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Environmental Burdens and Democratic Justice

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ENVIRONMENTAL BURDENS AND DEMOCRATIC JUSTICE

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I. Introduction*

In 1975, the United States Commission on Civil Rights chided the United States Environmental Protection Agency (the "EPA")

 Counsel to the Attorney General, on leave from the University of Texas Law School. I would like to thank the hard work and dedication of Catherine Sheafor and John Lee, lawyers in the Environment and Natural Resources Division of the Department of Justice. This Article could not have been written without their assistance. The views expressed in this Article are mine alone and do not represent the positions of the Department of Justice. Resources of the Department were not used in the production of this Article.

* This Article argues for a reform of the regulatory process we apply to scrutinize an increasing number of environmental justice issues. In arguing for such reform, it is important to point out both what this Article attempts to do, and what it does not attempt to do.

The Article is not intended to prescribe specific regulatory responses to any one particular environmental justice case or anticipated case. The analysis recognizes that each environmental justice claim has its own set of regulatory necessities and each Department and agency has its own regulatory culture. In every instance in which an environmental justice claim is raised, the particular facts of that case must be considered within the context of applicable laws, the general federal administrative structure, and an agency's individual regulatory culture.

On the other hand, this Article attempts to address regulatory reform from two points of view. First, it offers a general regulatory prescription for all policy makers who may be required to think through environmental justice issues when they arise. Second, it provides a generic regulatory template that may guide independent agencies in their handling of environmental justice issues as general reform of the regulatory process proceeds.

On February 11, 1994, President Clinton issued an Executive Order, Exec. Order 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), promoting federal actions to address environmental justice in minority and low income communities. The Executive Order directs each federal agency to achieve environmental justice as part of its mission to the greatest extent practicable and permitted by law. Agencies are required to identify programs, policies, or activities which cause disproportionately high and adverse human health or environmental effects. It further directs agencies to develop strategies to address those effects.

The Executive Order is a response to many of the regulatory problems diagnosed in the Article. By requiring each agency to examine its own internal administrative procedures, the Executive Order respects the independent regulatory cultures which exist throughout the federal government. By establishing a federal working group whose jurisdiction cuts across all federal agencies, the Executive Order recognizes the need to make certain the independent regulatory processes proceed coherently.

Like the Executive Order, this Article advocates a new way of addressing environmental justice issues within the current regulatory regime. It encourages participation of affected communities in policy decisions which may have adverse

for its failure to recognize its responsibility "to ensure that conditions such as the lack of fair housing laws, absence of a fair housing agency or the existence of exclusionary zoning ordinances do not contribute to the effective exclusion of minorities from EPA assistance."[1] The Commission simultaneously declared that if EPA did not take "positive steps to insure an end to the systematic discrimination which has resulted in inadequate sewer services in many minority communities," it would be responsible for perpetuating discrimination.[2] In response, EPA claimed it was not responsible for advocating the construction of sewer services in minority communities nationwide.[3]

Until recently, EPA continued to take a narrow view of its mission to protect public health and the environment.[4] Now, after investigation and criticism of the distributional inequities of environmental policies by the legal academic community,[5] other

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human health or environmental effects. It also directs decision makers to consider the fact of potential adverse environmental effects when making regulatory decisions. Increased participation and consideration of adverse effects ought to become hallmarks of regulatory reform in this Administration as we address the issues central to achieving environmental justice.

1. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, 598-99 (1975).

2. *Id.* at 595.

3. *Id.* at 589 (Letter from Carol M. Thomas, Director, EPA Office of Civil Rights, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights (July 8, 1975)).

4. *See, e.g., id.*; William K. Reilly, *Environmental Equity: EPA's Position*, 18 EPA J. 18, 22 (Mar./Apr. 1992) (minorities are often the chief beneficiaries of more general efforts to protect the environment).

5. Most legal academic investigations have come in the form of legal think pieces. Many were published within the last year and most focus on what citizens can do to get federal and state decisionmakers to remedy environmental racism. *See, e.g.*, Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); Edward P. Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993); Kelly M. Colquette & Elizabeth A.H. Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153 (1991); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787 (1993); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271 (1992); R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777 (1991); Rachel Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991); Naikang Tsao, Note, *Ameliorating Environmental Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366 (1992).

academics,[6] civil rights activists, and grass roots organizers,[7] EPA has recognized that it must investigate the distributional effects of its policies and practices.[8] The Clinton Administration and EPA Administrator Browner have declared their commitment to ensuring that environmental benefits and burdens are distributed fairly.[9]

To date, however, there has been relatively little academic discussion about how EPA and other federal agencies can achieve environmental justice.[10] In addition, most legal academic literature has focused either on simply identifying the legal issues associated with race and environmental law or on developing a litigation strategy for remedying "environmental racism."[11] None of the legal ac-

6. Other academics have explored the issue in similar pieces. *See, e.g.*, ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY (1990); Pat Bryant, *Toxics and Racial Justice*, 20 SOC. POL'Y, Summer 1989, at 48; Paul Mohai, *Black Environmentalism*, 71 SOC. SCI. Q. 744 (1990).

7. While academics have focused on theoretical analyses of distributional inequities and theoretical solutions to such inequities, civil rights activists and grass roots organizers have banded together to plead their cause. Luke W. Cole, *Remedies for Environmental Racism: A View From the Field*, 90 MICH. L. REV. 1991 (1992); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L. Q. 619 (1992); Bryant, *supra* note 6.

8. *See, e.g., EPA Agency Announces Advisory Panel on Environmental Justice Issues*, BNA Nat'l Envtl. Daily (Nov. 10, 1993); Craig Flournoy, *EPA Chief Vows West Dallas Lead Cleanup*, DALLAS MORNING NEWS, July 15, 1993, at 26A.

9. On Earth Day, April 21, 1993, President Clinton announced that EPA and the Department of Justice would "begin an interagency review of federal, state, and local regulations and enforcement that affect communities of color and low-income communities with the goal of formulating an aggressive investigation of the inequalities in exposure to environmental hazards." In addition, EPA Administrator Carol Browner listed "environmental justice" as one of four priorities for her term at EPA. And, Administrator Browner affirmed the Administration's commitment to environmental justice, stating that "we must explicitly recognize the ethnic, economic, and cultural make-up of the people we are trying to protect." On February 11, 1994, President Clinton signed Executive Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. That Order requires all federal agencies conducting activities that substantially affect human health or the environment to make environmental justice a priority. To that end, each federal agency must develop an environmental justice strategy by December 11, 1994. Exec. Order No. 12,898, 58 Fed. Reg. 63,955 (1994).

10. Although others have attempted to define environmental justice, *see, e.g.*, Deeohn Ferris, *A Challenge to EPA*, 18 EPA J. 28 (1992); Dorceta Taylor, *The Environmental Justice Movement*, 18 EPA J. 23, 24 (1992), this Article does not define the term. Rather, it assumes that the definition continues to evolve as policymakers struggle to develop an awareness and understanding of the potential distributional effects of environmental policies and practices. After all, without a full understanding of environmental risks, the distribution of those risks and the effects of particular policies on distribution patterns, policymakers can neither determine what is a just distribution nor develop a strategy for achieving "justice."

11. *See, e.g.*, Godsil, *supra* note 5; Tsao, *supra* note 5. Many scholars and activists have used the term "environmental racism" to describe the disproportionate burden

ademic literature has focused on the benefits of using an administrative framework to define or develop sustainable solutions to the distributional inequities of environmental laws. The purpose of this Article is to explain the benefits of pursuing an administrative model for change.[12] Unlike other legal academic pieces, this Article does not focus exclusively on the presence of distributional inequities or on private litigants' judicial remedies for distributional inequities. Rather, it accepts that distributional inequities are present and it offers a broader, holistic, front-end approach to the administration of environmental laws with the goal of creating a framework which federal agencies can use to both achieve and maintain environmental justice.

This Article is divided into three parts. First, it briefly discusses the history of the environmental justice movement and of historical political responses to distributional issues associated with the environment and human health. The second part of the Article describes the problems with relying exclusively on litigation as a mechanism for achieving environmental justice. Finally, this Article presents the theoretical basis for pursuing administrative solutions to the inequitable distribution of environmental hazards.

II. Background of Environmental Justice

In 1982, North Carolina officials decided to locate a poly-chlorinated biphenyl landfill near a predominantly black community in Warren County, North Carolina, resulting in protests similar to those associated with the civil rights movement in the 1960s.[13] Thereafter, Congressman Walter E. Fauntroy requested an investi-

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of environmental hazards on minority communities. In order to make sense of that term, one must have a clear idea of the highly charged and apparent meaning the term has. *See* Gerald Torres, *Race, Class, and Environmental Regulation*, 63 UNIV. COL. L. REV. 839 (1992). The meaning is clouded to the extent that the term gets broadly applied to a variety of activities and outcomes. *Id.* Because the issues surrounding environmental justice are so complex, one should be particularly careful not to adopt a single model or single slogan to assess or criticize the deficiencies of environmental protection policy. *Id.* at 847. Rather, environmental protection policy should be approached with a sensitivity to both the everyday reality of all affected groups and to the limitations of natural systems. *Id.* at 847-48; *see also* Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 UNIV. COL. L. REV. 921 (1992); A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 UNIV. COL. L. REV. 871 (1992). Only with this awareness can those who construct environmental policy develop policies that promote and sustain environmental justice.

12. *See infra* part IV.

13. *See* Godsil, *supra* note 5, at 394.

gation by the U.S. General Accounting Office ("GAO") of the socioeconomic and racial composition of the communities surrounding hazardous waste landfills in the South.[14] The 1983 GAO Study found that three of the four major landfills were located in predominantly black communities where citizens lived disproportionately below the poverty line.[15]

In 1987, motivated by the events in North Carolina and the GAO report, the United Church of Christ ("UCC") created a Commission for Racial Justice to conduct a nationwide study of the distribution of hazardous waste sites to determine if waste sites were disproportionately located in poor, minority neighborhoods.[16] The UCC's study on the distribution of hazardous waste sites found that race proved to be the most significant variable associated with the location of commercial hazardous waste facilities.[17]

Although the UCC Report spawned widespread inquiry into the correlation between race and environmental hazards, environmental justice really did not rise to the level of public debate until January 1990, when academicians and civil rights leaders convened the Michigan Conference on Race and Incidence of Environmental Hazards.

Since 1990, academicians, civil rights leaders and environmental groups have worked with grass roots activists to identify inequities in the distribution of environmental hazards and have found that distributional inequities exist in many areas, not just in hazardous waste facility siting. For example, minority and lower income children retain the highest risk of elevated blood lead levels.[18] Some studies show that minorities disproportionately suffer from occupational health risks such as exposure to pesticides, solvents, and metals.[19] In the contiguous United States, greater percentages of African Americans and Hispanics live in areas of reduced air quality than do whites.[20] Native Americans consume greater amounts

14. U.S. General Accounting Office, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) at 2 [hereinafter GAO STUDY].

15. *Id.*

16. UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter UCC REPORT].

17. *Id.*

18. Joel Schwarts & Ronnie Levin, *Lead: Example of the Job Ahead*, 18 EPA J. 42, 44 (1992).

19. Ivette Perfecto & Baldemar Valasquez, *Farm Workers: Among the Least Protected*, 18 EPA J. 13, 14 (1992).

20. D.R. Wernette & L.A. Nieves, *Breathing Polluted Air*, 18 EPA J. 16, 16-17 (1992).

of Great Lakes fish than the general population and may be at greater risk for dietary exposure to toxic chemicals.[21] Finally, pollution control often results in displaced job opportunities for minority and low-income workers.[22]

Traditional civil rights groups and environmental organizations have joined grass roots organizations and are beginning to search for ways to reduce these disproportionate effects on minorities.[23] Solutions, however, will not come overnight because policymakers and advocacy groups are still defining the issues. That process must not be taken lightly as the framing of the "problem" necessarily affects the framing of solutions, and those solutions can take a variety of forms.

III. Seeking Environmental Justice in the Courtroom

Throughout this century, people of color, when faced with incidents of racial oppression and discrimination, have successfully invoked the judiciary to execute the guarantees of our Constitution.[24] Not surprisingly, minority communities turned to the courts in order to seek redress for the disproportionate environmental burdens placed upon them. However, litigation has produced only limited success in combatting racially discriminatory inequities in the environmental arena.

This section argues that litigation, while at times useful and even necessary, may not be the most productive forum for people of color to address the environmental hazards imposed upon their communities. The doctrinal constraints of the equal protection clause, statutory limitations of substantive environmental laws and regulations, as well as practical and political considerations, all

21. Patrick C. West, *Health Concerns for Fish-Eating Tribes?*, 18 EPA J. 15 (1992). Significantly, Exec. Order 12,898 requires additional investigation of fish consumption patterns.

22. When jobs are displaced because of pollution control costs, it is more likely that those with less seniority lose their jobs. Lazarus, *supra* note 5, at 795, 799-800. Since minorities typically comprise a disproportionately large percentage of employees with lower seniority, minorities are often the ones that are displaced.

23. For example, many civil rights leaders and environmental justice organizers participated last summer and fall in the National Advisory Committee Environmental Policy and Technology.

24. *See, e.g.*, Thornburgh v. Gingles, 478 U.S. 30 (1986) (voting); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment); Brown v. Board of Educ., 349 U.S. 294 (1955) (education).

counsel that the battle for environmental justice may be better fought in the political, rather than judicial, forum.[25]

Presently, environmental justice causes of action[26] fall into two main categories: (1) antidiscrimination causes of action, and (2) environmental statutory causes of action. Antidiscrimination causes of action in the environmental context have relied primarily upon the Equal Protection Clause of the Fifth and Fourteenth Amendments.[27] For such claims, the distributional inequities of environmental risks and hazards serve as the substantive basis of the grievance. Yet, the straight civil rights or antidiscrimination approach has not had great success.[28] The failures owe less to the merits of the claims than to the levels of proof required to prevail in cases of alleged intentional discrimination.

Environmental statutory causes of action, on the other hand, ostensibly seek to enforce the statutory and regulatory obligations imposed upon government agencies and private actors by various federal and state environmental laws. In these cases, while distributional inequities may be the underlying motivation of such claims, they are not directly relevant to the subject matter of the claim. As a result, these claims have had more success. However, the scope of these types of claims may be limited. A discussion of each category follows.[29]

A. The Antidiscrimination Cases: Equal Protection and the Search for Purposeful Discrimination

If the disparate impact test developed in *Griggs v. Duke Power Co.*[30] heralded the heyday of the antidiscrimination era in the courtroom,[31] *Washington v. Davis*[32] quickly signalled its demise. In

25. I do not mean to suggest that litigation should be avoided altogether. Rather, I believe that minority communities—and their advocates—must recognize the limits and constraints of the judicial process if they are to utilize their resources most effectively.

26. By "environmental justice causes of action" I mean those legal claims that seek to redress the greater environmental burdens and risks that minority communities are forced to bear.

27. *See infra* nn. 30-41 for a discussion of environmental justice and the Equal Protection clause. To date, few cases have raised state constitutional claims. For a discussion of such claims *see* Tsao, *supra* note 5, at 394-405.

28. *See infra* part II.A.

29. Certainly, these are not the only avenues to obtain judicial relief. For further discussions of state law claims, *see*, Tsao, *supra* note 5; Reich, *supra* note 5, at 300-13.

30. 401 U.S. 424 (1971) (diploma as condition of employment unconstitutional).

31. For such a view of *Griggs*, *see* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1093-99 (1978).

Davis, plaintiffs challenged an admission test which was part of an application to enroll in a police training program and purported to measure an applicant's verbal ability, vocabulary, and reading comprehension.[33] Four times as many black applicants failed the test as white applicants.[34] Plaintiffs sued, contending that the test violated the Equal Protection Clause.[35]

Denying plaintiffs' appeal, the Supreme Court held that the Equal Protection Clause requires a showing of a racially discriminatory intent or purpose in order to establish a violation.[36] "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution," wrote the Court.[37] In support, the Court reasoned that a different rule would possibly invalidate "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more beneficial to the poor and to the average black than to the more affluent white."[38]

Village of Arlington Heights v. Metropolitan Housing Development Corporation[39] demonstrates how the Court has applied its

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32. 426 U.S. 229 (1976).

33. *Id.* at 234-35.

34. *Id.* at 237.

35. *Id.*

36. In so doing, the Supreme Court drew a distinction between employment discrimination suits brought under Title VII and those filed under the Equal Protection Clause:

> We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

Id. at 239.

37. *Id.* at 242. While the Court did not specify to what extent evidence of racially disparate impact is relevant to the inquiry, it did cite Yick Wo v. Hopkins, 118 U.S. 356 (1886), as an instance where such evidence was sufficient to establish that a statute "otherwise neutral on its face" violated the Equal Protection Clause. 426 U.S. at 241. Interestingly, Justice Stevens did not consider this of much use since, in *Yick Wo*, the disproportion was so dramatic that "it really does not matter whether the standard is phrased in terms of purpose or effect." *Washington v. Davis*, 426 U.S. at 254 (Stevens, J., concurring).

38. 426 U.S. at 248 (citation omitted). One commentator caustically noted that such a "parade of horribles" argument "would be embarrassing in a first-year law class." Freeman, *supra* note 30, at 1115. The intent requirement espoused in Washington v. Davis immediately provoked much academic debate. *See, e.g.*, Derek A. Bell, *Foreword: Equal Employment and the Continuing Need for Self-Help*, 8 LOY. U. CHI. L.J. 681 (1977); Freeman, *supra* note 30; Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). For an interesting sociological discussion of *Washington v. Davis*, *see* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 369-76 (1987).

39. 429 U.S. 252 (1977).

holding in *Washington v. Davis* to government decisions. Recognizing that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one,"[40] the Court outlined several factors to consider when searching for discriminatory intent: (1) the impact of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) any departures from the normal procedural or substantive sequence of the decision-making process; and (5) the legislative or administrative history of the challenged action.[41] Then, in a closing footnote, the Court observed that, even if a racially motivated purpose were established, the government had the opportunity to show that "the same decision would have resulted even had the impermissible purpose not been considered."[42] Thus, not only did the plaintiffs have to show that the decision was motivated by intentional discrimination, but that the discrimination was prejudicial.

It is clear that the burden of proving racially discriminatory intent is an extremely difficult hurdle to overcome. This is particularly evident in the context of environmental discrimination cases. To date, four reported cases[43] have relied upon the Equal Protection Clause to challenge discriminatory sitings of solid waste landfills by municipal agencies.[44] In all four cases, courts found that there was insufficient evidence of racially discriminatory intent.

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40. *Id.* at 265 (citation omitted).

41. *Id.* at 266-68.

42. *Id.* at 270-71 n. 21 (citing Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274 (1977)).

43. *See* R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission, 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986). For an example of an administrative case, see *In re* Genesee Power Station Ltd. Partnership, PDS Appeals Nos. 93-1 to 93-7 (Envtl. Appeals Board, U.S. Envtl. Protection Agency Sept. 8, 1993).

This Article limits its discussion to federal equal protection doctrine. An antidiscrimination suit can also be brought under state equal protection provisions and equal rights statutes. However, at the present time, no such cases have been reported. For a discussion of potential state causes of action, see *supra* notes 27-28.

44. While the environmental justice movement began with investigations of hazardous waste facility siting patterns, and the equal protection cases discussed herein are siting challenges, there are other environmental burdens that have not yet been challenged in court. Some of these burdens are described above. *See supra* notes 19-23 and accompanying text.

Two of these cases, in particular, underscore the difficulty of proving intentional racial animus—*Bean v. Southwestern Waste Management Corp.*[45] and *R.I.S.E., Inc. v. Kay.*[46]

In *Bean v. Southwestern Waste Management Corp.*,[47] the plaintiffs contested a permit granted by the Texas Department of Health ("TDH") to Southwestern Waste Management to operate a solid waste facility. Plaintiffs pointed out that a similar permit for the identical location previously had been denied,[48] the facility was to be built in an area[49] where 70% of the population were persons of color.[50] The site was only 1700 feet from a predominately black high school,[51] and was adjacent to a predominately black neighborhood.[52]

Suing under 42 U.S.C. § 1983,[53] plaintiffs sought a preliminary injunction on the grounds that (1) TDH's approval of the permit was indicative of a discriminatory pattern and practice of locating solid waste facilities in minority areas,[54] and (2) TDH's approval, "in the context of the historical placement of solid waste sites and the events surrounding the application, constituted discrimination."[55]

Relying upon *Washington v. Davis*[56] and *Arlington Heights*,[57] the court held that the plaintiffs had failed to show that the permit

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45. 482 F. Supp. 673.

46. 768 F. Supp. 1144; *see* Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is What We Measure*, 21 FORD. URB. L. J. 633, 660-65 (1993).

47. 482 F. Supp. at 673.

48. *Id.* at 679.

49. *See* Rodriguez v. Barcelo, 358 F. Supp. 43, 45 (D.P.R. 1973).

50. *Bean*, 482 F. Supp. at 678.

51. *Id.* at 679.

52. *Id.* at 680.

53. 42 U.S.C. § 1983 (1988) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

54. Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 677, *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

55. *Id.* at 678.

56. *See supra* text accompanying notes 32-38.

57. *See supra* text accompanying notes 39-42.

issuance was motivated by racial animus.[58] Notably, the court refused to impute the past actions of the Texas Department of Water Resources ("TDWR"), a sister state agency, to TDH when analyzing the existence of past discrimination.[59] Moreover, finding that the presence of two sites was statistically insignificant, the court rejected plaintiffs' claim that there was a history of discriminatory siting.[60] Finally, even though there was evidence that 15% of Houston's solid waste sites were located in an area containing only 7% of the population and that 70% of those residing in the area were persons of color, the court found no evidence of disparate impact.[61] While conceding that the permit decision was "illogical" and "unfortunate and insensitive," the court concluded there was not sufficient evidence to prove racially motivated intent.[62]

In *R.I.S.E, Inc. v. Kay*,[63] the King and Queen County Board of Supervisors authorized the development of a solid waste disposal facility.[64] Although the population of the County was 50% black and 50% white, the population within a half-mile radius of the proposed site was 64% black and 36% white.[65] Moreover, three other landfills had been approved by the County and were located in areas with large minority populations.[66] Furthermore, in the one instance where the County had opposed the operation of a landfill, the surrounding community was predominately white.[67]

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58. The court noted, "[T]he plaintiffs must show not just that the decision to grant the permit is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race." *Bean*, 482 F. Supp. at 677-80.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 680. The court's deference to the County is striking:

> If this Court were TDH, it might very well have denied this permit. It simply *does not make sense* to put a solid waste site so close to a high school, particularly one with no air conditioning. *Nor does it make sense* to put the land site so close to a residential neighborhood. But I am not TDH and for all I know, TDH may regularly approve of solid waste sites located near schools and residential areas, *as illogical as that may seem.*

Id. at 679-80 (emphasis added).

63. 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

64. *Id.* at 1146.

65. *Id.* at 1148.

66. The first, Mascot landfill, was located in an area where the population within a one-mile radius of the site was 100% black. In 1971, Dahlgren landfill was constructed in an area that was 90% to 95% black. Lastly, in 1977, the Owenton landfill was placed in an area where 100% of the residents within a half-mile radius of the site were black.

67. *R.I.S.E.*, Inc. v. Kay, 768 F. Supp. at 1149.

Given these facts, the *R.I.S.E.* court acknowledged that the proposed facility would disproportionately impact people of color.[68] Moreover, the court agreed that the County had historically located landfills in predominantly minority communities.[69] The court even recognized the possibility that the Board may "have been more concerned about the economic and legal plight of the County as a whole than the sentiments of residents who opposed the placement of the landfill in their neighborhood."[70] Nevertheless, the court held that the plaintiffs had fallen short of their burden to prove intentional discrimination.[71]

As *Bean* and *R.I.S.E.* illustrate, the burden to establish racially discriminatory purpose or intent, as a legal matter, is tremendous, particularly when the decisions at issue are governmental decisions, as they often are in the environmental context.[72] In fact, more often than not, environmental decisions can be—and often are—justified upon a host of "facially neutral" factors[73] such as the economic conditions of a particular neighborhood or the environmental conditions of a specific locale.[74] Nevertheless, the district courts' reluctance to find discriminatory intent can be distinguished from the apparent willingness of other courts to find purposeful discrimination in cases challenging the disparate allocation of municipal services.[75]

For instance, in *Dowell v. City of Apopka*,[76] black residents of Apopka alleged that the City had violated the Equal Protection

68. *Id.*

69. *Id.* at 1149.

70. *Id.* at 1150.

71. *Id.*

72. As the court noted in *Arlington Heights*, to divine a particular legislative or administrative intent underlying an administrative action or decision is itself a formidable task. 429 U.S. at 564-66.

73. Indeed, in this day and age, few would be so obtuse as to admit, on the record, that he or she made a particular decision based upon purely racial considerations. There are few "smoking guns" when it comes to racial discrimination.

74. *See, e.g.*, *R.I.S.E.* at 1150 (noting that "the Board appears to have balanced the economic, environmental, and cultural needs"). This is not to say that all such justifications are inherently suspect. However, attempts to call methods of discrimination and oppression by other names are not uncommon throughout the history of this nation. Therefore, the courts should look upon such "neutral" justification with a critical eye to insure that they are not simply clever pretexts.

75. *See, e.g.*, Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986); Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986); Dowdell v. City of Apopka, 511 F. Supp. 1375, 1383 (M.D. Fla. 1981), *rev'd in part on other grounds*, 689 F.2d 1181 (11th Cir. 1983).

76. 511 F. Supp. 1375, 1377 (M.D. Fla. 1981).

Clause and other statutes[77] by providing inferior municipal services to the black community. The court had no trouble finding intentional discrimination in this case. First, the court concluded that the large disparity between street paving, storm water drainage facilities and water distribution in minority and nonminority communities gave rise to an inference of discriminatory intent.[78] Additionally, the court found that requests for improvement of services from white residents were often answered, while requests from black residents were not.[79] Finally, the court found that City officials only needed to visit the black neighborhoods to know that their actions would have a discriminatory impact.[80] Based upon these findings, the court ruled that the City had intentionally discriminated against the black residents of Apopka in violation of the Equal Protection Clause.[81]

Likewise, in *Baker v. City of Kissimmee*,[82] the court held that the City had purposefully discriminated against its black residents in the provision of municipal services. Interestingly, in applying the factors enumerated in *Arlington Heights*, the *Baker* court did not limit its analysis of the legislative and administrative history of the decision to particular decisions of a specific agency.[83] Rather, the court engaged in a much broader analysis. Among the factors it found probative of racial animus were the exclusion of black residents from a 1935 democratic primary, the history of *de jure* racial segregation, prior exclusionary zoning, previous prohibitions of black occupants from municipal property, the underemployment of blacks within city government and "the present status of black citizens at the lowest end of the socioeconomic scale resulting in their effective exclusion from the political process."[84]

Although it is curious that the outcomes in the above municipal services cases are so different from those in cases challenging solid

77. Plaintiffs also filed claims pursuant to the State and Local Assistance Act of 1972, 31 U.S.C. § 1242, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988). *Dowdell*, 511 F. Supp. at 1377. For a discussion of Title VI in addressing environmental inequity issues, see *infra* note 90.

78. The court observed that the City had historically directed its resources to the predominately white neighborhoods and that blacks were under-represented in major political and administrative positions within the city government.

79. *Dowdell*, 511 F. Supp. at 1383.

80. *Id.*

81. *Id.*

82. 645 F. Supp. 571 (M.D. Fla. 1986).

83. *But see* East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission, 706 F. Supp. 880, 885 (M.D. Ga. 1989); *Bean*, 482 F. Supp. at 676.

84. *Baker*, 645 F. Supp. at 579, 588.

waste facilities, there are some distinctions which may explain the results.[85] First, in cases involving environmental actions—such as siting determinations—problems of statistical analysis are particularly acute. Furthermore, the low numbers of solid waste facilities make historical analysis difficult. Finally, there is disagreement as to the precise pool of persons affected by a particular facility or regulation.[86] These factors prohibit plaintiffs in waste facilities cases from presenting as compelling a statistical disparity as those in municipal services cases.[87]

Another distinction may be that, in municipal service cases, courts are asked to provide an available benefit to the aggrieved community. The cost is usually limited to specific fiscal liability—a court merely reorders spending priorities. In contrast, in cases challenging waste facilities, courts must allocate benefits and burdens within a zero-sum game. Unlike the municipal services cases where the allocational norm approaches equality, the allocational norm in siting decisions always creates winners and losers. As one commentator observed, "where the question is how environmental risks are to be distributed or redistributed, a court is likely to perceive the necessary tradeoffs. In short, the risks must go somewhere."[88]

Finally, the difference in results may also lie in the courts' perception of the benefits and burdens implicated in each case. That is to say, the consequences of inadequate municipal services—poor roads, debris, or poor sanitation—are readily apparent, as are the benefits of additional services—paved roads, clean neighborhoods, good water quality. Less apparent are the benefits and burdens—social, economic, health or psychological effects—associated with

85. For a thorough discussion of this, see Godsil, *supra* note 5, at 416-20; Lazarus, *supra* note 5, at 833-34; Tsao, *supra* note 5, at 412-14.

86. *See* Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 678 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986) (plaintiffs arguing that the court should consider the racial composition of a target area; the court decided to consider the racial composition of a census tract).

87. *See* Godsil, *supra* note 5, at 418.

88. Lazarus, *supra* note 5, at 833-34. Lazarus continues:

> Under these circumstances, courts seem far less willing to invoke the equal protection clause to dictate to local government how harms such as environmental risks must be redistributed in a community, perhaps because the redistribution would so directly implicate the quality of the environment enjoyed by those in the community wielding great political and economic influence.

Id.

varying levels of exposure to environmental hazards.[89] Whatever the reason, in the end, courts have been more reluctant to find purposeful discrimination where plaintiffs have raised environmental justice claims as opposed to municipal services claims.

Because a plaintiff must establish racially discriminatory intent or purpose, equal protection claims can redress only the most egregious cases. Thus, such a showing is a Herculean task indeed. Furthermore, such claims decontextualize the governmental action that is challenged. They tend to address each instance in isolation, separate and apart from the racial oppression and discrimination experienced by people of color throughout our nation's history.[90] They obfuscate the fact that present day institutions and their actions, even in the absence of intentional racial animus, can still operate to perpetuate the "badges and incidents" of racial injustice[91] and, in so doing, can lead to racially inequitable results.[92]

Just as antidiscrimination laws have not yet fully extricated our society from the manifestations of racial discrimination, neither can they wholly deliver us from the environmental dilemmas that overburden people of color.[93] Therefore, if our goal is the alleviation of the disparate environmental burdens faced by people of color, then the Equal Protection Clause and existing antidiscrimination laws can render only partial victories.[94]

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89. Perhaps it is this difference that underlies the courts' observation in municipal services cases that "[a] brief visit to the black community makes obvious the need for street paving and storm water drainage control." Dowdell v. City of Apopka, 511 F. Supp. 1375, 1383 (M.D. Fla. 1991), *rev'd in part on other grounds*, 689 F.2d 1181 (11th Cir. 1983); *see also* Godsil, *supra* note 5, at 419-20.

90. Such claims, in their search for fault and causation, perpetuate what Freeman terms the "perpetrator perspective." *See* Freeman, *supra* note 30, at 1052-1057.

91. This oft-quoted phrase first appears in *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (discussing Congress's power under the Thirteenth Amendment to abolish all badges and incidents of slavery). While racial injustice in this nation's history was most dramatically manifested in the *de jure* slavery of blacks, other racial groups have also encountered systemic discrimination. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1986) (Chinese laundry owner); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese American ordered to leave his residence).

92. *See generally* DERRICK BELL, AND WE ARE NOT SAVED (1987) (discussing society's failure to achieve equality); Lawrence, *supra* note 36, at 328-55 (discussing the irrationality of racism).

93. *See* Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1995-97 (1992) (citing grass roots activism as the real answer to environmental racism).

94. Another possible avenue of redress that has yet to be fully explored is Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d (1988). For a discussion of the advantages and limitations of Title VI in the context of environmental justice, *see* Lazarus, *supra* note 5, at 834-42. For a general discussion of Title VI and its legislative

B. Environmental Law Claims

In addition to antidiscrimination laws, minority communities have looked to federal and state environmental laws and regulations to challenge discriminatory environmental actions.[95] For example, in *El Pueblo para el Aire y Agua Limpio v. County of Kings*[96] the residents of Kettleman City, a small residential community in San Joaquin Valley, California, challenged a decision of the Kings County Board of Supervisors to grant a conditional permit for the construction and operation of a hazardous waste incinerator in Kettleman City.[97] The plaintiffs alleged, *inter alia*, that the environmental impact report prepared by the County failed to comply with the California Environmental Quality Act ("CEQA").[98]

The court agreed, finding that the environmental impact statement's analysis of air-quality impacts, agricultural impacts, and available alternative sites was flawed.[99] More significantly, however, the court held that the County's failure to provide Spanish translations of the environmental impact statement, public notices, and public meeting testimony to a community, where nearly forty percent of the residents spoke and read only Spanish, violated the public participation requirements of the CEQA.[100]

Houston v. City of Cocoa[101] is another instance where environmental statutes were used successfully to challenge environmental decisions that threatened to impose disproportionate burdens upon communities of color. In *City of Cocoa*, the plaintiffs challenged a municipal revitalization plan that proposed the redevelopment of a historic black neighborhood into large office complexes and luxury

history, *see* Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO. L.J. 1 (1981).

95. *See, e.g.*, El Pueblo Para el Aire y Agua Limpio v. County of Kings, [1991] 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. App. Dep't Super. Ct. 1991); Houston v. City of Cocoa, No. 89-92-CIV-ORL-29 (M.D. Fla. Dec. 22, 1989). *See generally* Tsao, *supra* note 5 (discussing state and federal legal remedies to environmental justice claims).

96. 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357.

97. Ninety-five percent of the residents of Kettleman City were Latino. Seventy percent of the residents spoke Spanish at home. *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ENVTL. L.Q. 619, 674-79 (1992). Mr. Cole was the attorney for the plaintiffs in this case and offers an intriguing personal account of its developments.

98. *El Pueblo para el Aire y Agua Limpio*, 22 Envtl. L. Rep. at 20,357-58.

99. *Id.*

100. *Id.* at 20,358.

101. No. 89-82-CIV-ORL-19 (M.D. Fla. Dec. 22, 1989); *see also* Karl S. Coplan, *Protecting Minority Communities With Environmental, Civil Rights Claims*, N.Y. L.J., Aug. 20, 1991, at 1 (discussing *Houston v. City of Cocoa*).

residential buildings.[102] A portion of the design and construction was to be funded by a Community Development Block Grant, which was administered by the U.S. Department of Housing and Urban Development (HUD).[103]

The eight named plaintiffs, who sued on behalf of themselves and a class of black residents, alleged that the City had violated the National Environmental Policy Act[104] (NEPA) by not considering the potential impact of the proposed development on their neighborhood.[105] The City filed a motion to dismiss, arguing, *inter alia*, that NEPA applied only to federal agencies and that the obligations under NEPA were limited to the natural environment as distinct from urban neighborhoods.[106]

The court denied the City's motion, holding that HUD had delegated its obligations under NEPA to the City.[107] Moreover, the court ruled that NEPA extended to urban, as well as natural, environments.[108] This ruling formed the catalyst for a negotiated settlement, which guaranteed a cooperative effort between the City and the black community to balance the economic needs of the city with the community's desire to maintain historical homes. The settlement also provided incentives for the development of low-income housing within the new area.[109]

While *El Pueblo para el Aire y Agua Limpio* and *City of Cocoa* successfully challenged the governmental action in question, *Dioxin/Organochlorine Center v. EPA*,[110] may illustrate several limits of relying upon existing environmental regulations to address concerns of environmental inequities. In *Dioxin/Organochlorine Center*, two environmental groups challenged EPA's establishment of a Total Maximum Daily Load ("TMDL")[111] for the release of

102. *City of Cocoa*, No. 89-82-CIV-ORL-19, slip op. at 3.

103. *Id.* at 2-3, 8-9.

104. *See* Coplan, supra *note* 101, at 2.

105. Plaintiffs also alleged violations of Title VII of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the Civil Rights Act of 1866, 42 U.S.C. §§ 1982, and the Thirteenth and Fourteenth Amendments to the U.S. Constitution.

106. *City of Cocoa*, No. 89-82-CIV-ORL-19, slip op. at 13-15.

107. *Id.* at 13.

108. *Id.* at 14.

109. *See* Coplan, supra *note* 101, at 5.

110. No. C93-33 (W.D. Wash. Aug. 10, 1993).

111. Section 303 of the Clean Water Act, 33 U.S.C. § 1313 (1988), requires each state to adopt water quality standards applicable to its intrastate and interstate waters. *See id.* § 1313(a)-(c). EPA reviews standards adopted by the states to ensure their consistency with the requirements of the Act. *Id.* § 1313(c)(3)-(4). In order to meet these water quality standards, EPA and the states were required to impose, by 1977,

2,3,7,8-tetrachlorodibenezo-p-dioxin ("dioxin")[112] in the Columbia River basin. Plaintiffs argued, in part, that EPA incorrectly employed a 0.013 ppq water standard for dioxin when calculating the TMDL.[113]

In arriving at this water standard, EPA estimated that the consumption rates by the affected community of maximum residue fish[114] would be equal to the national average total consumption rate for all freshwater and estuarine fish—6.5 grams per day.

Plaintiffs pointed out, however, that even by EPA's own estimates, Native Americans, Asian Americans, and low-income individuals residing along the Columbia River consume an average of between 100 and 150 grams of fish flesh per day over the course of a year.[115] "As a result, the human cancer risks facing these groups—and by implication the threats of reproductive and developmental damage—are several orders of magnitude greater than among groups that consume less."[116]

The court disagreed and upheld EPA's TMDL. Deferring to EPA's technical determinations, it concluded that EPA had reasonably estimated that the actual consumption of dioxin, even by those who consumed 150 grams of fish a day, would be less than the amount allowed by the water quality standard since not all of the fish in the Columbia River carried the maximum level of dioxin.[117]

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necessary effluent limitations. *Id.* § 1311(b)(1)(C). Where, however, these effluent limitations were not sufficient to bring the water bodies in compliance with the water quality standards, the Act also established a mechanism for determination of Total Maximum Daily Loads. Pursuant to this program, states are required to identify polluted water bodies, *id.* § 1311(b)(1)(A)-(B), and to develop TMDLs for pollutants on a priority basis for each identified water body. *Id.* § 1313(d)(1)(A), (C). In short, a TMDL represents the maximum amount of pollutant that can be introduced into a receiving water body without violating water quality standards, taking into account seasonal variations and a margin of safety. *Id.* § 1313(d)(1)(C).

112. Dioxin or "TCDD" is an unusually toxic compound with acute, subacute, and chronic effects in animals and humans; it displays an unusually high degree of reproductive toxicity and is mutagenic and carcinogenic. *Dioxin/Organochlorine Ctr.*, No. C93-33D, slip op. at 2 (W.D. Wash. Aug. 10, 1993).

113. *See id.* at 13.

114. "Maximum residue fish" was defined as pollutant-bearing fish that contained the maximum level of dioxin in ambient water and the maximum dioxin bioconcentration factor. United States' Memorandum In Opposition to Plaintiffs' Motions for Summary Judgment and In Support of Cross-Motion for Summary Judgment, Dioxin/Organochlorine Ctr. v. Rasmussen, Civ. No. C93-0033, at 57-58 (W.D. Wash. Aug. 10, 1993) (on file with author).

115. Plaintiffs' Memorandum In Support of Plaintiffs' Motion for Summary Judgment, Dioxin/Organochlorine Ctr. v. Rasmussen, Civ. No. C93-0033, at 16-17 (W.D. Wash. Aug. 10, 1993) (citations omitted) (on file with author).

116. *Id.* at 17.

117. *Dioxin/Organochlorine Ctr.*, No. C93-33D, slip op. at 16.

Furthermore, in a footnote, the court remarked that even assuming that an individual consumed 150 grams of maximum residue fish, that person would face a twenty-three in a million risk level for cancer, a level that was deemed acceptable by the courts.[118]

Interestingly, EPA's victory in this case can be attributed more to its conservative risk analysis than to its sensitivity to the varying dietary habits of affected minority communities. Indeed, while the TMDL may not pose a threat to the health of minority communities in proximity to the Columbia River, these minority communities suffer secondary effects of the TMDL. Even under EPA's analysis, members of these communities, on average, consume more fish and, therefore, face a greater risk of cancer than those of nonminority communities. The fact is that in ignoring the differences of culture, class, and race, the dioxin TMDL for the Columbia River resulted in a disproportionate distribution of risk of cancer for minority residents along the Columbia River.

While *El Pueblo para el Aire y Agua Limpio* and *City of Cocoa* demonstrate that state and federal environmental statutes may provide novel avenues for addressing issues of environmental justice, they, along with *Dioxin/Organochlorine Center*, show that the effectiveness of this approach is limited. First, federal statutes such as NEPA apply principally to federal agencies.[119] Additionally, both state and federal environmental statutes and regulations are highly technical and complex and may intimidate even experienced litigators. Furthermore, the victories in such cases are often procedural and fact-specific. Presumably, had the County in *El Pueblo para el Aire y Agua Limpio* analyzed the environmental data correctly and provided Spanish translations, the court would have upheld the permit notwithstanding the fact that Kettleman City was a predominately Latino community.[120] Finally, courts traditionally have granted substantial deference to agency determinations, which is an unsatisfying response when such determinations do not benefit from the participation of minority plaintiffs.

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118. *Id.* n.5.

119. *See* Reich, *supra* note 5, at 297 (discussing limitations of NEPA in addressing instances of environmental inequities); Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973) (generally critiquing NEPA).

120. Perhaps if the County had received the benefit of community input, it still would not have made a different choice. Indeed, the significance of this decision is its recognition that communities of color must be given the opportunity to participate in governmental decision-making in a meaningful fashion. That is, their concerns should carry as much weight as those of non-minorities.

Furthermore, few statutes—state or federal—require agency officials to consider the racial or distributional effects of an environmental decision or action.[121] Therefore, as aptly demonstrated by *Dioxin/Organochlorine Center*, a claim that relies upon a traditional environmental statute often does not necessarily affect the underlying decisionmaking process through which environmental benefits and burdens are distributed.

C. The Limitations of Litigation

When discussing racial discrimination, it is instructive to view the world through the eyes of those who are oppressed.[122] When viewed in this context, litigation as a whole may be seen to construct more barriers to community involvement and empowerment than it raises. To poor people and people of color, the environmental problems they face in their communities are primarily not legal ones, but political and economic ones.[123] The harms they experience are rooted more in the lack of political force and economic resources than a dearth of legal enforcement. After all, it is lack of informed participation and legal or regulatory experience that leaves many communities helpless against an agency's decision to locate a solid waste facility in their community. It is lack of clout, monetary and political, that often leads municipal governments to ignore requests by the poor and people of color for increased police protection, cleaner streets, and better schools. Therefore, while lawsuits can alleviate the most egregious instances

121. Given EPA's limited reading of Title VI, even that statute falls short. *See* Lazarus, *supra* note 5, at 836-38. For examples of attempts by state and local governments to address this issue, see Tsao, *supra* note 5, at 368-404.

122. Such "bottom up" narratives can illuminate aspects of issues often overlooked. *See generally* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (examining the use of "stories" in the struggle for racial reform); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). Matsuda writes:

> What is suggested here is not abstract consideration of the position of the least advantaged. The imagination of the academic philosopher cannot recreate the experience of life on the bottom. Instead we must look to what Gramsci called 'organic intellectuals,' grassroots philosophers who are uniquely able to relate theory to the concrete experience of oppression. The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so.

Id. at 325 (citations omitted).

123. Cole, *supra* note 92, at 648. In fact, minority communities may not characterize these problems as "environmental" at all. *See* Austin & Schill, *supra* note 5, at 71-72. The relationship between minority groups and environmental organizations has been less than ideal. *See* Reich, *supra* note 5, at 278.

of environmental race discrimination, many disparities that result from environmental decisions and policies can only be addressed through political means.[124]

Additionally, lawsuits can operate to disempower people of color by relegating the resolution of a particular problem into fora where the abundant resources of private corporations and governmental entities carry the day, and where strategic decisions are placed in the hands of legal and scientific "experts" rather than members of the affected community.[125] Furthermore, by the time a lawsuit is filed, it is often too late for the minority community to participate in the political process in any meaningful way. Political choices have already been made; bargains struck. Thus, when a complaint is filed, positions become entrenched and battle lines are drawn. Moreover, the framework of litigation often requires claims to be made in a way that will not fundamentally alter the underlying structure of decisionmaking. Thus, if a community is left with litigation, it usually means that problem solving through mediation, consultation, or full participation has either failed, or will be delayed.

As has already been shown, people of color bear a disproportionate degree of environmental harm and risk. In order to remedy this injustice, people of color have initially taken their cases to the courts. While much can still be accomplished in the courtroom, the doctrinal limitations of antidiscrimination laws and the highly procedural and technical nature of most environmental laws and regulations are formidable barriers to addressing the distributional inequities of environmental burdens and benefits.[126] Moreover, litigation may act to disempower minority communities by forcing them to adopt the constraints of the courtroom. We must take a holistic approach to addressing the dilemma of environmental injustice. We must begin to explore other avenues of redress.

IV. The Benefits of Administrative Reform: From Inside Out

If justice is to be achieved, one must consider not only the distributional impacts that environmental remedies will have, but also the decisionmaking process by which such impacts are allocated.[127] One avenue to environmental justice that has not been adequately

124. *See* Cole, *supra* note 92, at 641-60.

125. *Id.* at 650; Reich, *supra* note 5, at 281 n.47.

126. Of course, what it means to "achieve environmental justice" is itself a separate inquiry. *See generally* Been, *supra* note 5.

127. *See* Torres, *supra* note 11.

explored is the political avenue. This Section suggests that because decisions which determine environmental law and policy are often made at the administrative level[128] (as regulatory decisions), federal, state, and local administrative processes offer unique and invaluable opportunities for assessing and addressing distributional inequities.[129] In fact, only by changing the factors that are considered relevant in building the administrative record can the substantive decisions ever be changed.

A. Environmental Decisions

There are three types of federal agencies that have the power to make decisions which affect the distribution of environmental burdens or benefits: (1) agencies that implement and administer environmental laws; (2) agencies that conduct activities that directly affect the environment; and (3) agencies that make decisions that indirectly affect the environment.[130] State and local decisionmaking entities may be divided into similar categories.

Although it is critical to consider how all of these agencies and entities reach particular decisions, we can begin by examining the decisionmaking processes of the first category of federal environmental agencies, those that implement and administer environmental laws. The reason for this is plain: if environmental burdens have been inequitably distributed then the best way to address that problem is to do so directly.

B. Understanding Problem-Solving Within Divergent Regulatory Cultures

The solutions for redistributing environmental burdens must, in part, come from within the federal administrative framework.[131] The impact of federal regulatory processes on state and local activities puts federal reform at the center of any proposed solution to

128. In many cases Congress has ducked hard political choices by leaving it up to the agencies to promulgate regulations within broad congressionally established parameters. *See* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520-23 (1985).

129. Litigation and legislation are also important supplemental tools to administrative change. However, political avenues offer immediate and essential solutions.

130. *See* SUSTAINABLE ENVIRONMENTAL LAW 102 (Celia Campbell-Mohn et al. eds., 1993).

131. Although litigation also can be used to address distributional inequities, it does not offer the sole avenue to justice. In fact, this Article argues that the resource-intensive nature of litigation, the potential disempowerment, and the necessity of technical expertise, suggest that litigation cannot be widely used to ensure environmental justice.

the problems of distributional inequity. The transformation of federal regulatory culture is at the heart of that reform. Because regulatory culture arises out of a set of shared perceptions and goals, the preferred regulatory solutions are necessarily limited to the conception of the problems as perceived by the actors within the regulatory culture.[132] Thus, if EPA and other federal agencies are to offer solutions to inequities in the distribution of environmental burdens and in the laws by which those burdens are distributed, they must make environmental justice part of their culture.[133] This is not a mere additive process. Restructuring an extant regulatory culture will be difficult initially, as is all change. Similarly, there will be many efforts to translate the change into existing operational and analytic categories. Only by making the changes in vehicles for expanding and solidifying the relationships between the regulatory agent and its many constituencies can change have any hope for success. This should not be understood as a recipe for disguised co-optation or a variant on agency capture analysis. The understanding that lies at the root of the motivation for change is that the penalty for failure to change is bureaucratic irrelevance, if only because the constituency is changing. These ideas are discussed more thoroughly in the next section.

C. Redefining Regulatory Cultures

1. Community Participation

The only way that regulatory culture can be redefined is by including affected communities in the decisionmaking process.[134] Only through such inclusion can the regulatory culture be instilled with awareness and understanding of the true problems. In fact, members of affected minority groups themselves are the most appropriate ones to identify and prioritize the economic, social, health, educational, and environmental issues for their communities. Historically, the racial and ethnic groups who bear the greatest environmental burdens have not been participants in

132. *See* Gerald Torres, *Theoretical Problems with the Environmental Regulation of Agriculture*, 8 VA. ENVTL. L.J. 191, 193-94 (1989).

133. *See* Lazarus, *supra* note 5, at 850.

134. Several legal commentators and social scientists have noted the importance of political and economic empowerment of minority and low-income communities. *See* COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987); Bullard, *supra* note 6, at 45-78; Reich, *supra* note 5, at 277-78; Lazarus, *supra* note 5; Cole, *supra* note 7.

administrative environmental decisionmaking.[135] Now, with fairly compelling evidence that these groups are disproportionately burdened by environmental hazards, agencies must take special care to see that minority group members within the agency who have specific expertise are consulted in intra-agency decisionmaking, and that those who live in the affected communities have access to the decisionmaking process.[136] However, rather than presuming minority communities have been "excluded" from environmental decisionmaking and thereby focusing on recrimination, we should accept that the process probably has not been as open as it should be, and we should begin to concentrate on making the process more accessible. Blame, in this context, is wasteful.

There are a number of procedural mechanisms which, if implemented within administrative agencies, could improve the regulatory workings, begin to transform the governing regulatory culture, and increase minority access to the decisionmaking process. Including those within agencies who have special expertise in the construction of enforcement decisions or policy formulation has already been suggested. Notice and comment procedures should also be more fully implemented to specifically include the views of members of the communities that were formerly excluded from the decisionmaking process. If that were accomplished, those living in the affected communities would have greater access to the regulatory process. These results could also be achieved by holding public hearings more frequently, expanding community outreach programs, and developing alternative avenues for community input with the assistance of newly formed host community advisory committees.[137]

Another way to force agencies to consider distributional inequities is to require formal agency consideration of the distributional

135. *See* Lazarus, *supra* note 5, at 822 & n.145 (citing Memorandum from Ed Hanley, Deputy Assistant Administrator for Administration, to Clarice Gaylord, Re: Environmental Equity Report (Dec. 1991)).

136. EPA has begun already to ensure that minority and low-income communities have access to the agency's decisionmaking process. In May, Administrator Browner met with environmental justice leaders to solicit their views on agency programs and policies. EPA also recognized the importance of community outreach in recent testimony before the House Subcommittee on Transportation and Hazardous Waste.

137. EPA is beginning to create Superfund Advisory Committees. Senator Specter has introduced Senate Bill 443, which would amend the Solid Waste Disposal Act (SWDA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to require that a host community advisory committee issue or deny consent for each new permit application for a hazardous waste treatment storage or disposal facility. S. 443, 103d Cong., 1st Sess. (1993).

impacts of particular decisions. By using the mechanisms outlined above, the agencies could construct ways to harness these new sources of information to shape them into coherent recommendations for both assessing and distributing the burdens of our industrial society in a more equitable fashion. Community impact statements could be required for certain federal decisions just as the NEPA requires environmental impact statements for major federal actions significantly affecting the human environment.[138] Of course, if the NEPA model is used, and a procedural remedy is adopted rather than a substantive remedy, there must be some assurance that communities have participated in the process. Additionally, there must be some assurance that decisionmakers have sufficient information to fully assess the distributional impacts.

2. *Capacity Building*

Including affected communities in the decision-making process and utilizing procedural remedies, however, may not be enough to change regulatory cultures. Access is valuable only if those who were formerly excluded are capable of translating that access into thoughtful articulation of community concerns and meaningful suggestions for change. Thoughtful suggestions can only be advanced if the affected communities have the information necessary to ensure a full understanding of the problem. Thus, it is important to provide communities with the technical assistance that will enable them to know as much as possible, and as necessary, about the complex regulatory provisions and processes that are intrinsic to environmental law and policy.[139] In return for providing this assistance, agencies will receive valuable information and comments from affected communities.

Alternatively, capacity building can come from revised processes. For example, New Jersey has created an Office of the Public Advocate. Representatives from that Office have particular rights and duties related to promoting the interests of the public. A similar program may prove useful in the environmental arena. If experts and specialists are available to community groups and are required to advocate their interests, communities themselves will be more likely to fully understand complex environmental issues and thereby participate effectively.

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138. *See* Lazarus, *supra* note 5, at 843.

139. EPA is considering offering expanded technical assistance grants to minority and low-income communities.

Administrative processes are not democratic by nature.[140] Access is only valuable to the extent that it forces agencies to consider *and* address the concerns of minority communities, as expressed by the people in those communities.[141] Thus, even without a substantive mandate to address the concerns of minorities, environmental agencies and agencies that make decisions that affect the environment must adopt policies and make decisions that ensure an acceptable level of health protection for all communities, including minority and low-income communities. They must change their regulatory focus to allow for and require consideration of distributional effects. With that change, litigation may often be unnecessary.

D. Pursuing Administrative Solutions First

If regulatory cultures are successfully changed to ensure better consideration of, and accounting for, distributional inequities, administrative processes can be a powerful tool for redressing and preventing environmental inequities. One can see the intrinsic value of pursuing administrative solutions by looking at antidiscrimination cases and environmental regulation cases and asking, "what could have eliminated the need for litigation in the first instance?"[142]

For example, in *R.I.S.E., Inc. v. Kay*,[143] the King and Queen County Board of Supervisors could have avoided the courtroom by including minority populations in the decisionmaking process and by evaluating its own siting patterns. If the Board had invited mi-

140. *See* Daniel P. Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197, 252 (1984). Although notice and comment procedures are intended to make agencies more democratic and responsive, and they offer an important opportunity for affected persons to influence agency action, they do not make policymakers at agencies accountable in the same way that elections do. Nor should they, as there is some reason for preserving the Executive nature of administrative agencies. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 YALE J.L. ECON. & ORG. 81 (1985).

141. It is particularly important for agencies to address concerns of minorities *as expressed by minorities* because they alone can provide insight into what is important to the community, and what is a priority for the community.

142. The search for environmental justice can only be undertaken with an understanding of how, under civil rights and environmental laws, problems are identified and characterized and of how solutions are framed. Clearly, neither civil rights laws nor the environmental laws have prevented the disproportionate effect of environmental protection laws and policies on minority and low-income communities in the first instance. Now, as policymakers are faced with distributional inequities, one must ask how we can correct and prevent inequities. This Article argues that this can only be done through the use of *both* litigation and administrative reform.

143. 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

nority communities to the table, it would have had the opportunity to explain its decision outside of the courtroom and without substantial cost. Likewise, the community would have had the opportunity to present its concerns. With communication, the parties may have reached a compromise which would have addressed the needs of the entire county, including minority populations. Although the outcome may not have changed, if the County had reached out to the community, it probably could have, at the very least, prevented any claim of intentional discrimination. Additionally, community citizens could have presented their unique perspective on the effects of siting a facility in their neighborhood in a non-adversarial context.

Environmental regulation cases similarly show the inherent benefits of administrative reform. Had the County in *El Pueblo para el Aire y Agua Limpio v. County of Kings,*[144] rather than taking a narrow view of its legal responsibilities, appreciated and understood that the affected community could and would contribute effectively to the administrative process, it would have published public information in Spanish before being asked to do so. It was the State's and County's failure to recognize the importance of knowing the concerns of the community as expressed by the community, and their failure to solicit the views of the community, that forced the residents of Kettleman City into the courtroom. Had the State made clear, in the first instance, that translation was required, or had the County realized the importance of translation, Kettleman City residents would have had the opportunity for meaningful participation without going to court.[145] Thus, the County, through its own lack of insight, fought and lost a battle it never needed to fight. And, by fighting that battle, the County not only needlessly expended valuable resources, but it alienated the very constituency it was designed to serve—the people of Kettleman City.

144. 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. App. Dep't Super. Ct. Dec. 30, 1991).

145. Some federal agencies have attempted to fully inform affected communities by translating EIS for Spanish-speaking populations—for example, DOE in 1980 published in Spanish an EIS summary for a proposed radioactive waste storage facility in New Mexico (45 Fed. Reg. 70,539-41 (1980); HUD in 1980 prepared an EIS in Spanish for a housing project in Puerto Rico (45 Fed. Reg. 79,583-84 (1980) and 45 Fed. Reg. 80,189 (1980)). Significantly, Exec. Order 12,898, 59 Fed. Reg. 7629 (1994) encourages federal agencies to translate environmental documents for limited-english speakers.

Even if the outcome would have been the same had the County invited the community to participate, the people of Kettleman City would have had the opportunity to present their needs directly to the decisionmaker. The community, at the very least, would have raised awareness of social, economic,[146] and other concerns. But, perhaps with new awareness of these concerns the decisionmakers in Kettleman City would have begun to understand and consider both the distributional effects and potential cumulative effects of its decisions.

We can also learn from another case that was recently decided by the district court of New Mexico. In *City of Albuquerque v. Browner*,[147] an Indian pueblo, located in New Mexico, set water quality standards for the Rio Grande river that were more stringent than the State's standards. EPA approved those standards. The City, the only upstream discharger, filed suit challenging EPA's approval of the standards and the issuance of a permit for the City's waste water treatment plant which included the pueblo's standards.[148]

We have long recognized the sovereignty of Indian Nations as a matter of law. But, it was only recently that we began to change our environmental laws to grant Indian tribes the same sovereign rights that states have under environmental law. As the first pueblo tried to invoke those rights under the Clean Water Act, the United States faced a lawsuit.[149] The District Court for the District of New Mexico concluded that EPA did not act arbitrarily in approving and enforcing the pueblo's standards.[150]

The case presents two important lessons. First, federal, state, and local governments should be cognizant of all communities and, when making decisions, should meet the needs of the community, as expressed by the community. In *Browner*, the pueblo demon-

146. Often, the economic concerns of a community at large lead that community to make decisions without fully assessing the range of environmental and health effects. Decisionmakers must begin to prevent communities from being in a position where they are forced to choose between jobs and the environment. That can be done, in part, by recognizing that underemployment and unemployment are themselves health risks which should be taken into account by decisionmakers. In fact, the poor and people of color have higher death rates than the wealthy. *See* Gregory Pappas, *The Increasing Disparity in Mortality Between Socioeconomic Groups in the United States, 1960 and 1986*, NEW ENG. J. MED., July 8, 1993, at 103, 104; Mike Snider, *Education, Wealth Lower Death Risk Across the Board*, USA TODAY, Oct. 12, 1993, at 6D.

147. No. 93-82-MCiv (D. N.M. Oct. 25, 1993).

148. *Id.* at 3.

149. *Id.* at 2.

150. *Id.*

strated concerns about the quality of the water in the Rio Grande. That concern arose because members of the pueblo use the water to fish and for other cultural purposes.[151] Perhaps, in this case, with greater understanding and appreciation of these uses, New Mexico would have adopted more stringent standards or EPA would have required more stringent standards in the first instance.

The second lesson we can learn from *Browner* is that sovereigns should be sovereign. It took us a long time to grant Indian tribes rights under environmental laws. Now those rights should be respected.

Although it is clear that litigation could have been avoided in many of the "environmental justice cases" to date if administrative cultures had been more open and aware of the relevant issues, it also is important to recognize that litigation can serve an important purpose. If the decisionmaker properly considers and weighs the distributional effects of particular decisions, traditional environmental and civil rights litigation can be used to address instances where impermissible environmental hazards exist or where racial animus is present. Thus, litigation can serve as a "check" on administrative action.

V. Conclusion

Our current level of knowledge requires that we begin developing a framework for addressing the distributional issues associated with race and environmental hazards. The construction of that framework ought to be done from within the extant regulatory culture because that is the best way to ensure that institutional change will be achieved and made permanent. Only by transforming the ways that the problems of environmental justice are both conceived and perceived, can we create the institutional change that distributes costs and responsibilities without focusing on questions of fault or guilt. What we want are results—not self-righteousness. The effort must be to accomplish the goal of environmental protection in the most equitable and efficient manner possible. All governmental agencies and departments must begin to work together with affected communities to develop policies and programs that ensure that minorities, and the public as a whole, benefit from a clean environment and achieve a basic level of public health protection. Focusing on the ultimate public health costs of a mal-dis-

151. Many communities, not just Native American communities, rely on fish for subsistence. It is important for states with such populations to consider the needs of all of these communities when setting water quality standards and other standards.

tribution of environmental burdens reveals what is at stake in ensuring fuller participation in environmental decisionmaking. Real solutions can only come from open, intensive, deliberative, and well-informed communication.[152] Policies and programs must be developed with an understanding of, and appreciation for, the needs of communities (environmental, social, economic, and health), as expressed by those communities. Those needs must be addressed with a recognition of the natural barriers to the satisfaction of each. The dialogue has begun. However, we must make every effort to assure that it does not die as it did years ago only to resurface in twenty years as a problem that never went away.[153]

152. There is a tradition best represented by Frank Michelman that makes this point most forcefully. *See* Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

153. The problem of environmental justice was raised at a conference co-sponsored by the Sierra Club and the Urban League in Detroit in 1978. In the *Urban Environment Conference* these groups along with others like Environmentalists for Full Employment tried to join environmentalists with other social justice activists. Despite these efforts to begin a dialogue on environmental justice, that coalition was solidified only recently.