only support the argument for the racial inequity in judicial practice.<sup>9</sup>

Since the 1980s, communities have worked at establishing credibility as movement actors, formulating an argument that disparate impacts have resulted from discriminatory environmental management techniques. Polluters taking the “path of least resistance” are able to locate unjust environmental hazards in low income and people of color communities, resulting in decreased health, shorter life span, diminished personal finances and increased mortality.<sup>10</sup>

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<sup>8</sup> *Form and Substance, supra*, at 147.

<sup>9</sup> Granted the issues in American jurisprudence on handling the nuances of race as a matter of law and society, some wonder if the erasure of race is truly achievable. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279 (1987) (regarding the inequity of death penalty sentence in black and white defendants); Batson v. Kentucky, 476 U.S. 79 (1986) (where the use of peremptory challenges had the effect of excluding blacks from the jury); Ronald J. Ostrow, Crack Sentencing Disparity Reduction Gains Ground, L.A. Times, July 22, 1997, at A12 (regarding racial disparities in the sentencing process). In seeking to reconcile societal norms with adjudicative procedure, the court system has applied principles such as neutrality, color blind, community standard, as well as natural law and constitutionally balanced to implement a manner by which the racial discourse may be conducted as well as muted. The disparate impact which communities of color face in environmental law and management support W.E.B. DuBois’ assertion that race remains a dominant theme in American society. *See, W.E.B. Du Bois, The Souls of Black Folk* 13 (Donald B. Gibson ed., 1989). This article explores the substantive and procedural issues which, in many ways, serve to bar access to the courts for indigent and communities of color in environmental dealings. *See, generally Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 Ariz. L. Rev. 1219 (1998).

<sup>10</sup> *See, David Milton Whalin, Expanding Polluter Rights While Limiting Pollutee Rights*. 12 Fordham Env’tl. Law J. 329 (2001) [hereinafter *Polluter Rights*]; *See, e.g.,* Kelley J. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 Env’tl. Hlth. Persp. 317 (2007). [hereinafter *Community Health*]; *See, e.g.,* David B. Resnik & Gerard Roman, *Health, Justice and the Environment*, 21 Bioethics 230, 231 (2007) (pointing to the difference between inequality and inequity, highlight the limits of constitutional protection to only race or ethnicity with strict scrutiny of the courts. Thus, ‘inequality’ is an explanatory word regarding the differences between people or assemblages of people. ‘Inequity’ is a word which addresses the differences between people which are undeserved or unjust. It is relevant to differentiate between ‘health inequality’ and ‘health inequity’ as not every inequality may be deemed unjust or unwarranted. *See, infra*, Part VIII. Thus, health inequities for people of color have been well documented, where “African Americans in the US have a higher incidence of cancer than whites, Asians, Latinos, and Native Americans. African Americans also have a higher cancer mortality rate than all other racial or ethnic groups.” *See, National Cancer Center. Cancer health disparities fact sheet. Available at: <http://www.nci.nih.gov/cancertopics/types/disparities> [Accessed 28 November 2008]. *See, e.g.,* Kaiser Permanente Institute for Health Policy. Issue Brief: Racial and Ethnic Health Disparities. Available at: [http://www.kpihp.org/publications/docs/disparities\\_highlights.pdf](http://www.kpihp.org/publications/docs/disparities_highlights.pdf) [Accessed 28 November 2008].*

The 2006-2011 National Institute of Environmental Health Sciences (NIEHS) has presented a strategic plan which aims to “challeng[e] and energiz[e] the scientific community to use environmental health sciences to understand the causes of disease and to improve human health” supporting that “mounting evidence [exists] that environmental factors contribute substantially to most diseases of major public health significance.”<sup>11</sup> The NIEHS portal contains significant data on potential contamination sources, including the Toxic Release Inventory (“TRI”) facilities, various types of industrial and agricultural facilities, wastewater treatment plants, among others; disaster damage; demographic information by census tracts and block groups; base map layers and Imagery layers.<sup>12</sup> Further, the World Health Organization (WHO), recently estimated that over 25% of the burden of human illness worldwide can be attributed to modifiable environmental conditions.<sup>13</sup> In response, both litigant and administrative remedies have been instituted by the federal government to hear claims of environmental injustice.<sup>14</sup>

## I. Legal Strategies and Approaches

### A. Historical Context

The Equal Protection Clause provides the constitutional basis for the environmental justice and all other areas where government discrimination may be contested.<sup>15</sup> The Supreme Court instituted a number of elemental principles establishing equal protection. The action must

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<sup>11</sup> NIEHS. 2006–2011 Strategic Plan: New Frontiers in Environmental Sciences and Human Health. Research Triangle Park, NC: National Institute of Environmental Health Sciences. Available: <http://www.niehs.nih.gov/about/od/strategicplan/docs/strategic-plan06.pdf> [accessed 28 November 2008]. See, Keith Pezzoli, et al., *The NIEHS Environmental Health Sciences Data Resource Portal: Placing Advanced Technologies in Service to Vulnerable Communities*, 115 *Env'tl Hlth Persp.*, 564 (2007).

<sup>12</sup> See, Keith Pezzoli, et al., *supra*, at 564, 567.

<sup>13</sup> H. Frumkin, L. Frank, & R. Jackson. *Urban Sprawl and Public Health: Designing, Planning, and Building for Healthy Communities*. (2004). Washington, DC; See, Rajiv Bhatia & Aaron Wernham, *Integrating Human Health into Environmental Impact Assessment: An Unrealized Opportunity for Environmental Health and Justice*, 116 *Env'tl Hlth Persp.*, 991 (2008).

<sup>14</sup> See, e.g., Michael Fisher, *Environmental Racism Claims Brought under Title VI of the Civil Rights Act*, 25 *Env'tl. L.* 285, 312-13 (1995); [hereinafter *Racism Claims*]; Kristi M. Smith. *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought under EPA Administered Statutes 1995-2000*, 29 *Colum. J. Env'tl. L.* 359, 359-61 (2004) [hereinafter *Environmental Enforcement*].

<sup>15</sup> U.S. Const., amend. XIV, § 1.

foremost be a government action to constitute denial of equal protection.<sup>16</sup> This includes actions which were initiated by a private action but furthered by state law, including the court enforcement of a private racially discriminatory agreement.<sup>17</sup> Only unjustifiable discrimination is prohibited by the Equal Protection Clause; this means that one must provide evidence that others in comparable circumstances were treated in a different way.<sup>18</sup> Discrimination based on race was recognized as early as 1879 to violate the equal protection measures, where *Strauder v. West Virginia*<sup>19</sup> reversed the decision to bar African Americans from jury duty.<sup>20</sup> Soon afterward, the Court recognized the validity of the separate but equal doctrine<sup>21</sup> which the dissent of Justice Harlan supported the purpose of the Separate but Equal Doctrine was to prohibit people of color in a manner which “interferes with the personal freedom of citizens.” He further observed that “[o]ur Constitution is color-blind.” However, it was not until the 1954 *Brown v. Board of Education*<sup>22</sup> decision that the court ruled separate and equal to be inherently unequal. Laws which express overt discrimination against racial minorities are unlikely to resurface. However, in the environmental land use arena, laws which are facially neutral but are claimed to be unequally applied hold saliency for this article.

It often results that ostentatious proclamations by politicians yield limited substantive change, but may serve as means to garner wider attention to emerging phenomena. President John F. Kennedy once stated that “Simple justice requires that public funds, to which all

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<sup>16</sup> Philip Weinberg, *Equal Protection*, in *The Law of Environmental Justice, Theories and Procedures to Address Disproportionate Risks*, 3-20 (Michael B. Gerrard, Ed., 1999).

<sup>17</sup> *Id.* at 3. Private discrimination in itself does not constitute a denial of equal protection unless it is in some capacity required or supported by state law.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Strauder v. State of West Virginia*, 100 U.S. 303 (1879).

<sup>20</sup> Philip Weinberg, *supra*, at 4.

<sup>21</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>22</sup> *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.* 347 U.S. 483 (1954).

taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.”

<sup>23</sup> President Clinton executed Executive Order 12,898 mandating all federal agencies to make “achieving environmental justice as part of its mission by identifying... disproportionately high human or environmental effects” <sup>24</sup> notable in principle, though completely unenforceable. Disparagement for the order and its performance has been notable. <sup>25</sup> At the onset of the (Superfund) program, there certainly was myopic consideration of the issue of noxious waste. Criticism was prevalent, affirming that the cleanups were too sluggish, in too few numbers, and tying up a great amount of funding. <sup>26</sup> In failing to effectively tackle the possible risks of hazardous waste sites and failing to prioritize the remediation of sites due to the extent of hazard presented, the program can further be disparaged. <sup>27</sup> For the first decade which the Superfund program was in effect, 1,400 prospective Superfund sites were revealed which qualified for listing. However, only 25 of such sites were deleted. <sup>28</sup> How the Superfund program has conformed with the executive order has been brought to attention, with the US GAO stating that the

EPA is essentially relying on state and local governments to deal with the environmental justice concerns...even though the executive order does not apply to state or local

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<sup>23</sup> Message to Congress, H.R. Doc. No. 124, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 1534. President Kennedy's message promoted environmental justice long before it became popular.

<sup>24</sup> *See*, Exec. Ord. No. 12,898, 59 Fed.Red. 5929 (1994).

<sup>25</sup> *See*, U.S. Government Accountability Office 2005 (the U. S. Government Accounting Office adopted the name the U.S. Government Accountability Office in July 2005); U.S. Office of the Inspector General (U.S. OIG) 2004] (questioning the extent to which the executive order has been characterized and implemented at the federal level. *See*, Sandra George O’Neil, *Superfund: Evaluating the Impact of Executive Order 12,898*, 115 Environmental Health Perspectives 1087, 1088 (2007).

<sup>26</sup> *See*, Sandra George O’Neil, *Superfund: Evaluating the Impact of Executive Order 12,898*, 115 Environmental Health Perspectives 1087, 1088 (2007).

<sup>27</sup> *See Id*; Environmental Law Institute, *Protecting Public Health at Superfund Sites: Can Institutional Controls Meet the Challenge?* (1999) Washington DC.

<sup>28</sup> Sandra George O’Neil, *Environmental Justice in the Superfund Cleanup Process* [PhD Dissertation]. Chestnut Hill, MA:Boston College (2005); *See*, Sandra George O’Neil, *Superfund: Evaluating the Impact of Executive Order 12,898*, 115 Environmental Health Perspectives 1087, 1088 (2007).

governments, and, absent specific state or local law, they have no obligation to consider environmental justice. . . .<sup>29</sup>

However ineffective, President Clinton’s Executive Order and accompanying Memorandum on environmental equity was a contributor to the increasing attention by the EPA to Title VI as a conduit for environmental justice litigation.<sup>30</sup> The United States Environmental Protection Agency (“EPA”) also instituted the Office of Civil Rights<sup>31</sup> (“OCR”) where citizens can file claims of discrimination. A Federal advisory committee and internal office was also created by the EPA with no authoritative power though responsible for “coordinating the integration of environmental justice into agency policies and procedures.”<sup>32</sup> The 2001 revision of the Executive Order 12,898 by EPA administrator Christine Todd Whitman added further insult to injury. In removing considerations for the most impacted groups, she rephrases environmental justice in terms of “blind” justice, calling for the “fair treatment of people of all races, cultures, and incomes with respect to the development, implementation and enforcement of environmental laws and policies”<sup>33</sup> removing the consideration for low income and communities of color which have been historically discriminated against, and marginalized in the political process.

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<sup>29</sup> U.S. GAO, *Environmental Justice and Clean Air Rules*. GAO- 05-289. Washington, DC: U.S. Government Accountability Office (2005); *See*, O’Neil, *supra* (2007) at 1088.

<sup>30</sup> *I See*, Exec. Ord. No. 12,898, 59 Fed.Red. 5929 (1994); Memorandum on Environmental Justice, 1 Pub. Papers 241 (Feb. 11, 1994) (detailing the form and function of the Executive Order).

*See*, Sandra George O’Neil, *Superfund: Evaluating the Impact of Executive Order 12,898*, 115 *Environmental Health Perspectives* 1087, 1089 (2007).

<sup>31</sup> *Racism Claims, supra*, at 314 (holding that for the majority of time in which the OCR has existed under the EPA, it has primarily processed complaints of employment discrimination which originate within the agency. The OCR was staffed with the equivalent of four full time officers as recently as 1993).

<sup>32</sup> *See, eg.*, United States Environmental Protection Agency, Notice of Establishment of the National Environmental Justice Advisory Council and Request for Suggestions of Candidates for Membership. 58 Fed Reg. 59,723, 59,723-801 (Nov 10, 1993).

<sup>33</sup> US Office of Inspector General, *See* O’Neil, *supra*, (2007) at 1088.

## B. Title VI and environmental discrimination

EPA's Title VI of the Civil Rights Act of 1964 is another apparent venue for environmental justice claimants as it prohibits discrimination for all recipients of federal funding.

<sup>34</sup> Significantly, the EPA has proclaimed Title VI to be applicable to all EPA funded state agencies, even those programs which do not directly receive federal funds. <sup>35</sup> However, adjudication of cases of environmental discrimination has confronted considerable challenges. <sup>36</sup> This article reviews the substantive and procedural issues of environmental justice adjudication in the interest of bringing to light the incongruence between environmental regulation and civil-rights based litigant approaches, as well as presenting the opportunities available to those seeking remedy, particularly under Title VI of the Civil Rights Act of 1964. Characterized by many as embodying a new civil rights movement, environmental justice adjudication resembles other civil rights efforts in significant ways. However, the incommensurable differences between the two movements present interesting legal questions about the current system and its pro-business orientation where pollutees must guard themselves from the “depredations of the polluters” in what has been termed a “legal subversion.” <sup>37</sup> A review of environmental citizen suits also serves as a useful touching point for other movement actors seeking to effect real change and why significant gaps in the protections of citizen rights persist.

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<sup>34</sup> Justifying Incorporation, *supra*, at 145.

<sup>35</sup> *See*, 42 U.S.C. § 2000-42(1)(A), (3)(B).

<sup>36</sup> *See*, e.g., Racism Claims, *supra*.

<sup>37</sup> *See*, Polluter Rights, *supra*, at 331. Indeed, a pro-business orientation combined with inefficient and scantily supported environmental justice programs under the EPA have contributed to the limited effectiveness of environmental cleanup protocols. As the Superfund federal funding has become depleted (the fund officially reached a balance of zero at the end of 2003). Some funds have been allocated by cost recovery lawsuits brought against responsible parties. Other funding for Superfund projects via congressional allocation. Total Superfund program spending has lingered between \$1.41 billion in 1995 to \$1.24 billion in fiscal year 2004 U.S. GAO. 2004. Superfund Program Breakdown of Appropriations Data. GAO-04-787R. Washington, DC:U.S. Government Accounting Office. *See*, e.g., Sandra George O'Neil, *Superfund: Evaluating the Impact of Executive Order 12,898*, 115 Environmental Health Perspectives 1087, 1088 (2007).

### C. Theory and Practice of Environmental Justice

According to the United States Environmental Protection Agency (“EPA”) environmental justice (“EJ”) is defined as

The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.<sup>38</sup>

Environmental justice has therefore come forth as a broad response to environmental injustices ranging from the: (1) enhanced enforcement of environmental regulations in minority and low-income communities; (2) recognizing where disparate impacts already exist; (3) improved efforts at brownfield remediation, along with equitable cleanup standards that are as rigorous as standards used in other locales; and (4) inner city revitalization.<sup>39</sup>

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<sup>38</sup> See, U.S. Env’tl. Protection Agency, *Environmental Justice* <<http://www.epa.gov/compliance/environmentaljustice/index.html> > (last updated August 15, 2008; accessed September 1, 2008); Over time, advocates have adopted the term “environmental justice” and “environmental equity” almost interchangeably, leaving “environmental racism” behind in describing figures revealing environmental inequities. As these terms have different theoretical underpinnings and objectives, it is important to draw attention to the mode by which language reflects a wider understanding of race, equity and distribution. The fundamental basis of environmental equity is that even distribution of environmental hazards based on fairness in environmental decision making would yield a proportionate allocation for all parties. Environmental justice extends this precept, as it has come to reflect a complete intolerance to environmental hazard production of all forms by the curtailing of waste generation. Scholars and activists have been hesitant to draw a definitive consensus definition; there is a general agreement that environmental justice includes both environmental racism and environmental equity. There are many suggestions for why environmental justice has had prevalence over environmental racism. As blatant racism is more difficult to stomach as an immoral and intolerable attitude, companies and agencies are prone to a political nightmare due to discriminatory practices. People likely are no longer comfortable with environmental “racism.” Another element contributing to the dismantling of environmental racism is the proclamation of advocates of social equity that all of society should share the burden of environmental hazards regardless of their socio-economic status. In doing so, this assertion embodies a larger sentiment of equity from the environmental racism movement. Critics of the movement as a whole often point to the market forces argumentation that “white flight,” minority move-in, and one’s status on the socioeconomic ladder accounted for the evident disparities. These arguments necessarily ignore the historical oppression of people of color manifested by demographics and socio-economic status in education, employment, and housing, among other realms. Evans, *supra*, at 1269.

<sup>39</sup> See, *Justifying Incorporation, supra*.

Citizens have advanced the need for the government to pay mind to these diverse issues in stating that citizens possess certain environmental rights not the least of which is the right to a sound and healthy environment.<sup>40</sup> Distributional concerns are a critical element of environmental justice claimants as they question the disproportionate risks to which minority and low income communities face.<sup>41</sup> Many studies, including the groundbreaking General Accounting Office (“GAO”) report of 1983 investigated trends in the siting of hazardous waste facilities and the racial composition of host communities.<sup>42</sup> The GAO study revealed that three of the four off-site hazardous waste facilities in EPA Region IV were located in primarily African American communities though they only comprised twenty percent of the region’s population.<sup>43</sup> The United Church of Christ (“UCC”) implemented study of 1987 found race to be the overriding factor over socio-economic status in environmental decision making.<sup>44</sup> The study further attested that the proportion of minority residents in neighborhoods containing at least one hazardous waste facility was twice the proportion of minority residents without such facilities. The UCC study further reported that areas with two or more hazardous waste sites, or one of the five largest landfills in the country, the proportion of minorities was three times greater than the areas without waste facilities. A study by the National Law Journal looking at 1177 Superfund sites found that the penalties for sites having the greatest white populations were approximately 500% higher than areas with the greatest minority populations.<sup>45</sup>

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<sup>40</sup>See, Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 Duke Env’tl. L. & Pol’y F. 185, 185-86 (2003) [hereinafter *Federal Intervention*].

<sup>41</sup> *Id.* at 186.

<sup>42</sup> See, *Form and Substance*, *supra*, at 150.

<sup>43</sup> *Id.*; see also Gregory H. Meyers, *Developing a Cohesive Front against Environmental “Injustice,”* 8 U. Balt. J. Env’tl. L. 27-32 (2000) (discussing how communities can best protect themselves from environmental hazards by grassroots organizing, recognizing the financial and political hurdles to presenting claims of disproportionate impact).

<sup>44</sup> Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States* (1987).

<sup>45</sup> *Form and Substance*, *supra*, at 150. The 1992 National Law Journal study also revealed that polluted sites in minority communities took 20% longer than those in white communities to be placed on the EPA National Priorities

Though these studies demonstrate clear trends of disparate impact of pollution,<sup>46</sup> there is no agency, institution, or standard by which one can conclude how much pollution is too much.<sup>47</sup> Thus, even if it is likely that people of color and indigent communities have a cause of action for the disproportionate burden of pollution, the regulatory system does not lend itself to such cases.<sup>48</sup> By this note, the system of environmental regulation in place is both overly broad and underinclusive- thereby not amenable to a rights-based justification of environmental protection which indigent and people of color communities are raising. The environmental regulatory climate is overly broad as federal regulations apply even in instances when the total level of pollution does not constitute a violation of an individual's environmental rights.<sup>49</sup> As the regulatory system does not guarantee any minimum levels of environmental quality, it is simultaneously underinclusive of the environmental rights of citizens.<sup>50</sup> Environmental regulations navigate through individual toxicants, industries, and statutes rather than directly addressing the cumulative environmental threats a community may be in opposing.<sup>51</sup> This mode of environmental regulation thus cannot prevent inordinately high levels of pollution, particularly when they may be attributed to varying statutes, industries, and mediums. That environmental

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List. The remediation of the site also took 42% longer in minority communities than in white communities. Penalties against polluters were also 54% lower than penalties in white communities. *See*, R. Gregory Roberts, Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement, 48 Am U.L. Rev. 229, 251-53.

<sup>46</sup> Environmental health risks have been raised- pointing to the contamination of scarcely available potable water sources; landfill leachate and contamination from air pollutants have also been brought to the forefront in recent decades as major contributors of pollution. *See*, Agency for Toxic Substances and Disease Registry, Landfill Gas Primer: An Overview for Environmental Health Professionals. (2001). Atlanta: GA: Agency for Toxic Substances and Disease Registry. Available: <http://www.atsdr.cdc.gov/hac/landfill/html/intro.html> accessed 28 November 2008. *See*, Jennifer M. Norton, et al., *Race, Wealth, and Solid Waste Facilities in North Carolina*, 115 *Env't'l Hlth Persp.* 1344 (2007).

<sup>47</sup> *See, Federal Intervention, supra*, at 186.

<sup>48</sup> *Id.* at 188.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

justice claims rarely work is a common view of legal scholars;<sup>52</sup> nevertheless other scholars engage in efforts to advance the legal principles of environmental justice by suggesting novel court and legislative strategies<sup>53</sup> leaving one to conjecture that despite the present state of affairs one day the regulatory system may pay mind to the needs of its citizenry.<sup>54</sup>

Some have argued that the rigorous requirements for proving intent that civil rights laws, and the Equal Protection Doctrine in particular, require, have proven to be insurmountable for those seeking remedy for environmental injustice.<sup>55</sup> Title VI of the Civil Rights Act of 1964<sup>56</sup> is of particular concern in this article as it seeks to bridge civil rights doctrine and environmental regulatory controls. Title VI prohibits racial discrimination in federal programs by all recipients of Federal EPA funding.<sup>57</sup> The limits of regulatory protection, incommensurable values, and issues of minority protection under the Title VI Guidance present considerable challenges for

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<sup>52</sup> See, David Monsma, *Equal Rights, Governance and the Environment: Integrating Environmental Justice Principles into Corporate Responsibility*, 33 *Ecology L.Q.* 443, 443-45 (2006) [hereinafter *Corporate Responsibility*]; See generally, Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism has to Teach Environmentalists Today*, 31 *Env't'l. L.* 229-33 (2001) [hereinafter *Historical Juxtaposition*]; *Polluters Court*, *supra*, at 329.

<sup>53</sup> See, e.g., *Justifying Incorporation*, *supra*, at 1109.

<sup>54</sup> As an alternative to the present mode of environmental regulation, the European system functions in significantly divergent ways. In order to supersede the American system, an alternative would have to guarantee citizens' environmental rights at the minimum, to the same level as the status quo; they must also be adapted to the particular mission of protecting citizens' environmental rights. The European Community holds a strong hold on protecting the rights of citizens to a healthy environment as their principle of proportionality in environmental protection calls for a "measure [to] be reasonable and suitable, the least restrictive possible, and not disproportionate or excessive." This is implemented through the imposition of flexible, cost-effective direct regulation of the cumulative levels of environmental risk to which citizens and communities can be exposed. *Federal Intervention*, *supra*, at 189.

<sup>55</sup> See, e.g., *Guardians Ass'n v. Civil Serv. Comm.*, 463 U.S. 582 (1983) (holding that the reward of Title VII relief could not be sustained because proof of discriminatory intent was required); See, e.g., Kenneth Owens, *Environmental Justice Enforcement Requires Reassessment under the Equal Protection Clause*, Title VI of the Civil Rights Act, and Environmental Statutes 30 *Golden Gate U.L. Rev.* 379 (2000) (holding that, despite the fact that the court had not as of yet struck down on the private right of action for Title VI, § 602, administrative complaints have been unsuccessful, and that a showing of prima facie discrimination would require supplementation evidence based on the current standard for statistical support asserting a disparate impact); See, e.g., Valerie P. Mahoney, *Environmental Justice: From Partial Victories to Complete Solutions* 21 *Cardozo L. Rev.* 361, 382-91, 404-07 (1999), (asserting the importance of Title VII cases for environmental justice based on its analogy to Title VI, and that grassroots organizations continue to face significant hurdles for fighting environmental injustice) [hereinafter *Partial Victories*].

<sup>56</sup> See, Pub. L. 88-352, § 601, 78 Stat. 241, 252 (1964) (codified at 42 U.S.C. § 2000d (1994)).

<sup>57</sup> See, *Planning Milagros*, *supra*, at 47.

environmental citizen suits, and thus posits the question of whether it is time to change the approaches of environmental legislation to better recognize the needs of diverse communities.<sup>58</sup>

## II. History of Environmental Justice

### A. Love Canal, Mismanagement, and Sausages

In the 1970s, people likely did not recognize that the prominence of civil rights approaches would translate into a powerful environmental rights movement. The confluence of these two movements may be attributed to (mis)fortune which low income and communities of color have faced in the form of heavy handed mismanagement. It is undeniable that disasters breed environmental law. The origins of various federal statutes can be readily traced to specific ecological catastrophes. It would be unwarranted to isolate a single incident and label it the sole basis of a law, though it may safely be asserted that the current gambit of legislation would not include the Air Pollution Control Act had it not been for Donora, Los Angeles' poisonous smog, or the Oil Pollution Act of 1990 without the Exxon Valdez calamity.<sup>59</sup> We can thank Otto von Bismarck for the observation that the two worst things to watch being made are law and sausages.<sup>60</sup> Members of our administration can be thanked for passing a number of measures to control, prevent, and plan and dispose of environmental hazards. These actors can also be recognized for habitually falling short of directly addressing the problems which the victims of the disasters face which inspired the legislative effort in the first place.<sup>61</sup>

The year 2008 marks the thirty year anniversary of the Love Canal disaster. Noted as the “neighborhood that epitomized environmental horror,” Love Canal resonated with terror in as toxic ooze made its way through basements, schools; burning children and pets, where hundreds

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<sup>58</sup> See, *Form and Substance*, *supra* at 143.

<sup>59</sup> Michael Allan Wolf, *Environmental Law Slogans for the New Millennium*, 35 U. Rich. L. Rev. 91, 99 (2001).

<sup>60</sup> See, *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984).

<sup>61</sup> See, Wolf, *supra* note 40.

of working class families were evacuated, and Love Canal became the first polluted site to be put on the Superfund list.<sup>62</sup> The community of Love Canal successfully relocated 900 blue-collar families away from the toxic waste and brought the country's attention to the meager standard of care which we apply to our hazardous waste management. In fighting the multi-billion-dollar company Occidental Petroleum, the citizens of Love Canal marked the dawn of a new movement.<sup>63</sup> Lois Gibbs, the organizer of the grassroots effort, was then a housewife concerned with her daughter attending a school built atop a 20,000 ton toxic waste dump in Niagara Falls, New York. To her, Love Canal was the movement which marked nationwide concerns about environmentally linked health problems as well as "the right of corporations to increase their profits through calculated decisions to sacrifice innocent families."<sup>64</sup>

Indeed, both the government and private interests have a disreputable standing in the Love Canal disaster. Over twenty years passed from New York's state of emergency announcement at the Love Canal hazardous waste site in August of 1978, and the last meeting of the Love Canal Revitalization Agency in December of 1999.<sup>65</sup> Litigation with the adverse parties also amounted to two decades.<sup>66</sup> The needs of the Love Canal community organized by Lois Gibbs and others who were affected by the toxic substances were readily put aside by federal legislators and administrators at the sunrise of the Reagan administration.<sup>67</sup>

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<sup>62</sup> See, Anthony Depalma & David Staba, *Love Canal Declared Clean, Ending Toxic Horror*. New York Times, <<http://query.nytimes.com/gst/fullpage.html?res=9E05E1DF1231F93BA25750C0A9629C8B63&scp=1&sq=love%20canal&st=cse>> (last updated March 18, 2004; accessed September 10, 2008).

<sup>63</sup> Lois Gibbs, *Social Policy and Social Movements: Citizen Activism for Environmental Health: The Growth of a Powerful New Grassroots Health Movement*. 584 *Annals* 97, 98 (2002).

<sup>64</sup> *Id.*

<sup>65</sup> See, Wolf, *supra* note 40 at 99. The Love Canal Revitalization Agency was mandated by state legislature with restoring safe housing to the annihilated community.

<sup>66</sup> See *Id.*

<sup>67</sup> See *Id.*

These bureaucrats implemented a maze of legislation which can only in part be explained by the fear of a conservative veto.<sup>68</sup> Wide criticism of the Comprehensive Environmental Response Compensation Liability Act (“CERCLA”) was raised for investing more funds into the government administration and legal and expert costs than really remediating hazardous waste sites. In response to this criticism, Congress broadened its administrative reach rather than drawing back from the program.<sup>69</sup> Unclear language in the legislation led to broad judicial interpretation of CERCLA. Though environmental advocates may applaud this judicial activism, the conservative wing has worked to limit the applicability of CERCLA due to the expansive characteristics of CERCLA which they perceive as drawbacks.<sup>70</sup>

Considering the confluence of actors from divergent paths and perspectives, all are likely to have differing approaches and opinions on the success and failures of the Love Canal disaster. Allan Mazur posits in his 1998 text<sup>71</sup> on Love Canal that there is no manner by which to access the actual happenings without becoming deeply intertwined in the manner by which those happenings were registered and recalled by the actors involved.<sup>72</sup> The only method to draw upon the events is based on the subjective evidence with which one is presented.<sup>73</sup> Michael Edelstein affirms that “[s]ubjective and objective are scrambled egg and yolk;” regarding the issue of relativism in the Love Canal contamination as carrying significant weight.<sup>74</sup> However, Lois Gibbs’ assertion that Love Canal was the end of illusions; that the government one has counted on has failed to protect and provide for the community, however relative, rings true for the

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<sup>68</sup> *Id.* at 101.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Alan Mazur, *A Hazardous Inquiry: The Rashomon Effect at Love Canal* (1998).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Michael R. Edelstein, *Does Time Bring Perspective? Love Canal at the Age of Twenty: A Book Review of a Hazardous Inquiry: The Rashomon Effect at Love Canal*, 8 *Buff. Env't'l. L.J.* 309, 310 (2001).

hundreds of communities which have been dealt with deceptively and unjustly in toxic waste disposal and management.<sup>75</sup>

Other cases of environmental inequity were soon exposed and given a prominent voice as President Jimmy Carter declared “environmental emergencies” in 1978 and 1980. The horror of toxic ooze which motivated the implementation of CERCLA led to many more legislative gestures which have seemingly sought to ameliorate the horrors of hazardous waste, with mixed success. As the United Church of Christ published its research on the racial disparities in hazardous waste siting, citizens brought forth suits of environmental discrimination and consistently lost.<sup>76</sup>

## B. Citizen Suits Evidence

The term ‘private attorneys general’ was coined in 1943 by Jerome Frank to characterize those who litigate on behalf of the public interest.<sup>77</sup> Judge Frank ruled in *Associated Industries v. Ickes*<sup>78</sup> that Congress could allow individuals to enforce public rights, granted that the private litigant was impacted to a degree which could constitute a justiciable controversy.<sup>79</sup> However, the plaintiffs were asserting rights based on a common economic interest- as industrial coal consumers seeking to protect the application of the Bituminous Coal Act of 1937.<sup>80</sup> The rationale for the move was based upon reasoning that if Congress is able to empower the Attorney General

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<sup>75</sup> David Hahn-Baker, *The 20<sup>th</sup> Anniversary of Love Canal: Lessons Learned: Conference Held at University of Buffalo, October 8 & 9, 1998: Reflections on Love Canal* 8 Buff Env'tl L.J. 225, 230 (2001).

<sup>76</sup> *Form and Substance*, *supra*, at 144; see also Meyers, *supra* at 33-39.

<sup>77</sup> *Form and Substance*, *supra* at 144.

<sup>78</sup> 134 F.2d 694 (2d Cir. 1943) *vacated as moot*, *Ickes v. Associated Industries*, 320 U.S. 707, (Oct 18, 1943).

<sup>79</sup> *Ickles*, *supra*, at 704.

<sup>80</sup> Michael D. Axline, *Environmental Citizen Suits* § 1.02, 1-3 (3<sup>rd</sup> ed. 1995). This trend was carried through to the 1990s for bringing an environmental justice issue to court. See, e.g., Ellen P. Chapnick, *Access to the Courts, The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, (Michael B. Gerrard, ed. (1999) Four U.S. Supreme Court rulings establish the basis for constitutional and prudential questions. Three of the cases denied standing (*Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Steel Company v. Citizens for a Better Environment* 523 U.S. 83 (1998)). The fourth awarded standing to plaintiffs asserting an economic rather than an environmental interest (*Bennett v. Spear*, 520 U.S. 154 (1997)).

to bring an action against a public official to enforce a public right, citizens were also authorized by Congress to bring such actions.<sup>81</sup> However, bringing public suit for non-economic interests was not instituted without the prominence of the Civil Rights movement decades later.<sup>82</sup>

In 1963, the validity of public citizen suits grew as the civil rights movement pronounced its opposition to the impact of growth on the environment; the general public turned to the courtroom to prevent unlawful behavior which was non-economic as well as community oriented.<sup>83</sup> It took the first People of Color Environmental Summit to set into motion what is popularly termed the “Modern civil rights movement.”<sup>84</sup> The NAACP has held a prominent role in environmental citizen suits, setting the bar for rights-based adjudication in *NAACP v. Button*<sup>85</sup> where “litigation is not a technique of resolving private differences, but a means for achieving the lawful objectives of equality of treatment... for the members of the Negro community in this country. It is thus a form of political expression.”<sup>86</sup>

As the court had endorsed the idea of citizens employing litigation to enforce public rights, individuals began to search more aggressively for causes of action which would permit them to do so. In some instances, these causes of action were individual in character but were held by several citizens. Class actions were being used to pursue increasing demands of corporate democracy, consumer rights, and environmental protection.<sup>87</sup> The class action lawsuit route presented limited options as people could only litigate who had an effective cause of

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<sup>81</sup> *Ickles, supra*, at 704.

<sup>82</sup> *See*, Michael D. Axline, *Environmental Citizen Suits* § 1.02 (3<sup>rd</sup> ed. 1995).

<sup>83</sup> *Id.*

<sup>84</sup> *See*, Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism has to Teach Environmentalists Today*, 31 *Env't'l. L.* 229-35 (2001).

<sup>85</sup> *National Ass'n for Advancement of Colored People v. Button* 371 U.S. 415 (1963).

<sup>86</sup> *See*, Michael D. Axline, *Environmental Citizen Suits* § 1.02 (3<sup>rd</sup> ed. 1995).

<sup>87</sup> *Id.* at 1-4.

action.<sup>88</sup> The opportunities available were largely either sanctioned by statute to guard economic interests, or individual common law causes of action for personal injury or incursion of constitutional rights. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 provided a venue of enforcement for a solitary injured party which could be extended so as to benefit a larger number of individuals.<sup>89</sup> The collective expression of individual claims as a class action suit is a development adopted to redress the grievances not met by the regulatory action of government. In situations where it is not financially viable to acquire remedy by the conventional framework of collection of individual suits for damages, individuals which have been injured may not be afforded any effective manner to seek remedy unless under a class action.<sup>90</sup> Congress had not as of yet authorized by statute for individuals to impose rights with the sole purpose of protecting the public interest.<sup>91</sup> Thus, few incentives for prosecution were presented for those enjoining in *qui tam* actions, which were not finding favor in the courts.<sup>92</sup>

### C. International Environmental Approaches and Advantages

It is lamentable that the environmental justice movement in its infancy was able to garner so little attention compared to its antecedents, as the confluence of two significant movements. It is notable that abroad, environmental citizen suits have found more successes, though in the decidedly different framework of developing county/human rights issues and global environmental crises.<sup>93</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980).

<sup>91</sup> *Id.* at 1-4.

<sup>92</sup> *Id.* This motivated Congress to integrate statutory citizen suit provisions in almost all significant environmental law implemented. *See, e.g., Polluters Court, supra*, at 329-31.

<sup>93</sup> *Id.* *See eg.,* Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 *Stan. Env'tl. L.J.* 338, 343 (1996) (evaluating World Council of Churches Programme to Combat Racism, Materials for United Nations Commission on Human Rights Briefing (1995)); U.S. Suspends Permit of Japanese Firm to Build Plastics Factory, *Daily Yomiuri* (Japan), Sept. 19, 1997.

Within the international environmental protection efforts, concerns about racism and distributional equity have been attributed to conflicts between developed and developing country contexts and environmental human rights concerns. Such concerns have been brought forth in the context of nuclear weapons proliferation and mining of the natural resource base or past dispossession of land from colonial periods.<sup>94</sup> Though these issues command the same issues of public participation, equity, and distribution, they have been far more successful than in the United States context.<sup>95</sup> A striking difference is the compelling moral obligations which developed countries have to developing countries by their power and sovereign abilities to withhold sanction and support to address environmental problems or other efforts requested by developing countries.<sup>96</sup>

Abroad, resolving distributional and equity concerns have been closely linked to broad based solutions of global environmental issues (such as forest devastation) giving them precedence in a manner which is not amenable to the United States context, where advocates cannot independently excuse themselves from oversight of federal environmental regulations.<sup>97</sup>

### III. The Trouble of establishing Intent under the Equal Protection Doctrine

A number of environmental justice litigants looked to the Equal Protection Clause of the Fourteenth Amendment to pursue allegations. The Equal Protection Clause provides that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."<sup>98</sup> The requirements that plaintiffs make evident that

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<sup>94</sup>*Form and Substance, supra*, at 154.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> U.S. Const. amend. XIV, § 1.

discriminatory intent induced the challenged behavior<sup>99</sup> make it nearly impossible to prove even when disparate impact is unmistakable.<sup>100</sup> The Arlington Heights court recognized that decision making by government bodies rarely is driven by a single actor, but is drawn from multiple issues, such that discriminatory impact can only be made evident by drawing circumstantial evidence. The court outlined various factors which could prove discriminatory intent. These included the 1) official action's impact 2) the historical background of the ruling; 3) the particular course of events leading up to the contested decision; 4) substantive or procedural departures from the regular process of decision making; and 5) the legislative and administrative history of the contested decision. The court further expressed the list should not be deemed as exhaustive.<sup>101</sup> The court's opinion in Arlington Heights suggests that confirmation of any one of these factors would suffice to draw a conclusion of discriminatory intent. The court in Arlington Heights did not require the plaintiff to submit verification for each of the five factors in order to meet the requirement for discriminatory intent.<sup>102</sup>

*Bean v. Southwestern Waste Management Corp.* was the first environmental justice case tried under equal protection theory, and fell short despite the great amount of empirical data presented.<sup>103</sup> A similar case was tried ten years later in 1989, *E. Bibb Twiggs v. Macon Planning*

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<sup>99</sup> See, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) Arlington Heights involved a dispute by the Metropolitan Housing Development Corp. over the town's denial of a request for rezoning which would have allowed for the development of housing for racially integrated affordable housing. Evans, *supra*, at 1279.

See, eg., Lisa S. Core, *Alexander v. Sandoval: Why a Supreme Court Case about Drivers Licenses Matters to Environmental Justice Advocates*, 30 B.C. Env'tl. Aff. L. Rev. 191 (2002) [hereinafter Drivers Licenses]; Meagan Elizabeth Tolentino Garland, *Addressing Environmental Justice in Criminal Sentencing Process: Are Environmental Justice Communities "Vulnerable Victims" under 3A1.1(B)(1) of the Federal Sentencing Guidelines in the Post United States v. Booker Era?* 12 Alb. L. Env'tl. Outlook 1, (2007) 15-21 [hereinafter Vulnerable Victims].

<sup>100</sup> *Terry Props., Inc. v. Standard Oil Co.*, 799 F.2d 1523; *Drivers Licenses, supra*, at 195 (holding that the only successful application of the discriminatory impact requisite has been for municipal services, for which plaintiffs have successfully adjudicated where services were disseminated in a racially charged fashion).

<sup>101</sup> *Arlington Heights, supra*.

<sup>102</sup> *Id.*

<sup>103</sup> See *Vulnerable Victims, supra* at 16-17 (Citing *Bean v. Sw. Waste Mgmt.*, 482 F. Supp. 673, 681 (S.D. Tex., 1979) (Plaintiffs sought to contest the permitting of a solid waste landfill based on allegations that the Texas

& Zoning Commission,<sup>104</sup> and similarly failed under the Equal Protection standard.<sup>105</sup> Here, the Plaintiffs sought to avert the siting of a landfill in a predominantly African American community by the zoning board, and failed for being unable to provide a sufficient proof that race was an overriding factor in the siting decision.<sup>106</sup> The *Bean* and *Twiggs* cases demonstrate that statistical demographic data do not meet the standard of proof for discriminatory intent thereby failing to be legally actionable.<sup>107</sup>

In order to assess whether discriminatory intent is present, the court must survey the circumstantial and direct evidence which might consist of: (1) the impact of the action; (2) the historical background of the decision; (3) the particular course of events which have led up to the challenged conduct (4); any different approaches from the regular decision-making processes; (5) the legislative or administrative record of the decision.<sup>108</sup>

The pervasiveness and condition of institutional racism in the United States is completely disregarded by the intent requirement<sup>109</sup> as ‘modern-day institutional racism in the United States is rarely so apparent that it will be seen in the records of hearings and deliberations of a government body.’<sup>110</sup> Thus, the requirements cannot be satisfied, a significant problem for

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Department of Health had a discriminatory history of authorizing such permits for landfills in people of color communities. Despite having provided a significant amount of statistical data to support their argument, the plaintiffs failed to meet the intent standard and the court dismissed the claim).

The prevalence of a discriminatory purpose may often be inferred from the collection of facts presented, including the assertion, should it be true, that the law falls more harshly on people of color. Regardless of the validity of these facts, it has not been held that a law, facially neutral and serving ends otherwise within the authority of government to pursue, is invalid under equal protection theory solely due to the fact that it may impact a larger percentage of one race than another. *Evans*, *supra* at 1277.

<sup>104</sup> 706 F. Supp. 880, 884 (M.D. Ga. 1989).

<sup>105</sup> *Vulnerable Victims*, *supra*, at 15-18.

<sup>106</sup> *See*, 706 F. Supp. at 884; *Vulnerable Victims*, *supra*.

<sup>107</sup> *See*, *Vulnerable Victims*, *supra*, note 97, at 17.

<sup>108</sup> *Drivers Licenses*, *supra*, at 195.

<sup>109</sup> *See*, James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 *Stan. Env'tl. L.J.* 125, 145 (1994).

<sup>110</sup> *Drivers Licenses*, *supra*. *See*, *Guardians*, 463 U.S. at 622 (1983) (Marshall, J., dissenting) (an effects-based test is more practical than a test that focuses on the intent of the Title VI fund recipient because motive is difficult to determine);

environmental justice advocates which may be suffering under the influence of several contributing polluting sources, for which it is difficult to prove intent for any particular player.

<sup>111</sup> Many plaintiffs turned to Title VI of the Civil Rights Act of 1964 to pursue their claims in light of the difficulties of litigating under the Equal Protection Doctrine. <sup>112</sup>

#### A. Alternative Legislative Provisions

It is extraordinary for government to take the position that citizens- who have the most direct stake- should have no significant role to play in the determination of their environmental destiny. Is pursuit of the public interest to be the exclusive preserve of a professional bureaucracy? <sup>113</sup>

There has not been a dearth of legislation put in place to address concerns of environmental inequity, though their usefulness to the citizenry marked. By the end of the 1960s, when the difficulties of bringing qui tam actions were marked, Congress was led to include statutory citizen suit provisions in almost every significant environmental statute implemented. The adoption of the statutory citizen suit provision in the Clean Air Act, first appearing in the form of the Michigan Environmental Protection Act of 1970<sup>114</sup> as well as the recognition by the Supreme Court in *Sierra Club v. Morton*<sup>115</sup> that injury to environmental and aesthetic interests in could grant standing to citizens to sue parties infringing such injury were

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<sup>111</sup> *Drivers Licenses, supra; Federal Intervention, supra*, at 186.

<sup>112</sup> *Vulnerable Victims, supra*, at 18-19. In falling short on proof of a clearly discriminatory disposition, plaintiffs filing suit under the Equal Protection Clause have been forced to rely on support for disparate impact to litigate their cases. Evans, *supra*, at 1269; Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & Com. 597, 604 (1996) (asserting that the inability to bring forth conclusions "...from tight logical structures that effectively left only one compelling reading of the facts meant that, in the absence of the remnants of Jim Crow, mere inequality is not legally actionable...").

<sup>113</sup> J. Sax, *The People, No- Environment and the Bureaucracy*, *The New Republic*, June 19, 1971, reprinted in, Michael D. Axline, *Environmental Citizen Suits* §1.02 (3<sup>rd</sup> ed. 1995).

<sup>114</sup> See, Michael D. Axline, *Environmental Citizen Suits* §1.02 (3<sup>rd</sup> ed. 1995). Section 2 of the original bill drafted provides that "The attorney general, a city, village, or township or a citizen of the state may maintain an action for declaratory and equitable relief... for the protection of the air, water and other natural resources." Section 3 (1) provides that "the plaintiff in action has made a prima facie showing that the conduct of the defendant has, or is reasonably likely to pollute, impair, or destroy the air, water or other natural resources or the public trust of the state, the defendant has the burden of establishing that there is not feasible and prudent alternative..." This text appeared, changed slightly, in the Environmental Protection Act of 1970 under § 3 of S. 3575. This bill was presented in three Congresses but was never implemented, as it was strongly resisted by the Nixon Administration.

<sup>115</sup> 405 U.S. 727 (1972), *aff'd*, 3 Env't'l. L. Rep. 20173 (N.D. Cal. 1973).

the first significant provisions opening way for the expansion of the citizen suit provisions.<sup>116</sup>

The statutory endorsement of citizen suits did not yield significant advances in the enforcement of environmental regulations, particularly for minority communities.<sup>117</sup>

## B. Court Enforcement

Since the passage of President Clinton's Executive order 12,898 in 1998 a substantial amount of case law has developed regarding the enforcement of a private right of action under Title VI of the Civil Rights Act of 1964. To succeed in a Title VI suit, a plaintiff must demonstrate that a facially neutral entity receiving federal funds has resulted in an unnecessary discriminatory effect. In doing so, the plaintiff must demonstrate that the effect is unnecessary because the defendant may just as well pursue an appropriate alternative course of action.

Plaintiffs had, until recently, relied on section 602 of Title VI to pursue environmental justice claims.<sup>118</sup> The courts are generally averse to create a judicial remedy unless Congress

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<sup>116</sup> See, Michael D. Axline, *Environmental Citizen Suits* §1.02 (3<sup>rd</sup> ed. 1995).

The filing of an environmental justice petition by the community group St. James Citizens for Jobs and the Environment and request for an adjudicatory hearing with the Louisiana Department for Environmental Quality ("LDEQ") with the EPA in April of 1997 resulted in many successes. The permitting process was reopened by J. Dale Givens, Secretary of the LDEQ, to allow for increased dialogue between the LDEQ and concerned community members, to approach any issues regarding environmental equity. The air permit was rejected on technical grounds as it had failed to address all sources of pollution. Thus, the EPA failed to act explicitly on environmental justice concerns regarding the implementation of the Clean Air Act, ("CAA") but instead handing them over to the LDEQ to handle.

<sup>117</sup> The decision to not act directly on the environmental justice issues raised under the CAA, EPA administrator Carol Browner assumed the reasoning of the Environmental Appeals Board in *In re Chemical Waste Management of Indiana, Inc.*, 1995 WL 395962 (EPA June 29, 1995) (holding that 'the Executive Order does not purport to, and does not have the effect of, changing the substantive requirements for issuance of a permit under the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations'). See *Chemical Waste Management*, 1995 WL 395962, at 4. Thus, should the application requirements for the relevant statute be met by the applicant, the EPA must issue the permit disregarding the racial or socioeconomic composition of the surrounding district, or any impact the polluting facility may have on the area. A National Law Journal Study indicates that Clean Air Act enforcement cases have been disproportionately brought in white communities, suggesting that stronger enforcement mechanisms must be established to protect minority communities from singular risks. This is true despite the fact that greater numbers of minorities are exposed than whites. See, R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 Am U.L. Rev. 229, 252-69 [Hereinafter *Community Empowerment*].

<sup>118</sup> See, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,653 (June 27, 2000) [hereinafter EPA Title VI Guidance]; see *infra*, Part B. III.

has done so as well. Before *Alexander v. Sandoval*, federal courts have overwhelmingly implied a private right of action to enforce section 602.<sup>119</sup> The following discussion will look at the court's treatment of Title VI's implied private right action prior to *Sandoval*.

### *I. The Importance of Congressional Intent*

The Supreme Court has historically been cautious in asserting an implied right of action due to concerns with separation of powers. Implying where Congress did not have interest would overstep judicial boundaries and assume undue legislative powers.

A four factor test was established in *Cort v. Ash*<sup>120</sup> with wide applicability to establish the adequacy of implying a private right of action.<sup>121</sup> The statute first must have been intended to benefit the plaintiff.<sup>122</sup> Second, the court must identify implicit or explicit evidence of Congressional intent to implement the remedy.<sup>123</sup> Third, the judicial remedy must be unswerving of the essential principles of the legislative framework.<sup>124</sup> Fourth, the establishment of a federal right of action can not infringe upon significant state issues.<sup>125</sup> Justice Powell conferred his disapproval of the use of the *Cort* test and emphasized instead on whether Congress intended to create the remedy.<sup>126</sup> However, the *Thompson v. Thompson* court affirmed Congress' central interest to be the intent to enact the statute in evaluating whether to infer a

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<sup>119</sup> Those who argue against invoking a private right of action raise concerns regarding the excessive enforcement of federal standards, as well as the intrusion of agency specialization in the details of statutory standards, the crippling of an agency's ability to conjure a consistent and synchronized code of enforcement, as well as the impaired political accountability of the administrators of federal programs. *Supra*, *Drivers Licenses*, at 198-200, note 59.

<sup>120</sup> *Cort v. Ash*, 422 U.S. 66 (1975).

<sup>121</sup> *Id.* A stockholder was denied remedy for a violation of the Federal Elections Campaign Act Amendments of 1974, for which the court would not imply a private right of action. However, the four factor test implemented has brought guidance for other decisions. *Supra*, *Drivers Licenses*, at 201-2.

<sup>122</sup> 422 U.S. 78 (1975). See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689-90 (1979). Cannon is discussed in Part B.III. *infra*.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Justice Powell stated that the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, '...court[s] instead [should] substitute its own views as to the desirability of private enforcement.' Justice Powell also cautioned that the *Cort* test was too lenient to judges personal leniencies, thereby allowing them to ignore legislative intent and assume lawmaking power. Smith, *supra*, note 81 at 238.

private cause of action. Justice Scalia found the *Cort* test therefore supportive in this process.<sup>127</sup> He further elaborated that congressional intent is the deciding factor of the decision, where the other three components of the *Cort* test solely operate to support or negate the presence of congressional intent. Justice Scalia affirmed in the *Thompson* decision that the Supreme Court has long cast off its favorable attitude of implying a private right of action, indicative of the Supreme Court's opinion in *Sandoval*.<sup>128</sup>

#### V. Redressing Disparate Impact under Title VI

Two central concerns must be approached for a citizen to assert a cause of action under any statute: 1) what behavior does the statute proscribe and 2) is the statute privately enforceable?<sup>129</sup> These concerns were first approached in *Regents of the University of California v. Bakke*<sup>130</sup> and *Cannon v. the University of Chicago*<sup>131</sup> with respect to Title VI. The *Bakke* court proclaimed that Title VI must be held to proscribe only those racial classifications which would violate the Equal Protection Clause or the Fifth Amendment. That Title VI only protected against intentional discrimination was implicated in the *Bakke* decision; it was only thereafter with the ruling of *Cannon* that the courts addressed the second question coordinated in ruling that Title VI created a private right of action.<sup>132</sup> The *Bakke* discussion on whether intent was a necessary element of the implied Title VI right of action was revisited in 1983 with the *Guardians Association v. Civil Service Commission*.<sup>133</sup> The *Guardians Association* decision was made clear by the *Alexander v. Choate* ruling two years later in recognizing “the two pronged holding on the nature of the discrimination proscribed by Title VI [which had ] come into view

<sup>127</sup> *Supra*, *Drivers Licenses*, note 65.

<sup>128</sup> *Id.*

<sup>129</sup> *Community Empowerment*, *supra*, at 66-68.

<sup>130</sup> 438 U.S. 265, 281-87 (1978).

<sup>131</sup> 441 U.S. 677, 694-703 (1979), *appeal filed*, 648 F.2d 1104; *aff'd*, 784 F.2d 777; *motion granted in part*, 1988 U.S. Dist. LEXIS 4753; *motion granted in part*, 687 F. Supp. 424.

<sup>132</sup> *Community Empowerment*, *supra*, at 67.

<sup>133</sup> 463 U.S. 582 (1983).

in [*Guardians Association*].”<sup>134</sup> *Guardians Association* was interpreted as having stated that Title VI only remedies instances of intentional discrimination, and could be imposed privately as laid out by the *Cannon* decision.<sup>135</sup> However, the *Choate* Court also held that “actions having an unjustifiable disparate impact on minorities [could] be redressed through agency regulations designed to implement the purposes of Title VI.”<sup>136</sup>

Following *Guardians*, a demonstration of discriminatory purpose is required for a suit based on Title VI itself.<sup>137</sup> However, if suing under regulations which prohibit disparate impact, this hurdle does not present itself. Lower courts have strongly held the opinion that those regulations passed under Title VI may validly proscribe actions which have a disparate impact, even if the actions do not have a showing of discriminatory intent, for groups protected by statute.<sup>138</sup>

#### A. Title VII Analogy for Title VI Cases

The Supreme Court has not ruled on the plaintiff’s burden of proof beyond the initial standards of a Title VI case.<sup>139</sup> Title VI cases carry stringent evidentiary requirements, not unlike Title VII, the latter of which has established the disparate impact methodology as a common law definition of discrimination that is “generally applicable under the modern civil rights acts.”<sup>140</sup> The importance of Title VII jurisprudence to environmental justice is evident by analogy to Title VI.<sup>141</sup> A Title VII case requires the plaintiff provide there to be a showing of

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<sup>134</sup> 469 U.S. 287, 293 (1985).

<sup>135</sup> *Community Empowerment, supra*, at 69.

<sup>136</sup> *Community Empowerment, supra*, at 65. Though seemingly straightforward, the *Choate*, *Bakke*, and *Guardians Association* decisions have created considerable puzzlement as to the breadth and application of Title VI.

<sup>137</sup> *Fisher, supra*, at 319.

<sup>138</sup> *Id.* at 320.

<sup>139</sup> *Id.*

<sup>140</sup> *Fisher, supra*, 320.

<sup>141</sup> *Id.* See, e.g., Mahoney, *Partial Victories*, at 390- 95 for a discussion of Title VII in environmental justice. Presenting criticism of the analogy to Title VI; as Title VI fits more closely to the constitutional prohibition against federally funded activities for intentional discrimination, however, Title VII only covers private employment.

prima facie discrimination. The plaintiff must present evidence of discrimination in conduct; should this be unavailable, the plaintiff may present circumstantial evidence that the employer failed to hire the employee regardless of having the necessary credentials.<sup>142</sup>

Should the defendant present a sufficient argumentation that the action of concern was merited by a legitimate purpose, the plaintiff may present an alternative mode of action which is less discriminatory in nature and is sufficient in serving its legitimate purpose. Thus, the responsible party for choosing a site would be held to bring forth an unbiased justification for locating a polluting facility as a retort to a community's assertion that the facility was placed in their neighborhood unfairly.<sup>143</sup> For a Title VII case, the plaintiff may follow the defendant's justification for business necessity in stating that the supposed basis for refusing the employee was merely pretext.<sup>144</sup> This test as applied in *McDonnell Douglas Corp. v. Green*,<sup>145</sup> has been applied in other areas as well. These include claims presented pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 1201 *et seq.* and 42 U.S.C. §§ 1981 and 1983, as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*<sup>146</sup>

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Further, critics posit that Title VII falls short of mandating preferential treatment of people of color, and, as for Title VI, a defendant may rebut a discrimination charge with a valid justification for their actions.

<sup>142</sup> Alice Kaswan, *Environmental Justice: Bridging the Gap between Environmental Laws and "Justice,"* 47 Am. U.L. Rev. 221, 283 note 306 and accompanying text (1997). The applicant for employment must demonstrate that 1) s/he is a person of color; 2) that s/he submitted an application, and was qualified for a position for which the employer was seeking applicants; 3) that s/he was denied the position regardless of her or his qualifications; and that he applied and was qualified for a job for which the employer was seeking applicants; and 4) that subsequent to her or his rejection, the position continued to be open to applicants who had the same qualifications as the plaintiff. The particular requisites for a prima facie case may shift according to the circumstantial evidence presented.

<sup>143</sup> Kaswan, *supra*, at 284.

<sup>144</sup> *Id.* There are a number of ways that an employer's reasoning may be regarded as pretext. The plaintiff may present that the reasoning is not based on fact. The complainant may also declare that even if the rationale is based in fact, that it is not the true motivation, or that the action taken cannot be effectively explained by the reason provided.

<sup>145</sup> 411 U.S. 792 (1973).

<sup>146</sup> See, e.g., *Olson v. General Electric Astropace*, 101 F.3d 947 (3<sup>rd</sup> Cir. 1996) (ADA claim); *Annis v. County of Westchester*, 136 F.3d 239 (2<sup>nd</sup> Cir. 1998) (§1983 claim); *Stratton v. Department for the Aging*, 132 F.3d 869 (2<sup>nd</sup> Cir. 1997) (ADEA claim).

Title VI cases have been brought under the same evidentiary requirements such that the plaintiff is responsible with presenting the final factor of the test.<sup>147</sup> This therefore indicates that Title VI cases only are granted remedy if there is evidence of an *unwarranted* disparate impact.<sup>148</sup> Regardless of the fact that the EPA has presented there to be a prohibition of discriminatory impact by regulation, a remedy will not be granted where it is merely a showing of an overall discriminatory effect.<sup>149</sup>

Title VII's revision under the Civil Rights Act of 1991 increased the requirements for a defendant to counter a claim of prima facie disparate impact.<sup>150</sup> As Title VI adjudication reflects Title VII, this works to benefit environmental justice plaintiffs.<sup>151</sup> The 1991 revision of Title VII requires defendants to demonstrate there to be no racial disposition of the enterprise in addition to presenting why there is a business necessity for maintaining the policy in its current form.

As discriminatory intent cases consider the presence or lack of discriminatory impact as one of the many indicators of whether there is a biased motivation, it has been found that courts look at the support of such cases even where the legal standard for "discriminatory effect" is used. In *South Bronx Coalition for Clean Air Inc v. Conroy*,<sup>152</sup> a case contesting the siting of a waste transfer facility in a community of color, the court stated the legal standards for which the case was under in speech commonly applied under Title VI and Title VII cases. The *South Bronx* court's application of the Title VII framework for evaluating discriminatory impact under Title

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<sup>147</sup> Fisher, *supra*, at 320.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 321; *see, Wards Cove Packing Co. v. Antonio*, in favor of the defendants, the ruling was legislatively reversed under Congress.

<sup>151</sup> *See, e.g., Alice Kaswan, Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 Am. U.L. Rev. 221, 283-86 (1997) (asserting Title VII's usefulness to Title VI environmental citizen suits).

<sup>152</sup> 20 F.Supp.2d 565 (S.D.N.Y. 1998).

VI has been applied in other courts as well.<sup>153</sup> For instance, the Third Circuit applied the Title VII structure for the Title VI challenge in *NAACP v. Medical Center, Inc.*,<sup>154</sup> where the Court of Appeals for the Third Circuit emphasized that “uniformity in the procedural aspects of impact and intent cases is highly desirable.”<sup>155</sup> The most important distinction in the application of Title VII and Title VI cases is the capacity of the plaintiff in Title VI discriminatory impact cases to disprove the justification of the defendant by submitting information supporting an equally effective alternative which would be less impacting of the protected classes.<sup>156</sup> Showing that viable alternatives exist is usually significantly easier than demonstrating that the rationale presented by the defendant was merely pretext.<sup>157</sup>

The difficulties which environmental justice plaintiffs carry in presenting an argument and enabling change are far greater than other cases of discrimination in housing, education, or employment.<sup>158</sup> There are many rationales for these challenges; however it is a pressing concern for citizens to be able to engage in the political process where the health and livelihood of their communities are at stake. We are therefore interested in identifying the barriers to adjudication of such cases as dismantling each hurdle to the extent possible.

## B. Choice of Venue

A primary concern when presenting a citizen suit is deciding where to prosecute the claim.<sup>159</sup> Many dangers await should the prosecutor fail to meticulously interpret the relevant jurisdiction and venue regulations. The presence of several regulatory programs and resources

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<sup>153</sup> Kenneth J. Warren, *Evidentiary Issues: Proving Intent and Effect and Defining the Affected Community*, *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, 402 (Michael B. Gerrard, ed. 1999).

<sup>154</sup> 657 F.2d 1322, 336 (3<sup>rd</sup> Cir. 1981) (en banc).

<sup>155</sup> *Id.*

<sup>156</sup> Warren, *supra*, at 403.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 322.

<sup>159</sup> Axline, *supra*, at §2.01, 2-1.

can which transverse political and administrative borders.<sup>160</sup> Characterizing the challenged conduct also presents issues for making choices of forum. For example, a particular action may be contested in a district court, a United States court of appeals circuit court, or solely in the District of Columbia Circuit of the United States Court of Appeals according to the characterization of the action.<sup>161</sup> The characterization of the action also can determine whether or not jurisdiction exists for a federal court. This implicates that a claim against a noxious facility which is filed in federal court but holds there to be only state level violations of the law may not be enough to warrant federal jurisdiction without also presenting that each violation of state law is also an infringement of the “federal facilities” provision of the relevant federal statute.<sup>162</sup> The two most frequently applied citizen suit statutory sources of federal jurisdiction are the universal “federal question” jurisdictional statute<sup>163</sup> and jurisdictional grants in particular stipulations of statutory citizen suits.<sup>164</sup> Questions of jurisdiction can be raised by defendants in a citizen suit by way of a number of particular procedural defenses, including standing, mootness, and ripeness.<sup>165</sup>

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<sup>160</sup> *Id.* A noxious facility sited in a municipality on the periphery of two states may be under the jurisdiction of federal, state and local directives. The facility of interest may also be a burden to communities in both states. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987) (a nuisance claim under state law filed under the Clean Water Act considered by the federal court must appropriate the law of the state in which the effluent was discharged as opposed to the law of the state in which the affected plaintiffs reside).

<sup>161</sup> *Axline, supra.*, at 2-2.

<sup>162</sup> *Id.* at 2-2.

<sup>163</sup> *See*, 28 U.S.C. § 1331. This plaintiff must state that the complaint is provided by this statute for all suits filed against a federal agency by a citizen according to the Administrative Procedure Act (“APA”) standards for judicial review. This section provides that “[t]he district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Just about all cases which declare injury done by a federal agency will provide sufficient of a query at the federal level to use this statutory grant of jurisdiction. By the supremacy clause, federal agencies are federal agencies are only under question of federal laws save that the federal law requires that the agency be subject to state law. Therefore, if a citizen suit for which the defendant is a federal agency does not stipulate there to be a “federal question” there may not be a cause of action against the federal agency. *See, e.g., Axline, supra*, at 2-3, 2-4; *See, Califano v. Sanders*, 430 U.S. 99, 105 (1977).

<sup>164</sup> *Axline, supra*, at 2-2.

<sup>165</sup> *Id.* at 2-3.

Each particular citizen suit provision for particular statutes normally includes their own specific jurisdiction provisions.<sup>166</sup> District courts are granted citizen suit jurisdiction despite the amount being contested or the citizenship of the parties, to enforce particular provisions of the act.<sup>167</sup> Statutory provisions which establish jurisdiction for citizen suits also institute causes of action. A number of citizen suit terms include sections which specifically defend existing common law and statutory causes of action.

### C. Burden of Proof: Demonstrating Racial Disparity, Impact, and Substitute Recourse of Action

Three significant problems are evident for Title VI suits. These include the 1) relative nature of disparate impact of the action; 2) significance of the proximity to a polluting facility, as compared to the tangible harm thereof; 3) ability of the plaintiff to counter claims of legitimate necessity for the siting of a facility.<sup>168</sup>

### D. Demonstrating Racial Disparity

Evidence of disparity of the proposed facility rests heavily upon the ability to present an accurate demographic report of the region in contrast to other areas of relevant interest.<sup>169</sup> Hence, the scope of analysis must be inside the walls of the defendant's jurisdiction.<sup>170</sup>

When presenting evidentiary claims of disparity, plaintiffs must be careful to recognize the limitations of using pre-established standards of analysis. The use of census tracking or zip codes in determining whether a particular community has been made more vulnerable to a polluting facility may leave out critical components of a demographic profile due to the size of the area or the manner by which it is drawn. Thus, should the size of the demographic profile be

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<sup>166</sup> *Id.* at 2-5.0

<sup>167</sup> *Id.* at 2-5.0.

<sup>168</sup> *Fisher, supra*, at 322.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* So, if the defendant is a representative of the state, the jurisdiction would consist of a comparison of regions within the state; if the decision was authorized by county administrators, the analysis would consist of a county wide survey of disparate impact.

larger than the impacted area, a plaintiff's proof of disparity is lost as whites are counted to the same extent as people of color in the area of concern, making the extent of impact insignificant. Further, the boundaries of a pre-ordained study may extinguish the significance of a polluting facility to a people of color community. Thus, should a facility rest just across the boundary lines of a zip code, where zip codes are the unit of analysis, the demographic profile will lose this important piece of information.<sup>171</sup>

To remedy these issues of size and boundary lines, constructing a new demographic unit of analysis in a radial pattern would most benefit a plaintiff's claim of disparity.<sup>172</sup> The difficulties of drafting new studies are perhaps reconciled by the extent of interest of governmental agencies in computing data, as well as by the efforts of environmental justice advocates.<sup>173</sup>

#### E. Impact of an Adverse Action

Should defendants of an environmental justice case present the argument that no impact has been summoned from the proximity to a polluting facility; plaintiffs must present tangible impacts of the siting. This may not be instrumental to environmental justice cases as the proof of impact may be obviated already by the ensuing evidence of the case. Circumstantial evidence of a siting may present an argument for adverse impact; such as if the facility siting was effectively challenged in a white community and was thereafter located in a minority neighborhood. Other arguments for adverse health impacts, decreased property values, or enjoyment also present the real harm of the decision.<sup>174</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

However, the scope or reach of the burdens of a government resolution could be complicated, such as if they do not closely match that of political subdivisions.<sup>175</sup> Further, once the actual area of impact is outlined, the geographic boundary lines and the data supporting the case may not coincide perfectly.<sup>176</sup> These limits call for individuals interpreting the likely discriminatory impacts of an environmental resolution to make assumptions to make the analysis more straightforward which are prone to being challenged.<sup>177</sup>

Some additional factors to an adequate analysis must be considered. First of all, the inquiry being presented must be carefully framed. Is the contested impact regarding the extent of impacts of a certain facility or an examination of the sum of all facilities which are currently established or intended?<sup>178</sup> Second, the degree to which it is advisable for a community to frame itself in terms of race, class, or political influence, or by the health burdens held in common must be agreed upon.<sup>179</sup> The particular impacts under evaluation must be carefully designated. A community may be split where individuals are exposed to airborne effluent and others are exposed to polluted groundwater, though the contamination may be derived from one facility.<sup>180</sup> Lastly, a comparison group must be delineated in relation to the establishment of the impacted group. The way this is done may hold as much weight as the first decision of how to frame the impacted community by race, ethnicity or socio-economic status.<sup>181</sup>

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<sup>175</sup> Kenneth J. Warren, *Evidentiary Issues: Proving Intent and Effect and Defining the Affected Community*, *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, 397-428 (Michael B. Gerrard, ed. 1999).

<sup>176</sup> *Id.* at 398.

<sup>177</sup> *Id.* at 398.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Issues may arise where a component of a community to which there is no risk imposed may or may not be included where some or all of the members of a community of color are fighting the siting of noxious facility.

<sup>180</sup> *Id.* This is pertinent as the courts or other administrators may not consider all adverse effects presented as cognizable impacts.

<sup>181</sup> *Id.* at 398-99.

In a 1997 case, a citizens' organization held that their Title VI rights were violated when a permit was authorized to operate Soil Remediation Services in a primarily African American community.<sup>182</sup> The lower court found there to be no proof of intentional discrimination, and that no private right of action existed to enforce the statute.<sup>183</sup> The Third Circuit, pursuant to the great number of courts of appeals which have ruled there to be a private right of action under § 602,<sup>184</sup> made it feasible for private plaintiffs to bring lay claims in federal court regardless of whether administrative remedies had first been exhausted.<sup>185</sup> *Chester Residents* opened the door for other citizens to make such claims, such as the plaintiffs of *South Camden*.<sup>186</sup>

### III. *Powell v. Ridge*

In *Powell v. Ridge*,<sup>187</sup> a private right of action was considered once again by the Third Circuit to enforce Title VI's implementing regulations. Here, the court recognized there to be an established test for implying a private right of action under a statute which was recognized by *Cort*.<sup>188</sup> *Powell v. Ridge* further stated that the analysis provided by *Cort* for statutes may be applied to a regulation, here under the Department of Education.<sup>189</sup> As the court had previously acknowledged that *Chester Residents* had been vacated as moot, in answering the same question, it advanced its analysis by raising certain areas of analysis of the *Chester Residents* court.<sup>190</sup> A

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<sup>182</sup> *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 (3d Cir. 1997) (claiming a violation of sections 601 and 602 of Title VI) *aff'd*, 524 U.S. 915; *vacated*, 524 U.S. 974; *motion denied*, 525 U.S. 927.

<sup>183</sup> *Id.* at 928 (based on the decision of *Chowdhury v. Reading Hosp. & Med. Ctr.*, which approached whether a private plaintiff on the Court of Appeals is obliged to first exhaust administrative remedies prior to bringing suit under § 601).

<sup>184</sup> *See, infra*, Part II. (C).

<sup>185</sup> *See, Vulnerable Victims, supra*, at 16-18; *See, eg., Partial Victories, supra* text accompanying note 187 (1999) (citing *Chester*, 132 F.3d at 927) (concluding that "... private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 601 of Title VI").

<sup>186</sup> This opportunity was reaffirmed in a Third Circuit decision in *Powell v. Ridge*, 189 F.3d 387, 399 (3d Cir. 1999) (concluding there to be an implied right of action in § 601 of Title VI).

<sup>187</sup> 189 F.3d 387 (3d Cir. 1999). *See, e.g., Lisa S. Core, supra*, at 209-10.

<sup>188</sup> *Id.* at 391-97.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*, *see, e.g., Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939 (3d Cir. 1985); *Drivers Licenses, supra*, at 208-10; *See, e.g., Suzanne Smith, Current Treatment of Environmental Justice Claims: Plaintiffs Face a*

“hybrid test” was described by the court to be used to determine the manner by which a private right action may be implied.<sup>191</sup> The test stipulates that the court to establish or negate there to be a private right of action transmitted by the regulation. Should the court determine there not to be intent established for private actions, the case is concluded. On the other hand, should the court find a private right of action to be permissible under the legislation, a ruling mandates review of 1) whether the agency regulation is adequately within the confines of the enabling statute, and 2) if implying a private right of action will further its purposes.<sup>192</sup> The court determined all the relevant stipulations to have been met, such that a private right of action was recognized.<sup>193</sup>

## VI. South Camden

*South Camden Citizens in Action v. New Jersey Department of Environmental Protection (Camden II)* has been regarded as pivotal to environmental justice pursuits for its victorious application of Title VI theory; in stating that ‘Title VI creates an implied private right of action ... on a theory of disparate impact discrimination in the administration of a federally funded program.’<sup>194</sup> Here, concerned citizens of New Jersey contended that the New Jersey Department of Environmental Protection’s (“NJDEP”) move to authorize air pollution permits for a cement plant in a predominantly minority community would have a racially disparate impact.<sup>195</sup> The Third Circuit issued an injunction, halting both the operation of the cement facility and the

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*Dead end in the Courtroom.* 12 B.U. Pub. Int. L.J. 223, 243 (2002) (holding that plaintiffs could enforce the same regulations as in *Powell v. Ridge* under §1983. The court rejected the argument of the defendant that Title VI’s implementing regulations preclude § 1983 claims).

<sup>191</sup> 189 F.3d 387 (3d Cir. 1999) at 397.

<sup>192</sup> *See, Powell*, 189 F.3d at 398.

<sup>193</sup> The court found that a right of action may be implied under § 602 consistent with § 601 recognizing a private right of action, which is then implemented by § 602. *See, Powell*, 189 F.3d at 399-400.

<sup>194</sup> *South Camden Citizens in Action*, 145 F. Supp. 2d 446, 474, *reversed*, 274 F.3d 771; *dismissed*, 2003 U.S. Dist. LEXIS 6320, *judgment granted*, 2006 U.S. Dist. LEXIS 45765

<sup>195</sup> *Id.* at 450 (asserting that ninety-one percent of the community members were minorities).

permit issued by the NJDEP.<sup>196</sup> Shortly after this victory, however, the Supreme Court ruled on *Alexander v. Sandoval*, eliminating any prospects for a private right of action claim under Title VI.<sup>197</sup>

## VII. *Alexander v. Sandoval*

The recent decision of *Alexander v. Sandoval*<sup>198</sup> ruled that no private cause of action existed under Title VI of the Civil Rights Act of 1964 was devastating to environmental justice advocates, eliminating just about all venues to enforce the private right of action under Title VI.<sup>199</sup> In overturning thirty years of precedent and forcing environmental justice advocates to pursue new venues of enforcement by vacating its own jurisprudence and that of several courts of appeals.<sup>200</sup> The 5 to 4 decision by Justice Scalia held that no private right of action existed to enforce regulations disseminated under Title VI.<sup>201</sup>

*Sandoval* was a class action lawsuit brought against the Alabama Department of Public Safety for its decision to run drivers' licenses tests only in English. A suit was raised in district court by plaintiff *Sandoval*, holding that the English only examinations were in violation of the

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<sup>196</sup> *Id.* at 474.

<sup>197</sup> *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

<sup>198</sup> 121 S. Ct. 1511 (2001).

<sup>199</sup>The *Sandoval* decision ruling that no private right of action existed under Title VI to enforce disparate impact claims held broad implications for other types of disparate impact claims, including environmental claims, as the court promulgated a new rule restricting private rights of actions where the statute did not specifically state that a private right of action could be brought. However, the ruling did not appear to bar all venues to enforce EPA's Title VI disparate-impact regulations. See, *Community Empowerment, supra*. See, *eg.*, *Drivers, supra* at 190-192 (reviewing the history of citizen enforcement of Title VI's environmental justice litigation under disparate impact, stating that private disparate impact claims are no longer possible, though § 1983 may provide a venue for enforcement in some circumstances). Section 1983 indicates "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, ... 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... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The answer whether claimants may use § 1983 is not clear, as the purported rights are regulatory. The Supreme Court has made it clear that evidence of Congressional intent is required.

<sup>200</sup> See, 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. Env't'l. Aff. L. Rev 27.

<sup>201</sup> Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined Justice Scalia's opinion. *Sandoval*, 532 U.S. at 277.

Department of Justice (“DOJ”) which proscribe discrimination on the basis of race or national origin.<sup>202</sup> Sandoval brought her allegations under § 602, by the regulations proclaiming that a recipient of Federal funds may not use modes of administration “which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”<sup>203</sup> The majority, per Justice Scalia, denounced the prior decisions in stating “that [their] opinions have not eliminated all uncertainty regarding its commands.”<sup>204</sup>

The Sandoval decision dealt a rough blow to environmental justice advocates, though it did present one opportunity. Justice Stevens mentioned that Title VI plaintiff’s mere mention of § 1983 may bring them back into court. The plaintiffs in Camden II were readily equipped to lay Justice Stevens’ theory to the test in Camden III. Here, plaintiffs asserted there to be an adverse impact presented by the issuance of an air permit for a cement company under the authority of the NJDEP to their neighborhood.<sup>205</sup> Plaintiffs asserted there to be an “adverse disparate racial impact in violation of Title VI of the Civil Rights Act.”<sup>206</sup> Despite the fact that the Supreme Court had ruled there to be causes of action under § 1983 which were not limited merely to constitutional or equal rights infringements, and included federal statutes,<sup>207</sup> an examination of the § 602 stipulations of Title VI under a section 1983 action yielded two

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<sup>202</sup> See 42 U.S.C. §§ 2000d-2000d-1 (2000); *Sandoval*, 532 U.S. at 278-79.

<sup>203</sup> 28 C.F.R. § 42.104(b)(2) (2003).

<sup>204</sup> *Sandoval*, 532 U.S. at 278-79. See, *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974) (permitting private right of enforcement for rights granted by Title VI).

<sup>205</sup> *Garland*, *supra*, at 24.

<sup>206</sup> *Id.*

<sup>207</sup> See, Lisa S. Core, *supra*, at 213-24 (holding that statutory § 1983 claims are more favorable to plaintiffs than implied rights of action in accordance with its provision for a cause of action of "any rights, privileges, or immunities secured by the Constitution and laws" where explicit intent of the statute provides a strong footing for plaintiffs enforcing Title VI. See, *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that § 1983 provides a cause of action for I infringement of rights by of federal statutes and the constitution.) A remedy should exist should a plaintiff make evident there to be a federal right under § 1983. The defendant then is relied upon to demonstrate Congressional intent to foreclose the remedy. There is a difficult hurdle for the defendant based on a strong presumption supporting the use of § 1983. See, *Wilder*, 496 U.S. at 508.

limitations to the application of the law.<sup>208</sup> The court found that a § 1983 remedy is not due in cases where Congress has excluded such enforcement of the statute in its ratification.<sup>209</sup> Further, the court found that the § 1983 remedy is not due in cases where the statute has not granted any enforceable rights, privileges or immunities in the interpretation of § 1983.<sup>210</sup>

The plaintiff's claim was ultimately dismissed as the court presented that

An administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the EPA's disparate impact discrimination regulations.<sup>211</sup>

The door was closed for § 1983 as much as for the Equal Protection Act or Title VI.<sup>212</sup>

Thus, the major venues for the civil rights movement had been pronounced ineffective.

#### A. Nuances, concerns, stipulations

Legal scholars and other academics have presented a wide array of discussion surrounding the inadequacy of environmental justice adjudication and just as many interpretations of the law granting larger inclusion of racial disparities in environmental concerns.<sup>213</sup> Gerald Torres argues that "even if the environmental justice movement is a continuation of the civil rights struggle, the mechanical application of past solutions seems

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<sup>208</sup> *Id.*

<sup>209</sup> *Camden III*, 274 F.3d at 779.

<sup>210</sup> *Id.*

<sup>211</sup> *Camden III*, 274 F.3d at 774.

<sup>212</sup> (*Camden III*), 274 F.3d 771 (3d Cir. 2001), cert. denied, 536 U.S. 939 (2002).

<sup>213</sup> See, *Fleming, Justifying Incorporation, supra*, at 68-83 (presenting the use of SEQRA as a recourse for environmental justice claims due to its requirement for the relevant areas of environmental concern be granted a 'hard look,' the Court of Appeals has stated that the lead agency must satisfy SEQRA both 'procedurally and substantively.' SEQRA's broad reach beyond the limitations of NEPA holds that the lead agency must consider the natural environment, any social or economic implications, as well as the aesthetic and economic impacts of the proposed action. See also Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement under SEQRA*, 65 Alb. L. Rev. 421, 433-50 (2001) (supporting the use of SEQRA for its broad nature beyond that of NEPA; nevertheless its application is limited due to the more stringent requirements which preclude their ability to have standing compared to NEPA).

inappropriate in [the EJ] context."<sup>214</sup> This may certainly be true for the application of Title VI for environmental justice principles.

Litigant approaches for the environmental justice movement have been noted for being inherently limited as mode of enforcement for creating obstacles to involvement of communities of color impacted by a siting decision by moving the debate to the courtroom, “a forum notorious for favoring affluent Whites.”<sup>215</sup> Lawsuits are expensive and difficult to engage in for indigent individuals and working families; further, should the proceedings advance to an individual judgment or settlement, this may break up a community due to the uneven allocation of the settlement.<sup>216</sup> The community as a whole may be better served by engagement outside the judicial system.<sup>217</sup> As rulings on environmental justice decisions tend to be case specific, the potential for sweeping social change is limited.<sup>218</sup> Particular rulings are susceptible to be shot down or overruled, further reducing their utility for serious social change.<sup>219</sup> Further, a specific claim will only apply to a small category of environmental justice suits, meaning that drastic change in the manner which environmental justice issues are handled is unlikely.<sup>220</sup> Thus, only

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<sup>214</sup> *Id.* at 26.

<sup>215</sup> See, Mahoney, *supra* at 379; See, e.g., Steven A. Light & Kathryn R.L. Rand, *Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 Mich. J. Race & L. 1, 39 (1996).

<sup>216</sup> Mahoney, *supra*, at 379.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See, e.g., *El Pueblo para el Aire y Agua Limpio v. County of Kings*, 22 Env'tl. L. Rep. 20357 (Cal. App. Dep't Super. Ct. 1991). Here, the community of Kettleman City, California, an area with a marked Hispanic community, brought suit against the siting of a toxic waste incinerator. The plaintiffs brought into question the sanctity of an environmental impact statement, prepared according to the California Environmental Quality Act (“CEQA”). The court identified numerous violations of CEQA’s public participation requirements, most significantly in failing to provide a Spanish translation of the documents in question. The permit for the incinerator was denied by the court. Significant here is that, in attacking procedural compliance, one who had met the translation requisites would likely have been granted approval of the facility, giving the case very limited appeal as a precedent for other environmental litigants for social change. At the least, satisfying procedural compliance may make the expenses prohibitive and delay the siting of polluting facilities such that project managers may abandon the project due to prohibitive expenses. See also *Houston v. City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) P 15,625 (M.D. Fla. Dec. 22, 1989)). Partial Victories, *supra*, at 380-83. See also, Sheila Foster, *Impact Assessment*, in *The Law of*

minor victories may be declared in remedying the environmental inequities of minority communities.<sup>221</sup>

## B. Divergent Paths

The fissure between litigant and grassroots approaches in environmental justice cases reflects the broader divide between the Civil Rights movement and environmentalism. The civil rights prioritization of social justice concerns and environmentalists' agenda of natural resource conservation have been a long standing source of disagreement.<sup>222</sup> The differing experiences of these movements attests to the divergent approaches and perceptions of environmental justice, which Luke Cole affirms function to keep people of color and indigent communities powerless.<sup>223</sup> The mainstream environmental movement has materialized as an authoritative power in the 1960s and 1970s, comprised overwhelmingly of lawyers and scientists, which were predominantly white and middle class.<sup>224</sup> It was responsible for a wide array of environmental legislation which established an intricate regulatory process based on legal and scientific proficiency. In terming the environmental movement the 'legal-scientific movement' Cole affirms that environmental groups both marginalized grassroots communities and created a system which was largely inaccessible to lay persons.<sup>225</sup> The legal-scientific movement emphasizes protecting natural resources based on intrinsic, recreational and aesthetic values, while environmental justice proponents prioritize quality of live in human communities.<sup>226</sup>

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*Environmental Justice, Theories and Procedures to Address Disproportionate Risks*, 283-85, (Michael B. Gerrard, Ed., 1999).

<sup>221</sup> *Id.*

<sup>222</sup> Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 Am. U.L. Rev. 221, 256-68 (1997).

<sup>223</sup> Planning Milagros, *supra*, at 26-28.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

The regulatory system constructed aims to control pollution through risk management; polluters implement controls to monitor and decrease emissions of hazardous materials to tolerable limits. On the other hand, environmental justice advocates have the goal of pollution prevention with the optimal result being no risk to human health.<sup>227</sup> The environmental justice movement has coalesced through strong community organizing and political activism, and has proven this to be an effective manner to bring attention to governmental and corporate responsibility in land use decisions.<sup>228</sup> Scholars alike tend to agree that environmental justice testimonies resonates the loudest on the streets, in the form of people power, in contrast to any political effectiveness they may conjure.<sup>229</sup>

### VIII. Persistence of Inequality as a Wider Social Schema

The inability of environmental justice adjudication to garner significant footing in the court system holds considerable bearing for the manner in which we code, address and approach

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<sup>227</sup> *Id.*

<sup>228</sup> Fisher, *supra*, at 332.

<sup>229</sup> *Id. See*, Alice Kaswan, *supra* note 173 at 279- 83, 296-98 (1997). As the Civil Rights movement and environmental justice movement have the same goals of social justice, equal protection, and ending institutional discrimination, the successful application of diverse tactics laid the groundwork for the current environmental empowerment battle. The environmental justice movement is best equipped to engage in political protest on the streets and amass a local and national movement as the Civil Rights movement has. The community empowerment strategies employed at present may arguably stand a better chance than the Civil Rights movement as they are equipped with the institutions of the people of color movement. Their experience with community organizing and resistance may also make the environmental justice movement better prepared to emerge as a powerful force. Legislative and institutional recognition such as the Congressional Black Caucus allows for grassroots efforts to penetrate the mainstream environmental agenda.

The Shintech, Inc. controversy attests to the effectiveness of community empowerment strategies. A controversy in St. James Parish, Louisiana regarding a plan to implement a \$700 million PVC plant in a overwhelmingly minority community by Shintech, Inc. brought effective community engagement. As soon as community members became aware that the Louisiana Department of Environmental Quality (“LDEQ”) had attained approval for the air permits, petitions were filed with the EPA withdraw the permits for its environmental justice implications and on a technical basis.

The response from the community, including a filing of an environmental justice petition with the EPA on April 2, 1997, as well as a call for an adjudicatory hearing with the LDEQ on May 17<sup>th</sup>, 1997, led to several advances for the community. The permitting process was reopened for communication on any environmental justice issues between the permitting agency and concerned citizens. The air permit was ultimately rejected on a technical basis. The proposed plant was downsized and moved out of St. James Parish to Plaquemine, Louisiana. The new siting for the plant implicated there to be a communicative process regarding any environmental justice issues prior to submitting the permit application, attesting to the significance of the St. James Parish citizen efforts. See, R. Gregory Roberts, *supra*, note 27 at 255-69.

issues of inequality and prejudice for it to be regarded in a manner which is both morally innocuous and politically salient. For environmental citizen suits, the lack of legal recognition of indigent communities as a suspect category is an obvious concern for environmental justice advocates. The manner by which race therefore “trumps” income status begs the question of why or perhaps until when discriminated groups must continue to wrestle with the disparate treatment of the law by what is perceived as individual choice and public risk.

As the intersections of race, class, and political power are complex, there are a number of modes by which marginalized communities may become affected by inequities in environmental quality benefits and burdens.<sup>230</sup> These facets do not necessarily work smoothly with the civil rights framework or legal system generally. Robert D. Bullard, an eminent scholar of environmental justice, posits that though race and class are “intricately linked in our society” race “continues to be a potent predictor of where people live, which communities get dumped on, and which are spared.” In this vein, under the civil rights framework, impacts based on income does not work as well as it does for race. Race is widely recognized under constitutional law as a suspect categorization. The courts are required to use strict scrutiny and demonstrate a convincing government interest as it is applied as a foundation for making policy. However, federal courts do not recognize class as a suspect category or otherwise requisite of singular merit. Indigent communities therefore are accorded the argumentation that they simply have fewer options than wealthy ones. Constitutional and statutory terms do not provide any grounds for assertions that class or income as a category amounts to an actionable claim. Some have argued that affirmative action should be considered as a remedy for inequities due to income,

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<sup>230</sup> See, Gary C. Bryner, *Assessing Claims of Environmental Justice: Conceptual Frameworks, Justice and Natural Resources: Concepts, Strategies, and Applications*, Kathryn M. Mutz, Gary C. Bryner, & Douglas S. Kenney, eds., 34-35, 38-39 (2002); Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism has to Teach Environmentalists Today*, 31 *Env'tl. L.* 229, 254, 266 (2001).

rather than racial status. This view has yet to receive official legal or constitutional recognition. Civil rights law therefore does not have a large enough “tent” for environmental injustices in regards to class.

However, the familiar rational basis test by the Equal Protection Clause protects statutory classifications other than suspect categories such as race or an elemental right such as free speech granted there is a rational basis for the deliberation.<sup>231</sup> One noted case regarding a land use decision recognized classifications struck down for being irrational. A zoning law which excluded a group home for retarded individuals was ruled invalid in lacking a rational basis. Though the mentally retarded are not a suspect category the ordinance was held invalid since it was deficient of a rational basis. The zoning law provided for the institution of all sorts of residences, such as boarding houses, apartments, and nursing homes for the elderly and those undergoing recovery. Notwithstanding these designations, the ordinance excluded homes for the mentally ill. The Court stated the language “appears to us to rest on an irrational prejudice against the mentally retarded.”<sup>232</sup>

“The Justices had no difficulty in invalidating the zoning regulation at issue in *Cleburne* because the denial of a permit for the group of mentally retarded persons to live together could not in any conceivable way promote any interest other than the desire to exclude mentally retarded persons from the city.”<sup>233</sup>

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<sup>231</sup> Philip Weinberg, *Equal Protection*, in *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, 5-6 (Michael B. Gerrard, Ed., 1999).

<sup>232</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), citing *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 252 Ga. 484, 314 S.E.2d 218 (1984), dismissed for want of substantial federal question 469 U.S. 802, 105 S.Ct. 57, 83 L.Ed.2d 8 (1984).

<sup>233</sup> John E. Nowak & Ronald D. Rotunda, *Equal Protection*, Constitutional Law, sixth edition, § 14.3, page 655-56 (treatise)

## IX. Sustainable Development and Environmental Justice: Friend or Foe?

To explore the usefulness of sustainability to environmental justice, where both phenomena are clearly lacking in their ability to present substantive solutions and function symbiotically, an assemblage of ideas and programs operating with a balanced approach are useful.<sup>234</sup> The concepts of environmental justice and sustainability are both highly contested though present an attractive solution to where the “critical nexus” of the concepts overlap.<sup>235</sup> Thus, working toward sustainability and applying environmental justice principles in the areas of land use planning, solid waste, use of hazardous substances and residential energy use serves to advance the precepts of urban ecological thought in both areas.<sup>236</sup> The putative attractiveness of both concepts is the prioritization of community building and making room for community members to play a significant role in decisionmaking.

The widespread recognition of sustainable development as a public policy goal means that, as for environmental justice, there are many definitions, with the implications of each working definition carrying different and often elusive implications. Where sustainable development is meant to stand as “proxy for something desirable; a better way of living than what we currently have” where its “happy vagueness” effectively makes it a political buzzword.<sup>237</sup> Nevertheless, Agyeman, Bullard and Evans frame sustainability as “the need to ensure a better quality of life for all, now and into the future, in a just and equitable manner, whilst living

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<sup>234</sup> See, e.g., Julian Agyeman & Tom Evans, *Rethinking Sustainable Development: Toward Just Sustainability in Urban Communities: Building Equity Rights with Sustainable Solutions*, 590 *Annals* 35 (2003).

<sup>235</sup> *Id.* at 35-36.

<sup>236</sup> See *Id.*

<sup>237</sup> See, Lamont C. Hempel, *Conceptual and Analytical Challenges in Building Sustainable Communities*, in *Toward Sustainable Communities: Transition and Transformations in Environmental Policy* 43 (Daniel A. Mazmanian & Michael E. Kraft, eds., 1999); Emily Fisher, *Sustainable Development and Environmental Justice: Same Planet, Different Worlds?* 26 *Environ Ent'l L. & Pol'y J.* 201, 202 (2003).

within the limits of supporting ecosystems." <sup>238</sup> In the vein of sustainability as a "happy vagueness" is it relevant to mention that the definitions supplied by the World Commission on Environment and Development<sup>239</sup> and the International Union for the Conservation of Nature<sup>240</sup> do not identify justice or fairness- which is of utmost importance to the advancement of a mutually supportive relationship of these concepts.

The "First Annual Colloquium" on sustainability and environmental justice was held in 2000 at Jackson State University, for which Minister Benjamin Muhammad described sustainability as a manner by which to stimulate economic growth without degrading the environment. <sup>241</sup> He posits that the "ultimate question" is whether all people entitled to the same opportunities to live in prosperity. This presents the premise of freedom such that access to elemental requisites of life should be available outside of the elite.<sup>242</sup> Another panelist, Professor Robert W. Collin, proposed that the "absence of community voices, particularly minority communities, in sustainable development will move us toward 'bioregionally based sustainability where it's greenfields for whites and brownfields for browns unless the community comes in and grabs a say.' " Thus, the only workable definitions of sustainability are those which recognize the historic inequities in environmental issues.<sup>243</sup>

Land use planning has often led to environmental burdens being imposed upon low income and communities of color, as well as encouraging wanton resource consumption and sprawled out neighborhoods. A shift in land use planning has recognized the need for a prioritization of efficient land development, mixed use housing and other developments, as well

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<sup>238</sup> See, Julian Agyeman, Robert Bullard, and Tom Evans, *Exploring the nexus: Bringing together sustainability, environmental justice and equity*. 6 *Space and Polity* 77-90. (2002).

<sup>239</sup> World Commission on Environment and Development, *Our Common Future*, Oxford (1987).

<sup>240</sup> International Union for the Conservation of Nature, *Caring for the Earth* (1991).

<sup>241</sup> Fisher, *supra* at 204.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

as the remediation of expired industrial lands.<sup>244</sup> Further, adaptations in procedure can integrate a more prominent role for community members for involvement in the planning decision making. Making the needs of the community members a priority is being implemented in connecting them to the urban planning procedures.<sup>245</sup>

Other scholars have examined the principles of sustainable development and environmental justice to foreshadow inconsistencies in their models. Campbell cites these individually; he further posits that a planner is able to move toward sustainability at the nexus of the commonly entertained sustainability triangle “green, profitable and fair.”<sup>246</sup>

I must voice alarm here as the death of sustainability may lie in its application as a marketing tool, where it essentially functions to increase the distance between environmental justice and sustainability. The popular application of the term, in relation to goods, such as solar paneling or a naturally produced designer clothes or hybrid automobiles, sounds like a register for the well heeled who desire all the same comforts with less guilt. The term “green” has also been prey to this gambit of consumerist practices which reinforce the present patterns of consumption and waste.<sup>247</sup> Thus, escaping this mode of ersatz environmental advocacy is imperative in bridging these movements.

On this note, if we are to construe development as increasing consumption with a diminishing resource base, correlating development with sustainability seems absurd.<sup>248</sup>

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<sup>244</sup> *Id.* at 42.

<sup>245</sup> *Id.*

<sup>246</sup> Scott Campbell, *Green Cities, Growing Cities, Just Cities? Urban planning and the Contradictions of Sustainable Development*, 62 *Journal of the American Planning Association* 296-312 (1996); Julian Agyeman & Tom Evans, *Rethinking Sustainable Development: Toward Just Sustainability in Urban Communities: Building Equity Rights with Sustainable Solutions*, 590 *Annals* 35 (2003).

<sup>247</sup> Emily Fisher, *Sustainable Development and Environmental Justice: Same Planet, Different Worlds?* 26 *Environ't L. & Pol'y J.* 202 (2003).

<sup>248</sup> Fisher, *supra*, at 205.

Nevertheless, sustainable development with a community focus prioritizes health and longevity of the natural and human environment.

### Approaches to Holistic Healing: Linkages and Coalition Building

Social movement actors have expressed that single issue activism does not work.<sup>249</sup> Working as a coalition is an indispensable element to the success of issues which affect isolated communities. Environmental justice and sustainability may therefore be mutually beneficial though prioritizing different objectives. Thus, as environmental justice seeks to remedy the disparate impacts of environmental burdens, failing to question the existence of environmental burdens in the first place puts environmental justice advocates at a great disadvantage.<sup>250</sup> By working to close up the cycle of the production of waste by resource consumption, these causes can be linked with the aim to remedy human's relation to the natural environment such that the earth is not being consistently ravaged and depleted.

Sustainable development works on the bases that, with the opportunity to do so, nature can do an n astonishing amount to reprocess waste products, control temperatures, purify the air, and regulate excesses in water flow. Sustainable development is also economically driven toward creating communities which can be held economically accountable and self-reliant. This means identifying and fulfilling the needs of a community, without infringing upon the capacity of its neighbors to do the same.<sup>251</sup>

There are notable linkages between sustainability, conservation, and environmental justice as a public policy tool. In recognizing the multitude of needs of varying communities, environmental justice shares the same concern of the Endangered Species Act (“ESA”) with

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<sup>249</sup> Interview with Sarah Schulman, Professor, City University of New York, (Nov. 23, 2008).

<sup>250</sup> Fisher, *supra*, at 205.

<sup>251</sup> Fisher, *supra*, at 208.

populations burdened by environmental calamity and destruction. The irrefutable connections between protecting natural resources and the health of all communities must be prioritized. That a clean environment can positively impact the holistic health of community residents should be readily integrated into environmental law.<sup>252</sup>

## X. Conclusion

The historic prioritization of environmental laws on wilderness areas and neglect of urban blight have made many social justice proponents skeptical of environmental legislation.<sup>253</sup> With this in mind, Title VI may serve as a means to link these divergent causes, if anything by the stringent application of technical data and environmental legislation to the people of color movement.<sup>254</sup> Bringing a marginal movement into the forefront surely needs the solid foundation which working with the government through established policies provides. In the same note, the extent to which Title VI has been unable to secure remedy to its plaintiffs reinforces critics' claims of the environmental justice movement as an ineffective means to grant significant change in communities. Only time will tell if Title VI and the closing of doors with the Sandoval ruling have in fact resonated the death toll to a radical, forthcoming political movement. In light of these significant challenges, sustainable development presents the prospect of reconciling environmental and social justice concerns.

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<sup>252</sup> Barry E. Hill & Nicolas Targ, *The Link Between Natural Resources and the Issue of Environmental Justice*, 28 B.C. Env't'l L. Rev. 1, 4-5, (2000).

<sup>253</sup> Fisher, *supra*, at 332.

<sup>254</sup> *Id.*

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United States Environmental Protection Agency, Notice of Establishment of the National Environmental Justice Advisory Council and Request for Suggestions of Candidates for Membership. 58 Fed Reg. 59,723, 59,723-801 (Nov 10, 1993).....	7

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